



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 163 OF 2014

LOIS WAIRIMU MAGUA.....PLAINTIFF

VERSUS

HENRY KETER CHEPSENGENY.....1ST DEFENDANT

RUKIMA ESTATE LIMITED.....2ND DEFENDANT

NAKURU DISTRICT LAND REGISTRAR.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

MAMIS MOTOR WORLD.....5TH DEFENDANT

KENYA COMMERCIAL BANK.....6TH DEFENDANT

MADRINE WAWIRA MUTHONI.....7TH DEFENDANT

JANE NJERI JAMES.....8TH DEFENDANT

J U D G M E N T

1. The present suit was commenced by the plaintiff by way of plaint dated 9th June 2014 filed in Court on 10th June 2014. The plaint was amended on 15th August 2016 and further amended on 22nd May 2017. The further amended plaint was the basis of the trial. The plaintiff averred that she was the lawful owner of all that land parcel known as **Nakuru Municipality Block 20/111** measuring approximately 0.2349 Ha (“the suit property”) which she stated she had purchased from the 1st defendant vide a sale agreement dated 16th September 2006. The plaintiff stated that the property was transferred to her in terms of the sale agreement but her attempts to take occupation and possession of the suit property was thwarted by agents of the 2nd defendant.

2. The plaintiff further averred she later came to learn there was in existence another title over the same property issued by the 3rd defendant in the names of the 2nd defendant. The plaintiff contended that such title would only have been issued fraudulently and in collusion amongst the defendants and was irregular and illegal. In particular the plaintiff averred that the registration of the suit property in the name of the 8th defendant was illegally and fraudulently procured. The plaintiff prayed for judgment against the defendants jointly and severally for orders:-

(a) A declaration that the plaintiff is the owner of leasehold title for Nakuru Municipality Block 20/111 and cancellation of the 8th Defendant’s leasehold Title for Nakuru Municipality Block 20/111.

(b) An eviction order do issue removing the 8th Defendant, by itself, its directors, officers, agents and or servants from Nakuru Municipality Block 20/111 measuring approximately 0.2349 Ha.

(c) A temporally and permanent order of injunction restraining 5th 8th Defendant, by itself, its directors, officers, agents and or servants from trespassing onto, occupying, developing or in any manner howsoever from dealing with Nakuru municipality Block 20/111.

(d) A declaration that any title that inured from the 2nd to 7th defendant's title was invalid as the same was fraudulently obtained.

(e) A temporary and permanent order of injunction restraining the 8th Defendant, by herself, agents and or servants from trespassing onto, occupying, developing or in any manner howsoever from dealing with Nakuru Municipality Block 20/111.

(f) A declaration that the 8th Defendants title be cancelled since the alleged title inures from the 7th Defendant's title.

(g) Discharge of a charge of the subject piece of land by the 6th defendant.

(h) In the alternative, compensation at the market value of the pieces of land Nakuru Municipality Block 20/111.

(i) Costs of this

suit.

3. The 1st defendant never appeared, did not file any pleadings and did not participate in the trial.

4. The 2nd defendant, Rukima estates Limited, filed a statement of defence dated 6th November 2017. The 2nd defendant denied the allegations of fraud attributed to it by the plaintiff and further stated it had lawfully been allocated the suit property in 1995 and was issued a certificate of lease in 2001 upon the lease in its favour being registered. The 2nd defendant averred that the plaintiff may have been a victim of a fraudulent transaction perpetrated either by the 1st defendant and/or his agents. The 2nd defendant denied the plaintiff was entitled to the orders she sought vide the plaint.

5. The 3rd and 4th defendants, the Land Registrar and the Attorney General filed a joint defence on 23rd April 2015. The 3rd and 4th defendants denied all the allegations of fraud against them and put the plaintiff to strict proof.

6. The 5th defendant Mamis Motor World Ltd vide a statement of defence filed on 6th November 2017 denied the allegations of fraud against it and averred that it purchased the suit property from the 7th Defendant acting through one Boniface Munyinyi Mugo who held a power of attorney donated to him by the 7th defendant.

7. The 5th defendant averred that due process was followed in having the property transferred and registered in its name. The 5th defendant maintained it was an innocent purchaser for value without any notice of any defect in the title.

8. The 6th defendant, Kenya Commercial Bank Ltd, who holds a charge of the suit property having financed the 8th defendant, Jane Njeri James to purchase the suit property filed a statement of defence on 2nd November 2017. In the statement of defence the Bank denied the plaintiff was the registered owner of the suit property and further denied the allegations of fraud, collusion and illegality against it and the other defendants as particularized under paragraph 12 of the further amended plaint. The Bank averred that it took a charge over the suit property as security for monies advanced to the 8th defendant after conducting proper due diligence and affirming that the 8th defendant was the registered owner of the suit property.

9. The 7th Defendant, Madrine Wawira Muthoni, with leave of the court filed her defence and documents out of time on 23rd September 2019. She stated that her brother in law, one Boniface M Mukuria brought to her attention a property title number Nakuru Municipality block 20/111(" the suit property") that had been offered for sale for Kshs.6.5 million by Rukima Estate Ltd (2nd defendant). She stated she was interested and agreed the terms of sale with the vendor, paid a deposit of Kshs.4.5 million and the balance of Kshs.2million was to be paid upon registration of the transfer. She stated as she was resident in the United States of America (USA) she executed all the necessary documents and left her brother in law to handle the finalization of the transaction. The 7th defendant stated although her brother in law had authority to represent her in the sale transaction she did not donate to him the power of Attorney that he allegedly used to effect transactions respecting the suit property. The 7th defendant stated she was unaware the suit property was transferred to her name before being sold and transferred to the 5th defendant, Mamis Motor World Ltd. She stated she dealt with the 2nd defendant in good faith and was not liable for any misdeeds that her brother in law may have been involved in relating to the suit property. She stated she was refunded the sum of Kshs 4.5 million by her brother in law when the transaction failed to materialize.

