



**Ngeeni & another v Ngarira & 2 others (Civil Appeal E057 of 2021)  
[2025] KECA 1496 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1496 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL E057 OF 2021  
W KARANJA, LK KIMARU & AO MUCHELULE, JJA  
SEPTEMBER 19, 2025**

**BETWEEN**

**LUGARD MURIUKI NGEENI ..... 1<sup>ST</sup> APPELLANT**

**CHARLES MIGWI GITHINJI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PETER NJUKI NGARIRA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR KERUGOYA ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at Kerugoya (E.C.Cherono, J.) delivered on 29th May 2020 in ELC Case No. 710 of 2013)*

**JUDGMENT**

1. By a plaint dated 10<sup>th</sup> September 2013, Peter Njuki Ngarira, (the 1<sup>st</sup> respondent) sued the appellants together with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents seeking orders, inter alia:- (a) a permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> appellants 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 1<sup>st</sup> respondent from the property title No. Kabare/Mikarara/853; (b) an order directing the Land Registrar Kerugoya to rectify by canceling all the entries in the register made on the 23<sup>rd</sup> July 2012 and 4<sup>th</sup> September 2012 and canceling the Title deeds issued to the 1<sup>st</sup> and 2<sup>nd</sup> appellants; (c) an order directing the Land Registrar to issue a new title deed to and in the names of the 1<sup>st</sup> respondent; (d) damages.
2. During the hearing, the 1<sup>st</sup> respondent called one witness in support of his case. It was the 1<sup>st</sup> respondent's evidence that he was the owner of Land parcel No. Kabare/Mikarara/853 (the suit land) before the 1<sup>st</sup> appellant allegedly sold and transferred it to the 2<sup>nd</sup> appellant. He stated that the 1<sup>st</sup>



- appellant had loaned him Ksh.50,000.00 which was to be paid after one (1) month. He said that he gave his title deed as security for the loan and also gave a copy of his ID, PIN Number and a passport size photo. The 1<sup>st</sup> respondent and the 1<sup>st</sup> appellant drafted an agreement for the loan. The loan agreement was drafted by Ikahu Nganga Advocate's secretary, namely Mary but the 1<sup>st</sup> appellant said he was not given a copy of the alleged agreement the same day as the advocate was not around to sign the same.
3. He contended that he kept asking for the signed agreement, but it was not until 3<sup>rd</sup> September 2012 that the said secretary gave him 2 agreements; one for Ksh.50,000.00 dated 14<sup>th</sup> June 2012 and another for Ksh.500,000.00 dated 14<sup>th</sup> May 2012 after he threatened to sue them. It was his further evidence that he did not receive Ksh.500,000.00 but rather received Ksh.50,000.00 in the presence of John Migwi, Paul Njoka and Sicily Wanjira. He added that the money he was borrowing was meant for his daughter's school fees.
  4. The 1<sup>st</sup> respondent further testified that upon receipt of the two agreements, he 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 1<sup>st</sup> respondent also testified that on 13<sup>th</sup> July 2012, he called the 1<sup>st</sup> appellant so that they could meet in order for him to refund his money. He stated that the 1<sup>st</sup> appellant told him that he was in Dubai and would call him later. He said that the 1<sup>st</sup> appellant did not call him back or 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.
  5. According to the 1<sup>st</sup> respondent, he did not attend the Land Control Board (LCB). He positively identified his photo on the transfer form and the photo of the 1<sup>st</sup> appellant 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 (the 2<sup>nd</sup> appellant).
  6. On cross-examination, he admitted that he had borrowed Kshs.50,000.00 from the 1<sup>st</sup> appellant and that he was to refund Ksh.100,000.00. He stated that he was given the money on 14<sup>th</sup> June 2012 and was to refund by 14<sup>th</sup> July 2012. He produced a piece of paper dated 14<sup>th</sup> June 2012 which did not bear his signature or that of the 1<sup>st</sup> appellant. It did not also bear the advocate's stamp and signature. It was not also witnessed.
  7. On being referred to an agreement dated 14<sup>th</sup> May 2012, the 1<sup>st</sup> respondent 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 ID, 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.
  8. Sicily Wanjiru testified as PW2. She stated that she was the wife of the 1<sup>st</sup> respondent and that she was the one that received the money from the 1<sup>st</sup> appellant and not the 1<sup>st</sup> respondent.
  9. The 1<sup>st</sup> appellant, Lugard Muriuki testified as DW1. He stated that he knew the 1<sup>st</sup> respondent since he had approached him in 2012 wanting some money. He contended that the 1<sup>st</sup> respondent gave him his title deed to act as security and he gave him Ksh.500,000.00. He said that the money was to be refunded before 23<sup>rd</sup> July 2012 failing which he was to transfer the said land to himself. The 1<sup>st</sup> appellant confirmed that the 1<sup>st</sup> respondent gave him a copy of his ID, KRA PIN Number, passport size photograph and consent. Further he testified that the 1<sup>st</sup> respondent also signed the transfer forms.
  10. The 1<sup>st</sup> appellant further testified that they signed an agreement dated 14<sup>th</sup> May 2012 and that the said agreement was signed by John Migwi, Peter Njuki, Sicily Wanjira and himself. The 1<sup>st</sup> appellant