10. The 8th Defendant, Jane Njeri James filed her defence on 6th November 2017. She denied the plaintiff was the registered owner of the suit property as alleged in the further amended plaint. The 8th Defendant averred that she purchased the suit property after carrying out appropriate due diligence and that as at the time she purchased the property, the same was in the name of the 5th defendant. She denied she was party to any collusion or fraudulent dealings in regard to the suit property as alleged by the plaintiff. She averred that she properly, lawfully and legitimately acquired the suit property after following due process. She maintained she was a bonafide and innocent purchaser for value without any notice of any defect in the title. She asserted she was the lawful owner of the suit property and contended the plaintiff cannot be entitled to the orders that she sought in the plaint.

11. The suit was part heard before Munyao, J before whom all the parties/witnesses testified save for the 7th defendant, Madrine Wawira Muthoni, who testified before me on 27th February 2020. To contextualize the issue for determination in the suit I will set out albeit briefly

the evidence adduced by the parties.

Evidence of the Parties

12. The plaintiff Loise Wairimu Magua, testified as PW1. She testified that she was a dentist by profession and was upto 2010 when she migrated to the United States of America (USA) working and residing in Nakuru . She testified that in the year 2006 a cousin of hers informed her there was a property on sale within Nakuru. She stated she requested the cousin to have a search carried out in respect of the property and that after the search was done it revealed the property Nakuru Municipality Block 20/111 was owned by Henry Keter. She stated that on 16th September 2006 she entered into a sale agreement with the said Henry Keter to purchase the property for Kshs.2,000,000/= . She paid a deposit of Kshs.1,200,000/= and the balance was to be paid to the vendor by monthly installments of Kshs100,000/= . The sale Agreement and the acknowledgment for Kshs.1,200,000/= were tendered in evidence as PEX 1 and 2 respectively. The witness explained that she paid the balance of the purchase. She further stated the vendor (Mr. Keter) signed the transfer of lease on 16th September 2006 and a title was processed and issued in her name on 23rd October 2008 as per the copy of certificate of lease exhibited in plaintiff's bundle of documents.

13. The plaintiff further testified that after she got her title to the property she attempted to take possession of the property but Dr. Gisemba Mayaka who was a Civil servant who had been allocated the house by virtue of his employment as a veterinary doctor was residing in the house . After Dr. Gisemba vacated the house, the plaintiff explained she once more attempted to take possession of the property but she was repulsed. She stated her husband was assaulted by the 2nd defendant's agents when he attempted to get into the property. The plaintiff explained that she had not managed to take possession of the property by the time she left for the USA but said she had been paying the rates for the property to the Municipal Council .

14. The plaintiff stated she became aware of the parallel title issued in favour of Rukima Estates Ltd when they reported the assault on her husband to the police and the CID furnished her a copy of the title showing the 2nd defendant was also registered as the owner of the suit property . The plaintiff stated when she inquired from the Lands office she was issue with the white cards, one bearing her name and the other bearing the name of Rukima Estates Ltd as per (PEX8) and (PEX 9). She stated it was then she decided to consult her lawyer who wrote the letter dated 3rd March 2010 (PEX10). The plaintiff explained she had all along been paying land rent to the Commissioner of lands for the property and produced payment slips dated 29th December 2007, 31st December 2008 and 19th February 2009(PEX 11) (a) (b) & (c) . The witness further stated she opened a water account in her name and was receiving water bills.

15. The plaintiff further testified that as per the white card (abstract of title) (PEX13) the current owner of the suit property is shown as Jane Njeri James and before her the owner is noted as Mamis Motor World Ltd and before that it was Madrine Wawira Muthoni. The plaintiff stated she never sold the land to any of the parties mentioned. She maintained before she purchased the property she has carried out a search of the property and the official search had showed Henry Keter was the registered owner. She stated the title was transferred to her name after she purchased. She produced 2 search certificates one indicating Henry Keter as owner and the other indicating her as the owner (Pex 14 and 15 respectively).

16. The plaintiff in concluding her evidence in chief stated that she dealt with Henry Keter in good faith and she did not agree she had fallen victim to conmen. She stated the Land Office procedurally processed the transaction culminating with her being issued with a title in her name. It was her position that she was the rightful owner of the suit property. She asserted that the value of the suit property as at the time she filed suit was Kshs15 million as per the valuation report by Maritime Valuers dated 14th March 2014 (PEX 16).

17 Under cross examination by Mr. Waiganjo advocate, for the 2nd defendant, the plaintiff affirmed that the first entry in the white card (PEX 13) is that of Rukima Estates Ltd . She stated this card was opened on 23rd October 2001 when Rukima Estate Ltd was registered as owner. As regards the white card where Henry Keter was registered, the witness stated the same was opened on 27th December 2002. The witness stated she did not know how Rukima Estates Ltd got to be registered as owner of the suit property. She stated the search she obtained showed Henry Keter was the owner. She stated though Henry Keter was served with the court documents he never appeared. She stated she only saw Henry Keter when they were transacting and she had not seen him since she left for the USA.

18. The plaintiff affirmed that Henry Keter did not show her or furnish her with any letter of allotment of the plot to him and that he only furnished her with a copy of the title in his name. Henry Keter also did not avail to her any correspondence from the commissioner of Lands, Director of Surveys or the Chief Land Registrar authorizing issues of a lease to him in regard to the property. The plaintiff affirmed she personally did not seek clarification of the allotment to either Henry Keter or Rukima Estates Ltd from the Commissioner of Lands office in Nairobi. She stated she left it to her lawyer to do the appropriate verifications. She affirmed the letter dated 27th October 1995 was a letter of allotment to Rukima Estate Ltd and that vide a letter dated 6th August 2001 the Chief Land Registrar forwarded a lease in favour of Rukima Estates Ltd to be registered at Nakuru, Lands office.

19. The plaintiff further stated that as per the white card (PEX13) the Land Registrar had entered a restriction by the PS but the same was removed. The plaintiff stated Mr Keter authorized him to pay the rates and land rent that was in arrears and she duly effected payments and was issued receipts for the payments. The plaintiff insisted she had done appropriate due diligence before she purchased the suit property.

20. Under cross examination by Mr. Ochang advocate for the 5th and 8th defendants the plaintiff stated Mr. Keter was aware of the suit and she was not aware why he failed to participate in the proceedings. She disclosed that she had not visited the suit property before she entered into the sale agreement with Mr. Keter. She stated that by the time she paid for the water connection and power connection she was not in possession of the suit property and has never accessed the suit property since purchasing the same. She stated it was her advocate Ms Chesang who processed the title in regard to her transaction and she did not have in her possession the transfer that was lodged for registration .

21. The plaintiff cross examined by Ms Matu advocate for the 6th defendant affirmed that the consideration noted on the instrument of

transfer was Kshs1.2 million and not Ksh2.0 million which was the purchase price. She stated she gave to Mr. Keter Kshs.48,000/= to pay stamp duty but stated she had no evidence that the duty was paid. Upon being cross examined by Mr. Ondieki state counsel, the plaintiff stated it was Mr. Keter who lodged the transfer for registration. The plaintiff further stated the letter dated 4th March 2011 from the Land Registrar indicated that there were no records in the name of Mr. Keter held by the land registry. The witness stated there were however 2 white cards issued by the same land registry and it was only the Land Registrar who could explain the anomaly.

22. Hon Onesmus Kimani Ngunjiri testified as DW1 for and on behalf of the 2nd defendant, Rukima Estate Ltd. He stated he did not know the plaintiff. He explained his wife, Ruth Muthoni Kimani and himself are the directors of the 2nd defendant company. He stated he did not know the 1st defendant, Henry Keter and he also did not know Mamis Motor World Ltd, the 5th defendant. He also stated he did not know the 8th defendant, Jane Njeri James. He stated he knew the 7th defendant, Madrine Wawira Muthoni as they sold land parcel Nakuru Municipality Block 20/111 to her around January 2012. He stated after they sold the property to her they gave possession of the property to her.

23. The witness in his evidence explained that the 2nd defendant was allocated the suit property by the Commissioner of Lands vide a letter dated 27th October 1995 following an application. He testified that the 2nd defendant accepted the allotment and paid the requisite charges of Kshs.67,380/- on 2nd April 1996 and was issued with a receipt for the same. The 2nd defendant further paid survey fees to the Director of Surveyors. The Commissioner of Lands prepared a lease in favour of the 2nd defendant which was sent to Nakuru vide letter dated 6th August 2001 and was registered. The witness produced a copy of the abstract of title (white card) which indicated the register for land parcel Nakuru Municipality Block 20/111 was opened on 23rd October 2001 and that the 1st Lessee was Rukima Estate Ltd.

24. The witness further testified that the Land Registrar made an entry against the title "fraud suspected" but upon 2nd defendant raising issue with the Land Registrar, the restriction was removed. The witness further stated the PS Ministry of Housing had caused a restriction to be registered against the title but this also was removed after the 2nd defendant went to court and obtained an order for its removal. The witness testified that after the restriction by the PS was removed the 2nd defendant sold the property to Madrine Wawira Muthoni and the sale transaction was fully completed in her favour. He affirmed the 2nd defendant had no claim or interest in the suit property having sold and transferred the property to Madrine Wawira muthoni.

25. The witness on being shown the white card produced by the plaintiff showing Keter was the 1st registered owner to the same property on 27th December 2002 stated he had never seen the card before. He pointed out that the card in favour of Rukima Estates Ltd was opened on 23rd October 2001 while the card in favour of Henry Keter was opened on 27th December 2002. He stated the card showing Henry Keter was the 1st Lessee could not be genuine and that it was the card in favour of Rukima Estates Ltd that was the genuine one. He stated he did not know Henry Keter and that he had never come to the property. He further stated that his brother John Muthee Ngunjiri was staying on the property and there was a time he informed him through phone that somebody had attempted to access the property and they repulsed the attempt. He stated further that after he raised complaints with the Ministry of Lands, the ministry wrote the letter dated 4th March 2011 confirming the property belonged to Rukima Estates Ltd. He stated that the Land Registrar was vide a letter dated 8th June 2011 directed to expunge the documents relating to the title allegedly issued to Mr. Keter.