stated that there was no other agreement that he was aware of and denied that he had travelled to Dubai. He stated that when the 1<sup>st</sup> respondent did not pay him as agreed, he transferred the land to himself and thereafter sold it to the 2<sup>nd</sup> appellant on 28<sup>th</sup> August 2012. He stated that the 1<sup>st</sup> respondent borrowed the money to pay school fees and some debt he had incurred. He stated that he requested the 1<sup>st</sup> respondent to go to the LCB before he could loan him the money just as a precaution in case the 1<sup>st</sup> respondent defaulted in refunding his money.

11. The 1<sup>st</sup> appellant contended that he met the 1<sup>st</sup> respondent on 14<sup>th</sup> May 2012 at the office of Ikahu Nganga Advocates where they signed an agreement and the parties present witnessed the same. He testified that he then handed over the Ksh.500,000.00 in cash to the 1<sup>st</sup> respondent and all the parties were given copies of the agreement.
12. He testified that he called the 1<sup>st</sup> respondent to ask him to refund his money and after he failed to refund the money, he transferred the land to himself. However, no evidence to that effect was placed before the court. He stated that the land measures approximately 8 acres and that there was an error on the agreement on the part of the acreage where it states 3 acres. He testified that he paid stamp duty and that he could not take possession of the land as the 1<sup>st</sup> respondent refused to hand over vacant possession. He testified that on 28<sup>th</sup> August 2012, he sold the land to Charles Migwi, the 2<sup>nd</sup> appellant at a consideration of Ksh.2,200,000.00. The 2<sup>nd</sup> appellant then took him to Gichugu Law Courts and the Court issued eviction orders which they attempted to serve upon the 1<sup>st</sup> respondent but they were chased away.
13. On cross-examination, the 1<sup>st</sup> appellant stated 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 LCB together with the 1<sup>st</sup> respondent and that he did not force the 1<sup>st</sup> respondent to transfer the land to him but did it voluntarily and willingly.
14. The 2<sup>nd</sup> appellant, Charles Migwi testified as DW2. He stated that he did not understand why he was sued by the 1<sup>st</sup> respondent yet he had not bought the land from him. He testified that he bought the land from Lugard Muriuki (1<sup>st</sup> appellant) at a consideration of Ksh. 2,200,000 and that they drew an agreement on 28<sup>th</sup> August 2012. He further testified that he conducted a search and found that the suit land was registered in the name of the 1<sup>st</sup> appellant. He stated that there was no restriction on the land at the time and that he got consent from the LCB and paid stamp duty. He stated that the title deed was issued to him on 4<sup>th</sup> September 2012. He said that he has been unable to occupy the land as the 1<sup>st</sup> respondent refused to vacate the property and that he sought to have him evicted.
15. Faith Mutei the Land Registrar Kerugoya testified as DW3. She stated that the suit land was resultant from the sub-division of land parcel No. Kabare/Mikarara/8 which was done on 1<sup>st</sup> 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 27<sup>th</sup> November 2011 in the name of the said Peter Njuki Ngarira. She stated that on 23<sup>rd</sup> July 2012 a transfer was effected to Lugard Muriuki Ngeeni and a title issued on 27<sup>th</sup> July 2012. On 4<sup>th</sup> September 2012, a transfer was effected to Charles Migwi Githinji and a title deed issued on the same date. She stated that on 19<sup>th</sup> October 2012, a restriction was registered by the D.C.I.O Kirinyaga and the same office removed the restriction on 26<sup>th</sup> March 2013. She testified that the original title was presented to the Land Registry together with all completion documents which include LCB consent, both the vendor's and transferee's copies of ID Cards and PIN Certificates and the receipt for payment of stamp duty. She said that the stamp duty was paid on 23<sup>rd</sup> July 2012 by Lugard Muriuki Ngeeni.