26. The witness denied that Rukima Estates Limited obtained title to the suit property fraudulently. He further denied being aware of the transaction between Mr. Keter and the plaintiff. He maintained it was the 2nd defendant who was paying rates for the property before it sold the property. He stated he was not aware of the transactions that took place relating to the property after they sold and transferred the property to Madrine Muthoni. The witness denied that the company Rukima Estates Ltd was not registered in the year 2001 when it was registered as owner of the suit land. He insisted the company was registered before it was allocated the land in 1995.

27. Mr. Samuel Omondo Okello testified as DW2 on behalf of Kenya Commercial Bank Ltd (KCB) the 6th Defendant. He stated he working for KCB and was at the time he was testifying the mortgages Business Manager based at Naivasha. In June 2014 he was the Mortgages Business Manager at the Bank's Nakuru Branch. It was his evidence that one Jane Njeri James approached the Bank seeking a mortgage facility to complete her purchase of land parcel Nakuru /Municipality Block 20/111 that she was purchasing. He stated that the Bank requested to be furnished with copies of the sale agreement and the title and that after the bank did its appraisal the Bank approved the application for Mortgage and issued a letter of offer dated 1st July 2014. He stated the bank agreed to advance Kshs.21,300,000/- (DEX10). The Bank instructed the law firm of M/s Ashitva & Company Advocates to prepare the security documentation to facilitate the release of the mortgage funds. The witness stated that after the advocates carried out the appropriate due diligence and ascertained the property was in order, they processed and registered the transfer and the charge and in doing so the advocates followed due process. They carried out the appropriate searches on the vendor and on the suit property and obtained the requisite consents to transfer and charge. After the charge was duly registered the bank paid and released the mortgage funds as required. A post registration search confirmed the suit property was appropriately charged in favour of the bank.

28. In cross examination the witness affirmed that on carrying out their due diligence they found that the title of the suit land was registered in the name of Mamis Motor World Ltd who were the vendor's and that the name of the plaintiff did not feature in the title. He affirmed that there was nothing sinister respecting the title that would have cast any doubt that the vendor was the bonafide owner. He noted however several transactions were effected in regard to the title within a short span of time but maintained the successive transactions did not denote the same were fraudulent. He stated as far as the bank was concerned there was no "red flag" that could have put the bank on notice. The bank was satisfied with the documentation and that was why it disbursed the mortgage facility.

29. DW3 Raymond Gitonga was the Land Registrar in Nakuru and it was his evidence that as per the records available at their office, Rukima Estates Limited was allotted the suit property. He noted the wording "fraud suspected" noted in the white card could not constitute an entry as it was not signed. He stated the restriction placed by the P.S claiming the land was a government house was removed through a court order although the court order was unavailable at the office. The Land Registrar affirmed that the white card that is held by the office is "PEX8" which shows Rukima Estates Ltd was registered as the first lessee on 23rd October 2001. The Land Registrar shown the other

white card which shows Henry Keter was registered as the first lessee on 27th December 2002 stated that they do not have such a card in their records. He stated that the later card did not have the wording "Fraud suspected" and also did not have the entry respecting the restriction by the PS and the removal thereof. The Land Registrar maintained there cannot be two proprietors of the same property who have different records. He stated they rely on the records held at the Lands office to verify ownership of the properties registered with the office.

30. In cross examination the land Registrar affirmed the current owner of the suit property as per the white card is Jane Njeri James and that previously Mamis Motor World Ltd were the registered owners. He affirmed the property is charged to Kenya Commercial Bank Ltd. He stated the records they hold do not show that Henry Keter or Loise Magua were at any time registered as owners of the property. The witness after he was shown the various documents held by the plaintiff evidencing ownership stated that he could not tell where the documents emanated from since they did not have the same in their office. He stated PEX8 was copied from what was held in the Register and represented the present status of the suit property.

31. DW4 Teresia Njambi Wachira, a director of Mamis Motor World Ltd testified on behalf of the 5th defendant. She testified that she did not know Henry Keter and that Mamis Motor World Ltd purchased land parcel Nakuru Municipality Block 20/111 which was sold to them by one Boniface Mukuria, a brother in law of one Madrine Muthoni. It was her evidence that the said Boniface Mukuria held a power of attorney and he availed to them all the title documents. She stated they carried out a search on 13th December 2012 and the search showed that the title was registered in the name of Madrine Waweru Muthoni Mugo. The certificate of lease had been issued in her favour on 4th December 2012. The witness stated as the documents for the property were in order they agreed to buy the property after they had inspected the same for the consideration of Kshs.18.5 million. They entered into an agreement of sale dated 15th December 2012. The witness stated they took a Mortgage from Equity Bank Ltd to finance the purchase and the property was the security. The witness stated that after they purchased the property she took possession and occupied the house until when they sold the property to Jane Njeri James after they experienced difficulties in servicing the Mortgage they had taken from the bank. The witness further in her evidence stated that from the time they purchased the property upto the time they sold the property to the 8th defendant they did not encounter either the 1st defendant or the plaintiff, and none of them came to the property claiming ownership of the property right. She further stated at the time they purchased the property they had no knowledge that anybody else was claiming ownership of the property. The witness insisted the plaintiff's claim cannot be genuine as her records do not appear at the Land Registry.