16. Upon considering the dispute, the trial Judge framed three issues for consideration by the Court: whether the plaintiff has proved fraud against the defendant; (2) what are the appropriate orders to issue? and (3) who will pay the costs of the suit?
17. With regards to the 1<sup>st</sup> issue the learned Judge held that the agreement dated 14<sup>th</sup> May 2012 indicated that the 1<sup>st</sup> respondent had already taken the 1<sup>st</sup> appellant to the LCB for transfer as security should the 1<sup>st</sup> respondent default. The Judge held that the clause contemplated the transfer upon a future happening or event and that explained why the application for consent of LCB and the consent used to effect the transfer in favour of the 1<sup>st</sup> appellant is dated 25<sup>th</sup> April 2012. The Judge held that the consent from the LCB was issued in anticipation of a future event.
18. Based on the above the Judge held that the actions of the appellant from the evidence showed that he had all the intentions to have the suit property transferred to himself through hook or crook and that explained why he insisted that the 1<sup>st</sup> respondent give him a consent before advancing the loan. The Judge posited that if the 1<sup>st</sup> appellant did not intend to convert the 1<sup>st</sup> respondent's land to be his own, then why did he not write him a demand letter or even call or look for him to ask for the refund of his money?
19. On the transfers, the Judge held that the testimony of DW3 who is the custodian of all land transactions including the ones related to the suit property was incomplete as she was not able to produce these very important documents in her evidence. The Judge observed that 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 give such errors.
20. On the payment of stamp duty, the Judge held that there was no evidence of the stamp duty of Kshs.500.00 and Kshs.90,000.00 having been paid as testified by the 1<sup>st</sup> and 2<sup>nd</sup> appellants. The Judge held that no evidence was presented that such payments were ever made.
21. On the issue of spousal consent, the Judge held that it is a mandatory requirement that spousal consent is obtained before any disposal of interest in land is effected. That the 1<sup>st</sup> appellant confirmed to the Court that the 1<sup>st</sup> respondent was married to PW2. The learned Judge held that DW3 who is the Land Registrar Kirinyaga, confirmed that there were no spousal consents presented to her office by either the 1<sup>st</sup> or the 2<sup>nd</sup> appellants when the registration of the transfers were done. The Judge found that the effect of those transfers and registration amounted to a nullity and were of no legal effect.
22. As to whether the purchase was for value without notice, the learned Judge held that from the evidence, the manner in which the 1<sup>st</sup> appellant acquired the suit property from the 1<sup>st</sup> respondent was unprocedural and tainted with illegality and, therefore, it followed that the 2<sup>nd</sup> appellant could not have acquired a good title from the 1<sup>st</sup> appellant. The Judge held that the 1<sup>st</sup> appellant admitted that he had not taken possession of the suit property but went ahead and purported to transfer it to the 2<sup>nd</sup> appellant in a callous and mischievous way.
23. Finally, the Judge found that the title by the 1<sup>st</sup> appellant was obtained through fraud and misrepresentation and that on the other hand, the 2<sup>nd</sup> appellant obtained his title through a hybrid of fraud and misrepresentation and also acquired through illegality, un-procedurally and through corrupt practice. The Judge allowed the 1<sup>st</sup> respondent's claims as prayed.
24. Aggrieved by the decision, the appellants filed this appeal on ground, inter alia, that the Honourable Judge erred in law and fact: by holding that, the 1<sup>st</sup> respondent had proved his case and orders sought for in his plaint were available which holding was against the weight of evidence adduced before the trial court; by holding that, the agreement between the 1<sup>st</sup> appellant and 1<sup>st</sup> respondent in



respect to the suit land L.R. Kabare/Mikarara/853 was tainted with fraud, illegality, un-procedural and corrupt practice and which finding was not supported by sufficient and admissible evidence; by not properly considering and appreciating the clear terms and conditions of the sale agreement between the 1<sup>st</sup> appellant and 1<sup>st</sup> respondent dated 14<sup>th</sup> May 2012 and hence failed to give the same proper interpretation based on the intentions of the parties privy to the contract; by holding that the transfer of LR Kabare/Mikarara/853 from 1<sup>st</sup> respondent to the 1<sup>st</sup> appellant and the legal instruments of transfer thereon were tainted with fraud, illegality or forgery and hence null and void and which finding was not based on sound analysis of evidence on record hence arrived at a fundamental finding whose standard of proof on fraud had not been duly discharged; by faulting the transfer instruments on the suit land between the 1<sup>st</sup> appellant and 1<sup>st</sup> respondent and declaring the same as null and void ; by holding that no stamp duty was paid for the transfers of the suit land between 1<sup>st</sup> appellant and the 1<sup>st</sup> respondent and later between 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant; by placing great emphasis as to issue of spousal consent upon transfer or other dealings on the suit land ; by holding that the 2<sup>nd</sup> appellant's title was impeachable for being tainted with fraud, illegality, forgery and corrupt practices ; by ordering the cancellation of the title deed issued to the 1<sup>st</sup> appellant and later to the 2<sup>nd</sup> appellant and ordering reversal of the suit land to the 1<sup>st</sup> respondent without considering that the 1<sup>st</sup> respondent had acknowledged receipt of Kshs.500,000.00 from the 1<sup>st</sup> appellant pursuant to the valid and binding sale agreement dated 14<sup>th</sup> May 2012 ; by making a finding that assisted the 1<sup>st</sup> respondent to avoid his legal obligations on sale agreement between him and the 1<sup>st</sup> appellant hence negotiated the 1<sup>st</sup> respondent out of a bad bargain against the legal principles of the law of contracts; by dismissing the 2<sup>nd</sup> appellant's counter-claim with costs without considering the evidence adduced in support thereof.

25. When the appeal came up for hearing before us on a virtual platform on 24<sup>th</sup> June 2024, learned counsel Mr. Kiguru Kahigah appeared for the appellants while learned counsel Mr Kinyua Mwaniki appeared for the 1<sup>st</sup> respondent and Ms. Fatma Ali appeared for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. All the parties had filed written submissions in support of their cases.
26. As to whether fraud was proved it was submitted that the same was never proved to the required standard by the 1<sup>st</sup> respondent. Reliance was placed on Vijay Morjaria -vs- Nansingh Madhusingh Darbar & another [2000] eKLR and Kinyanjui Kamau -vs- George Kamau Njoroge [2015] eKLR for the proposition that fraud must be pleaded and strictly proved.
27. As to whether the 2<sup>nd</sup> appellant was an innocent purchaser for value it was submitted that the 2<sup>nd</sup> appellant was an innocent purchaser for value and that he had conducted the necessary due diligence before purchasing the property. Reliance was placed on Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura -vs- Attorney General & 4 others [2013] eKLR and Katende -vs- Haridas and Company Limited, EALR [2008] 2 EA 17.
28. On behalf of the 1<sup>st</sup> respondent, it was submitted that the 1<sup>st</sup> respondent proved fraud and misrepresentation for the reasons that the 1<sup>st</sup> appellant in his evidence testified that a consent from the LCB was obtained even before the loan amount was disbursed to the 1<sup>st</sup> respondent and that if the 1<sup>st</sup> respondent defaulted in repayment of the loan the suit property would be directly transferred to the 1<sup>st</sup> appellant. It was submitted that this is nullity ab initio going by the provisions of the *Land Act*.
29. It was submitted that the agreement had been back dated without his knowledge as it indicated an erroneous size of the suit property being 1.377 Ha instead of 3.177 Ha yet the advocate who prepared it was not called as a witness to state that was a mere mistake and that the said agreement required the 1<sup>st</sup> respondent to surrender the suit property forthwith upon execution on 14<sup>th</sup> May 2012 yet from the record the one-month loan repayment period was to lapse on 14<sup>th</sup> July 2012.