32. In cross examination the witness stated they had no claim to the property since they sold and transferred their interest to the 8th defendant. The witness further stated appropriate due diligence was conducted before they purchased the property. She stated the firm of Gordon Ogola & Company Advocates acted for them in the initial purchase transaction and again when they sold the property to the 8th defendant. She denied there was any fraud or collusion involving the Land Registrar when the transactions were undertaken. The witness stated that after they purchased the property she resided thereon for 1 1/2 years before they sold the property to Jane Njeri James in June 2014. She denied they sold the property to defeat the plaintiff's claim asserting that at the time of sale they were not aware there was a case on the property or that the plaintiff was staking any claim of ownership in the property.

33. The 8th Defendant, Jane Njeri James testified as DW5. The witness stated she resided in Nairobi where she carried on business. The witness stated that she purchased land parcel Nakuru municipality Block 20/111 from Mamis Motor World Ltd in July 2014 for the consideration of Kshs29,500,000/-. She stated she became aware the property was on sale from a director of the company who availed a copy of a search certificate to her. She stated she sought a loan from Kenya commercial Bank Ltd to purchase the property. The bank she stated advanced her a sum of Kshs21,300,000/= towards the purchase. She stated the Bank carried out its own due diligence and was satisfied the property had no issues and it was on that basis they agreed to finance her in the purchase. She stated she had no knowledge that anybody else had any interest in the property. She stated it was when the sale transaction was completed and she wanted to take possession of the property that she was served with court summons in these proceedings. She stated she has not as yet taken possession as she decided to have the issue of ownership first resolved by the court.

34. The witness in her evidence stated when she agreed to buy the property she did not know and there was nothing to show the property had any issue of any kind whatsoever. The records and the search from the Lands Registry showed the land belonged to Mamis Motor World Ltd. She stated issues touching on ownership of the land only cropped up after she had finalized her sale transaction. She maintained she obtained title to the land procedurally.

35. In cross examination by Mr. Waiganjo advocate she stated she was served with the Court documents around 22nd May 2017 by which time she had finalized the purchase of the property. She stated she knew the directors of Mamis Motor World Ltd before the sale. She stated she visited the property before buying. She stated further that Kenya commercial Bank Ltd conducted due diligence before agreeing to give her a loan on the security of the property and if the land had a problem they would not have approved the loan.

36. The witness further cross examined by Mr Langat advocate for the plaintiff stated she had known Teresia Njambi (DW4) over a long period of time and it was her who informed her they were selling the suit property. The witness further affirmed the bank paid the sum of Kshs21,300,000/= direct to Mamis Motor World Ltd as the sellers and that she paid the balance of Kshs8.200,000/- to the seller. She stated she had not as yet taken possession and that the vendor were still in possession pending the determination of the suit. She refuted the sale of the property to her was intended to defeat the claim by the plaintiff.

37. The 7th defendant, Madrine Wawira Muthoni was with the leave of the Court allowed to file her defence out of time and to testify. She testified as DW6 and it was her evidence that sometime in 2011 she was alerted by one Boniface Mukuria who was her relative about a property in Nakuru Milimani area that was on offer for sale for Kshs. 6.5 million. The witness stated she was interested and agreed to buy the property. She paid a deposit of Kshs 4.5 million which she deposited with the said Boniface Mukuria (her brother in law) and was to get the balance of Kshs.2.0 million through a loan. She executed a sale agreement with the vendor Rukima Estate Ltd on 23rd September 2011. The witness who holds dual citizenship of Kenya and the USA and is resident in the USA stated that she signed the Agreement when she visited Kenya but had remitted the deposit monies to his brother in law from the USA. She stated she entrusted her brother in law and authorized him to handle the sale transaction on her behalf. She stated she signed the sale agreement and executed the transfer (though she could not remember if it was blank or not) and left the same with his brother in law. She stated her brother in law who was a Bank Manager

at Chase Bank Ltd was to assist her to procure a loan for the balance of the purchase price. She made the loan application and left her brother in law to process the loan for her. She stated even though the loan was approved she never got the money and her brother in law only took her around in circles giving all manner of stories. After one year or so without any progress, the witness stated she requested to be refunded her money.

38. The witness stated the brother in law refunded to her all the money she had paid towards the purchase of the suit property by April 2013 and according to her she treated the matter as closed. The witness stated on the basis of the documents availed by the 2nd defendant including the letter of allotment dated 27th October 1995, payment receipts for the allotment, and certificate of lease dated 23rd October 2001 she was satisfied the property she was purchasing was genuine. The witness however stated she never completed the transaction and never took occupation of the suit premises

39. In cross examination the witness admitted that she authorized her brother in law to transact on her behalf. She stated Rukima Estates Ltd have never made any demand to her and that she never communicated to Rukima Estates Ltd after she executed the agreement. She stated further Rukima Estate Ltd never made any refund to her and that all the refund was made to her by her brother in law. She affirmed she had no claim against Rukima Estates Ltd and neither was she challenging the title the 2nd defendant held.

40. Further cross-examined by Mr. Ondieki State Counsel she affirmed she never notified any person that she was not proceeding with the sale transaction save for her brother in law. She confirmed she ledt with her brother in law her photos, copy of identity card, KRA pin and signed transfer. She conceded these documents could have been use to complete the transaction . The witness however denied she donated a power of attorney in favour of her brother in law. She denied signing any power of attorney . The witness stated she fully trusted her brother in law to undertake the transaction on her behalf.