30. Counsel submitted that the transfer form presented to the registry was incomplete as it did not indicate the consideration of the transaction, it did not indicate the KRA Pins for the transferor and the transferee and that the same was drawn, executed and registered on 23<sup>rd</sup> July 2012 and that the signature appearing for the transferor was that of the 1<sup>st</sup> appellant whereas that of the transferee was that of the 1<sup>st</sup> respondent.
31. It was submitted that the failure to fulfil the requirement of spousal consent is another aspect of the evidence that clearly show how the 1<sup>st</sup> appellant wanted to transfer the suit property to himself without knowledge of the 1<sup>st</sup> respondent.
32. Counsel submitted that the 2<sup>nd</sup> appellant cannot claim to be an innocent purchaser for value without notice as he failed to prove so in his counter-claim that despite his allegation that he purchased the suit property from the 1<sup>st</sup> appellant for a consideration of Kshs.2,400,000.00 through an agreement dated 28<sup>th</sup> July 2012 no proof of payment of the consideration was ever tabled before the trial court.
33. It was submitted that the 2<sup>nd</sup> appellant despite his submissions before the Court cannot be considered a bonafide purchaser for value since he did not prove at the ELC that he acquired a valid legal title, that he carried out the necessary due diligence to determine the lawful owner and that he indeed paid valuable consideration for the purchase price. Further, that the dealings in the suit property were marred with illegality, and so the 1<sup>st</sup> appellant did not have a good title in the property that he could pass to the 2<sup>nd</sup> appellant or anybody else and so he cannot purport to have transferred a good title to the 2<sup>nd</sup> appellant and the 2<sup>nd</sup> appellant cannot likewise purport to hold a valid title to the suit property. Reliance was placed in *Esther Ndegi Njiru & Another -vs- Leonard Gatei* [2014] eKLR.
34. We were urged to dismiss the appeal with costs to the 1<sup>st</sup> respondent.
35. The 3<sup>rd</sup> respondent submitted that it was not privy to the contract between the 1<sup>st</sup> appellant and the 1<sup>st</sup> respondent. Reliance was placed in *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others* [2018] eKLR and *Savings & Loan (K) Limited -vs- Kanyenje Karangaita Gakombe & Another* [2015] eKLR and *Aineah Likuyani Njirah -vs- Aga Khan Health Services* [2013] eKLR. Further that the essence of the privity rule is that only the parties that actually negotiated a contract, who are privy to it are entitled to enforce its terms that advances that a contract cannot confer rights or impose obligations on any person other than the parties to the contract, and accordingly a contract cannot be enforced either for or against a 3<sup>rd</sup> party.
36. It was submitted that the Land Registrar, Kerugoya testified that all the documents that were relied upon to transfer the suit property were in order save for the spousal consent and that the 1<sup>st</sup> respondent having offered the property as security for the loan is estopped from claiming that the same is matrimonial property and that the spouse did not sign any consent to that effect. Reliance was placed on *Maltex Commercial Supplies Limited & Anor -vs- Euro Bank Limited (In Liquidation)* HCCC Number 82 of 2006.
37. Finally, it was submitted that the existence of the contract was not disputed by the parties and that the legality of the contract was not challenged and no good reason was given for defaulting in repayment.



38. This is a first appeal and, and our mandate is as clearly set out under rule 31(1) of the Court of Appeal Rules, which mandate has been followed with reverence as demonstrated in plethora of cases determined before this Court. For instance, in Nairobi

Bottlers Limited -vs- Imbuga (Civil Appeal E661 of 2022) [2024] KECA 434 (KLR) where this Court held:

Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re-appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been the subject of various judicial pronouncements in such cases as Nicholas Njeru vs. Attorney General & Others [2013] eKLR where it was stated:

[In] a first appeal, we are required to re- evaluate the evidence and arrive at our own independent findings and conclusions of the matter.””

See also Peters -vs- Sunday Post Limited [1958] EA.

39. Having considered the Record of appeal and the parties’ submissions, the main issues for consideration are whether: the transfer of the suit property was obtained by way of undue influence, coercion and fraud; whether the sale and transfer of the suit property to the 2<sup>nd</sup> appellant was void and finally whether the 2<sup>nd</sup> appellant was a bona fide purchaser for value, and whether he acquired good title from the 1<sup>st</sup> appellant.
40. What is in dispute in this matter was the manner in which the transaction relating to the transfer of the suit property was executed. The 1<sup>st</sup> respondent’s claim was that the transaction was null and void as the 1<sup>st</sup> appellant illegally transferred to himself the suit property on the allegation that the 1<sup>st</sup> respondent had signed a sale agreement dated 14<sup>th</sup> May 2012 which provided for such transfer in the event that the loan advanced was not paid back.
41. On the other hand, the 1<sup>st</sup> appellant took the view that the 1<sup>st</sup> respondent freely and voluntarily agreed to give him the title deed to the suit property as security for the loan of Kshs.500,000.00 loaned to him which was to be paid on or before 14<sup>th</sup> July 2012, and that as a prerequisite the 1<sup>st</sup> respondent had obtained a consent from the LCB to transfer the suit property to him and that he had further signed a transfer in his favour should he default on repayment of the said loan. The 1<sup>st</sup> appellant submitted that it was a term of the agreement that should the 1<sup>st</sup> respondent default in paying the loan advanced to him then he would transfer the suit property to himself and that no undue influence, coercion or fraud was brought to bear on him during the transaction. The trial court on the issue of fraud and coercion held that;

...First, the acreage of the suit property is given in the agreement as measuring 1.377 Ha. However, the acreage of the suit land from the official search produced by the 1<sup>st</sup> defendant as 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> party) had already taken the 2<sup>nd</sup> party (read 1<sup>st</sup> defendant) to the LCB for transfer as security should the 1<sup>st</sup> party (read plaintiff) default. That clause contemplates the transfer upon a future happening or event. That explains why the application for consent of LCB and the consent used to effect the transfer in favour of the 1<sup>st</sup> defendant is dated 25<sup>th</sup> April 2012. It



therefore follows that the consent from the LCB 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 1<sup>st</sup> 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 1<sup>st</sup> defendant did not intent 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?”

42. The law of contract recognizes and respects the freedom of parties to enter into agreements setting out the parameters within which they are to be governed. In the case of Abdul Jalil Yafai -vs- Farid Jalil Mohammed [2015] eKLR, this Court stated that the law equally places a high value on ensuring parties have truly consented to the terms that bind them.
43. It is on record that the advocate who prepared the said agreements was not called as a witness to testify in court. The 1<sup>st</sup> respondent stated that he was perplexed to find that there were two agreements and especially the one dated 15<sup>th</sup> May 2012 which alleged that the 1<sup>st</sup> appellant had loaned him Kshs.500,000.00. This was disputed by the 1<sup>st</sup> respondent who stated that he only received Kshs.50,000.00 from the 1<sup>st</sup> appellant. PW2 who is his wife and who was present at the advocate's office testified that she was the one who received the Kshs.50,000.00 loan and not the 1<sup>st</sup> respondent.
44. From our analysis of the record, we perceive that the 1<sup>st</sup> appellant applied some form of undue influence on the 1<sup>st</sup> respondent before advancing him the soft loan of Kshs.50,000.00 first and as rightly held by the trial Judge that the agreement dated 14<sup>th</sup> May 2012 indicated that the 1<sup>st</sup> respondent had already taken the 1<sup>st</sup> appellant to the LCB for transfer as security should the 1<sup>st</sup> respondent default. Indeed, the trial court held, and rightly so in our view, that the actions of the 1<sup>st</sup> appellant 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 1<sup>st</sup> respondent gives him a consent before advancing the loan. We ask ourselves the same question as the trial Court, why didn't the 1<sup>st</sup> appellant first issue a demand notice to the 1<sup>st</sup> respondent before exercising the option to transfer the suit property to himself? Why the hurry? We agree with the trial Court that the entire transaction reeked of fraud and illegality! We can safely state at this point that the LCB Consent was issued contrary to law as it related to a future event, and the same was null and void for all purposes.
45. It is common ground that the 1<sup>st</sup> respondent pleaded fraud, misrepresentation, deceit and illegality against the appellants in their acquisition of the suit property and provided the particulars of the same. When a document containing contractual terms is signed, then, in the absence of undue influence, coercion, fraud, misrepresentation or non est factum, the party signing it is bound, and it is wholly immaterial whether he has read the document or not. There is no doubt that the 1<sup>st</sup> respondent executed an agreement dated 14<sup>th</sup> May 2012 and the transfer dated 23<sup>rd</sup> July 2012 save that now the 1<sup>st</sup> respondent argues that such execution was obtained by way of undue influence, coercion and fraud as the content of the agreement was contrary to what he had agreed with the 1<sup>st</sup> appellant, as the agreement indicated that he had received Kshs.500,000.00 from the 1<sup>st</sup> appellant while the amount he had actually received was Kshs.50,000.00