41. Following the conclusion of the trial the parties were directed to file their final written submissions which they all did . Having reviewed the pleadings, the evidence by the parties and the written submissions of the parties the court identifies the following issues for determination.

(i) Who between the 1st defendant and the 2nd defendant was allocated land parcel Nakuru Municipality Bock 20/111 and who held a valid title to the property?

(ii) Whether the plaintiff acquired a valid title to land parcel Nakuru Municipality Block 20/111 from the 1st defendant?

(iii) Whether the transactions entered into as amongst the 2nd to 8th defendants were fraudulent and therefore void?

(iv) What order should the court make or grant?

42. From a careful review of the evidence it is evident that the central issue in this suit is who between the 1st defendant, Henry Keter Chepsengeny, and Rukima Estate Limited held a valid title to land parcel Nakuru Municipality Block 20/111. This is because the plaintiff's claim against all the defendants is founded on an agreement of sale she entered into with the 1st defendant for the purchase of the suit property in 2007 which resulted in the property being transferred to her. In her evidence she produced the sale agreement, a search certificate and an abstract of title that showed the 1st defendant was registered as owner of the property on 27th December 2002. The plaintiff did not produce any other documents to support the 1st defendant's ownership of the suit property . The 1st defendant as observed earlier, though served with summons, did not appear and/or participate in any manner in the proceedings.

43. The 2nd defendant, Rukima Estate Limited, through its director Onesmus Kimani adduced evidence to the effect that it was allocated the suit property through a formal letter of allotment dated 27th October 1995 and that it accepted the allotment, paid the allotment charges and survey fees and was issued with a lease for the property which was registered and a certificate of lease was issued in its favour on 23rd October 2001. It is this property the 2nd defendant stated it sold to the 7th defendant, Madrine Wawira Muthoni. In order to ascertain who between the 1st defendant and the 2nd defendant held a valid title to the suit property it is necessary to analyse the evidence and evaluate the documentary evidence to determine the root of the titles proffered by the parties in evidence.

44. The evidence as adduced by the plaintiff was that she was alerted by her cousin about the property being on offer for sale. She requested the cousin to carry out a search and when the search came out and revealed Henry Keter as the owner and a copy of title was availed showing Henry Keter to be the owner, she proceeded to enter into the sale agreement to purchase the property. No other documentary evidence and/or any other correspondence was availed by Henry Keter to show how he came to own the property. In her evidence, the plaintiff in cross examination by Mr. Ondieki state counsel, she affirmed that it was Mr Keter who undertook the processing of the registration of her transfer inter alia she stated thus : -

“ For my title it was Mrs. Chesang (advocate) who called me to pick it. Mr. Keter took the transfer from to the land office and Mrs. Chesang can explain about the transfer. She later called me for the title.

45. The documents that the plaintiff relied on to prove Henry Keter owned the suit land before she purchased the same was the copy of the search (not carried out by herself), copy of title and copy of abstract of title which showed Henry Keter was registered and issued a certificate of lease on 27th December 2002. There was no explanation on what basis Henry Keter was registered as owner of the suit property on 27th December 2002. Was he allotted the land, and if so, did he meet the terms of the allotment? These are questions that beg for answers. The plaintiff in carrying out her due diligence before she agreed to purchase the suit property would have been expected to go behind the

title Henry Keter produced and sought to know how he acquired the title. It is common knowledge that leaseholds within Townships such as Nakuru have their origin from the government and would be initiated by a letter of allotment which sets out the terms and conditions that an allottee must satisfy before being issued a title.

46. In a situation such as in the present case where the plaintiff exhibited title to the suit property and the 2nd defendant equally exhibited title to the same property it was absolutely necessary for the plaintiff to establish the root of the title she exhibited. I am not satisfied that the plaintiff demonstrated that the 1st defendant held a good title that he could transfer to her.

47. In the case of **Munyu Maina -vs- Hiram Gathia Maina (2013) eKLR** the Court of Appeal held that where a title was under challenge it was not enough to just wave the title as proof of ownership and that it was necessary to go beyond the title to demonstrate the legality of ownership. The Court in the case stated as follows:

“—We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title and show the acquisition was legal,— It is our considered view that the respondent did not go this extra mile that is required of him...”

48. The sale agreement entered between the plaintiff and Henry Keter dated 16th September 2006 raises concern whether indeed the said Henry Keter had any interest in the property that he could have sold to the plaintiff. Under clause 2.II. of the Agreement the plaintiff was required to pay to the Commissioner of Lands land rent for the period 1st July 1995 to 1st January 2006 amounting to Kshs226,763/=. It was not apparent how this amount was made up but considering the abstract of title indicated Henry Keter was registered as owner on 27th December 2002 the issue arises whether Henry Keter was registered without clearing the outstanding dues.