46. The 1<sup>st</sup> appellant testified that he had advanced and given the 1<sup>st</sup> respondent Kshs.500,000.00 in cash at the advocate's office and that when the 1<sup>st</sup> respondent defaulted in paying the same as agreed on or before 14<sup>th</sup> July 2012, he transferred the suit property to himself which was a term of the agreement dated 14<sup>th</sup> May 2012.
47. Black's Law Dictionary defines undue influence as follows:
- “Persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party's free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party.”
48. Lord Nicholls in *Royal Bank of Scotland -vs- Etridge (No.2)* [2002] A.C. 773 defined undue influence as “the taking of unfair advantage, misuse of influence, abuse of trust and confidence and a connotation of impropriety.” The foregoing suggests that undue influence entails the misuse of one person's position of influence he/she has over another to induce the other to enter into a transaction which is substantially not to his interest or benefit.
49. Whether or not a transaction is the end result of undue influence is a matter of fact. The general rule is that he who asserts the wrong, in this case the 1<sup>st</sup> respondent, bears the burden of proving the same. Did he do so? It is common ground that the 1<sup>st</sup> respondent approached the 1<sup>st</sup> appellant for a soft loan of Kshs.50,000.00 as he was in dire need of money to pay for his daughter's school fees. To gain his trust the 1<sup>st</sup> appellant insisted that the 1<sup>st</sup> respondent gives him the title deed to the suit property and also insisted that the 1<sup>st</sup> respondent obtains a consent from the LCB for transfer as security should he default. The consent from the LCB is dated 25<sup>th</sup> April 2012 way before the agreement was signed and the loan advanced. The 1<sup>st</sup> respondent agreed to all this as he was desperate, and the 1<sup>st</sup> appellant took undue advantage of that.
50. Looking closely at the sale agreements dated 14<sup>th</sup> May 2012 and 14<sup>th</sup> June 2012, we cannot help but note that all these agreements were engineered by the 1<sup>st</sup> appellant. He did not deny that the advocate who drafted the two agreements was an advocate of his choice. It is rather strange that the said advocate did not appear in court to testify on the contents of the two agreements which the trial Judge noted had errors and more so the agreement dated 14<sup>th</sup> May 2012 which indicated that the acreage of the suit property, L.R. No. Kabare/Mikarara/853 was given as measuring 1.377 Ha but the official search produced by the 1<sup>st</sup> appellant indicated the acreage as 3.77 Ha. This to us is an error that points at fraud and misrepresentation.
51. Of concern, to us also is that the consideration indicated in the agreement dated 14<sup>th</sup> May 2012 was Kshs.500,000.00. While we are cognizant that a court is not concerned with the adequacy of consideration, when it comes to the question of enforceability of a contract, there is a glaring question which cannot escape our minds. Why would the 1<sup>st</sup> appellant's advocate indicate in the agreement dated 14<sup>th</sup> May 2012 that the 1<sup>st</sup> respondent had received Kshs.500,000.00 from the 1<sup>st</sup> appellant and indicate in the agreement dated 14<sup>th</sup> June 2012 that the amount advanced to the 1<sup>st</sup> respondent by the 1<sup>st</sup> appellant was Kshs.50,000.00? Another question that bothered the conscious of this court is that, even if we were to uphold the agreement to the effect that the value of the suit property was Kshs.500,000.00, is it feasible that the same parcel of land would be sold at the value of Kshs.2,200,000.00 after just a month? The 1<sup>st</sup> appellant knew that he was exerting undue influence on the 1<sup>st</sup> respondent. Such an agreement cannot be valid or enforceable by this Court.



52. Taking into account the foregoing, we, like the learned Judge, find that the circumstances surrounding the matter gave rise to a presumption of undue influence on the part of the 1<sup>st</sup> appellant as set out in the Royal Bank of Scotland case.

53. The net effect is that the agreements which gave rise to the arrangement that the 1<sup>st</sup> respondent and the 1<sup>st</sup> appellant found themselves in did not reflect the true and independent consent of 1<sup>st</sup> respondent. We also find that the aforementioned agreements meet the criteria of being regarded as unconscionable bargains as discussed at Para 7-133 of Chitty on Contracts, 31<sup>st</sup> edition, Vol 1:

For the doctrine to be applicable three elements must be established; first that the bargain must be oppressive to the complainant in overall terms; second that it may only apply when the complainant was suffering from certain types of bargaining weakness; and third that the other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant.”

54. Further, we hold that notwithstanding the fact that the 1<sup>st</sup> appellant’s title issued on 27<sup>th</sup> July 2012 was registered under Section 23 of the repealed Registration of Title Act the same was impeachable in the circumstances stated herein above. To that extent, we concur with Waki, J.A in Kenya National Highway Authority -vs- Shalien Masood Mughal & 5 others [2017] eKLR wherein he quoted with approval the sentiments of the High Court in Chemei Investments Limited - vs- The Attorney General & Others Nairobi Petition No. 94 of 2005 to the effect that: -

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra) where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

55. As we conclude, we state that the 1<sup>st</sup> appellant’s transfer of the suit property to himself smacks of deceit and misrepresentation. He set out a scheme to obtain the property at a paltry Kshs.50,000.00 thus unjustly enriching himself seeing that he sold the same to the 2<sup>nd</sup> appellant at Kshs.2,200,000.00 shortly after the transfer. He made sure that the 1<sup>st</sup> respondent did not pay the money and that is why he avoided a meeting with him when the 1<sup>st</sup> appellant called him to arrange a meeting so that he could give him back his money.

56. As to whether the 2<sup>nd</sup> appellant was a bona fide purchaser for value; Black’s Law Dictionary (8<sup>th</sup> Edition) defines a “bona fide purchaser” as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

57. In the case of Dina Management Limited -vs- County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), the Supreme Court stated that, for a court to establish whether a party is a bona fide purchaser for value, the court must first establish the root of the title right



from the first allotment. The Court upheld the dicta in Samuel Kamere -vs- Lands Registrar, Kajiado, [2015] eKLR and stated that:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property ...”

58. So, did the 2<sup>nd</sup> appellant acquire a valid and legal title to the suit property? The 2<sup>nd</sup> appellant’s case was that he purchased the suit property from the 1<sup>st</sup> appellant who was the registered title holder; that he conducted a search at the Registry and confirmed that the land was owned by the 1<sup>st</sup> appellant. However, of significance is that the 2<sup>nd</sup> appellant made no effort to conduct further inquiry into the 1<sup>st</sup> appellant’s title, even though it should have occurred to him that the 1<sup>st</sup> appellant was disposing of the suit land less than 2 months after it had been transferred to him. In other words, he did not establish the root of the 1<sup>st</sup> appellant’s title, which essentially required that he ascertain how it had come into existence, and how the 1<sup>st</sup> appellant came to be the registered owner and who was in actual physical possession at the time he purchased the same from the 1<sup>st</sup> appellant.
59. As to whether the 2<sup>nd</sup> appellant was a bona fide purchaser for value without notice, we form the view that, had the 2<sup>nd</sup> appellant conducted sufficient enquiry into the 1<sup>st</sup> appellants title, he would have discovered that the 1<sup>st</sup> respondent had been in actual and physical occupation of the suit property. At the very least, he ought to have enquired into the history behind the 1<sup>st</sup> appellant’s acquisition of the title.
60. In the case of Kukan & another (Administrators of the Estate of the Late Jason Kukan Lila) -vs- Kibutha (Civil Appeal 339 of 2018) [2023] KECA 742 (KLR) this Court affirmed the standards of due diligence laid out by Mutungi, J. in the case of Esther Ndegi Njiru & Another vs Leonard Gatei [2014] eKLR where the learned Judge held as follows:
- “The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of *the constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the title.”
61. The agreements between the 1<sup>st</sup> appellant and 1<sup>st</sup> respondent were shrouded with deceit on the part of the 1<sup>st</sup> appellant; undue influence misrepresentation (of both the consideration and the size of the suit land); deficiency in that they lacked spousal consents and also lack of valid LCB consent. This inevitably leads us to the indubitable conclusion that the entire transaction was unlawful, irregular and could not pass property to the 1<sup>st</sup> appellant, could not pass good title to the 2<sup>nd</sup> appellant.
62. We have said enough to show that, the 2<sup>nd</sup> appellant having failed to undertake sufficient due diligence into the title to the suit property, turned a blind eye to all the extant irregularities and, as a consequence, was not by any standard a bona fide purchaser for value of the suit property without notice.



63. We have carefully considered this appeal and have concluded that the same has no merit and we dismiss it with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT NYERI THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