49. The usual practice is that before any allottee or lessee is registered as owner, all outstanding dues must be paid. Henry Keter could not have been registered when there was outstanding rent. There is further no evidence what instrument was registered so that Henry Keter was issued a certificate of lease. Where the government was the lessor, it was the Commissioner of Lands who prepared, issued and executed the lease on behalf of the Government whereupon the Chief Land Registrar would forward the lease to the appropriate Land Registry for registration after execution by the Lessee. There is no evidence that Henry Keter had any lease issued in his name by the Commissioner of Lands which would have been registered in the Lands Registry at Nakuru

50. In the premises there is no evidence whatsoever to show that the 1st defendant had any land that he could have sold to the plaintiff. The Land Registrar who testified before the court affirmed that they did not hold any documents relating to the title held by the plaintiff in the Land Registry. The records held by the Land Registry showed Rukima Estates Ltd was the original allottee of land parcel Nakuru Municipality Block 20/111 and was registered as owner on 23rd October 2001. He stated the property had been transferred severally and presently the registered owner was Jane Njeri James, the 8th defendant. I am in the circumstances persuaded that Henry Keter did not hold any valid title to the suit property and that the documents he availed to the plaintiff which the plaintiff relied on to enter into the sale agreement with the said Keter must have been fake and were manufactured with the singular objective of committing fraud on gullible persons such as the plaintiff.

51. Turning to the title that was held and exhibited by the 2nd defendant, Rukima Estates Limited there is evidence to support a finding that it was procedurally obtained as illustrated hereunder. The 2nd defendant tendered in evidence a letter of allotment dated 27th October 1995 which showed Rukima Estate was allocated an ‘unsurveyed Residential plot ‘A’ Nakuru Municipality’ for a term of 99 years from 1st November 1995 at the annual rent of Kshs11,400/=. The charges payable as per the letter of allotment was Kshs67,380/=. The letter of allotment was issued pursuant to Authority ref No.102749/17/GA/36. Rukima Estate on 2nd February 1996 paid the charges under the letter of allotment vide receipt No.D284982 for Kshs67,380/= issued by the Department of lands. By the letter dated 22nd September 1999 exhibited by the 2nd defendant, the Commissioner of Lands confirmed to the Director of surveys that the survey fees of Kshs2,450/= had been paid vide the said receipt No.D284982 of 2nd February 1996 in response to the Director of Surveys letter dated 14th June 1999 and confirmed the RIM could be amended appropriately.

52. The Commissioner of Lands vide letter dated 6th August 2001 forwarded the lease for land parcel Nakuru Municipality Block 20/111 to the District Land Registrar Nakuru for registration. The letter was in the following terms:-

The District Land Registrar

Nakuru

6th August 2001

Thro’

The Chief Land Registrar

NAIROBI

RE: NAKURU MUNICIPALITY BLOCK 20/111

I forward herewith a lease document in triplicate duly signed and stamped for registration. Registration fees of Kshs250/= has been paid vide receipt No.D284982 of 2nd February, 1996.

F M Mwaka

For Commissioner of Lands

CC

Rukima Estate Limited

P O Box 3338-

NAKURU Please avail your self to the above mentioned Land Registrar for execution and collection of your lease.

53. After Rukima Estate Ltd executed the lease, the lease was registered on 23rd October 2001 and they were issued with a certificate of lease. A copy of the certificate of lease and abstract of title exhibited confirmed this position. Having regard to the documents exhibited by the 2nd defendant, I have no doubt that they were indeed allotted the suit property as an unsurveyed plot and that the same was surveyed and that they were issued a lease by the Commissioner of Lands as the Commissioner of Land's letter dated 6th August 2001 attests. It was upon the registration of this lease that the 2nd defendant was issued with the certificate of lease on 23rd October 2001. This court sitting at Nairobi in the case of **James Waiga Kaireti & Another -vs- The Attorney General & 4 others -vs- (2015) eKLR** had occasion to consider the effect of a letter of allotment that had been accepted and there was a purported cancellation of the same. The court made reference to various pronouncements by courts and in disposing the issue stated thus:-

*“ The position of an allottee of a parcel of land was succinctly summed up by Odunga J in the case of **Commissioner of Commissioner of Lands & Another -vs- Kithinji Murugu Kagere (2014) eKLR** where the learned Judge while referring to the decision in the case of **Rukaya Ali Mohamed -vs- David Gikonyo Nambacha & Another (Kisumu) HCCC No.9 of 2004** observed thus:-*

*“21. As was held in **Rukaya Ali Mohammed –vs- David Gikonyo Nambacha & Another (supra)** once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. No such allegation was made by the Respondent herein”*

The plaintiff herein was in the position of an allottee and his allotment of land parcel No.1840 could not be cancelled and/or revoked at the whims of the 3rd defendant without due process .Having regard to the circumstances and the evidence tendered on behalf of the parties I am not satisfied that the 3rd defendant acted within the law when he purported to cancel the allotment to the plaintiff of plot No.1840 and I hold the cancellation was unlawful and therefore invalid”

54. In the instance case the 2nd defendant has proved it had a lawful allotment of the suit property which the allotting authority did not challenge and or revoke. The title in favour of the 2nd defendant was procedurally processed and accordingly he acquired an absolute title that was indefeasible unless a challenge of the same could have been brought and sustained under section 26(1) (a) & (b) of the Land Registration Act,2012. The Commissioner of Lands vide various correspondences confirmed the land the subject matter of the suit belonged to the 2nd defendant. The Commissioner of Lands letter dated 4th March 2011 was responded to by the Land Registrar on 18th April 2011 where the Land Registrar affirmed the 2nd defendant was the registered owner of the suit property and they had no documents to support the registration of Henry Keter Chepsengony . The 2nd paragraph of the letter of 18th April, 2011 was in the following terms

“ please receive certified copies of green and white card for the above referred to parcel alongside a lease document in the name of Rukima Estate Limited, which supports the registration of the said company on the parcel. There are no documents in support of the registration of Henry Keter Chepsengony.”

55. On the evidence on record the title issued to Rukima Estate Limited was properly and genuinely issued and could not be impugned. It is my determination therefore that Rukima Estate Ltd was legitimately allotted the suit property and that the title issued to it on 23rd October 2001 was validly issued . The corollary is that I find and hold the 1st defendant Henry Keter Chepsengony did not hold a valid title at any time over the suit property. Indeed it is instructive that he never appeared to defend the title he allegedly held over the same property. It is no wonder even the plaintiff could not get him to come to testify to defend the title he sold to her.

56. It is unfortunate the plaintiff fell victim to a fraudster who must have craftily perhaps with assistance of some officers in the Lands office (not necessarily the Land Registrar), set out to con her by manufacturing documents that showed he was the owner of the property. Earlier in the judgment I faulted the plaintiff's extent of the due diligence she carried out. Had the plaintiff deepened her due diligence she could easily have blown off the lid on the fraudster. She placed too much faith on the papers the 1st defendant produced. The plaintiff even trusted him to process the transfer and that is how she ended up getting duped with papers from the backstreet. It was not made clear what role the lawyer the plaintiff had engaged during the transaction played in the transaction as it was Henry Keter who appeared to have handled all the processes.

57. The Court having determined that the 1st defendant, Henry Keter Chepsengony never had any valid title to land parcel Nakuru Municipality Block 20/111. It follows therefore he did not have any valid interest in the said parcel of land that he could have transferred to the plaintiff. The agreement dated 16th September 2006 between the plaintiff and the 1st defendant for the purchase of the suit property by the plaintiff from the 1st defendant was void. The 1st defendant did not have any valid title to the property and he could not sell that which he did

not own. The transfer effected to the plaintiff of land parcel Nakuru Municipality Block20/111 by the 1st defendant was fraudulent and not effectual. The plaintiff did not therefore acquire any valid title to land parcel Nakuru Municipality Block20/111. She was a victim of a scam by fraudsters fronted by the 1st defendant and her only recourse would be against the 1st defendant who swindled the money from her.

58. The plaintiff has alleged fraud as against the 2nd defendant to the 8th defendant in regard to the dealings relating to the suit property. The plaintiff's claim of fraudulent dealings by the defendants was predicated on the fact that she was the lawful owner of the suit property. The Court having held that the plaintiff did not hold a valid title to the suit property, the plaintiff's claim that the 2nd defendant had no valid title which they could have transacted collapses. The Court indeed has held the 2nd defendant's title to the suit property issued on 23rd October 2001 was valid and was procedurally acquired. The 2nd defendant therefore could lawfully sell the suit property as they did to the 7th defendant.

59. In the course of the trial it emerged that the 7th defendant Madrine Wawira Muthoni, was resident in the USA and held dual citizenship for Kenya and the USA. She however affirmed that she executed the sale agreement between herself and the 2nd defendant when she visited the country. She confirmed she authorized her brother in law one Boniface Mukuria to represent her in the sale transaction. She executed all the necessary documents and left all the other documents required to facilitate the processing of the transfer. Her brother in law who was a manager at Chase Bank Nakuru Branch was to assist her to obtain a loan of Kshs2.0 million from the Bank to complete payment of the balance.

60. The 2nd defendant confirmed that the agreement with the 7th defendant was completed and the property transferred to the 7th defendant after the purchase price was paid. The title abstract shows the property was transferred to the name of the 7th defendant on 12th August 2012. Although the 7th defendant denied executing a power of attorney in favour of her brother in law in cross examination, the power of attorney shown to her was not exhibited and was not admitted in evidence. However given that the 7th defendant had given her brother in law authority to complete the transaction on her behalf, including to assist her to obtain financing from the bank one cannot rule out the possibility that she could in fact have executed a power of attorney alongside the other documents like the transfer. The 7th defendant's brother in law may have chosen to take advantage of the 7th defendant but that could not invalidate the sale to her and the subsequent sale to the 5th defendant, Mamis Motor World Ltd as the 7th defendant's brother in law had authority from the sister in law and he held himself to have her authority.

61. The 3rd defendant in my view acted in good faith in effecting the registration of the transfer in favor of the 7th defendant and subsequently in effecting the transfers in favour of the 5th and 8th defendants. The charges in favour of Equity Bank Ltd and the Kenya Commercial Bank Ltd, the 6th Defendant were validly and properly registered after appropriate due diligence had been carried out and the said institutions cannot be faulted. The 8th defendant was a bonafide purchaser for value and her registration as owner of the suit property was validly done. There is nothing she did wrong and her title cannot be impeached under the provisions of section 26 (1) (a) & (b) of the Land Registration Act, 2012. Her title is absolute and indefeasible and she is entitled to enjoy all the rights conferred by registration within the meaning of section 24 and 25 of the land Registration Act 2012.

62. It is my determination therefore that the plaintiff has failed to prove and/or establish any fraud against the 2nd to 8th defendants to the required standard and her suit against them must of necessity fail. The plaintiff is not entitled to the order/reliefs sought in the further amended plaint. The plaintiff's suit is accordingly dismissed with costs to the 2 to 8th defendants.

64. Orders accordingly.

Judgment dated signed and delivered at Nakuru electronically (virtually) this 29th day of July 2020.

J M MUTUNGI

JUDGE