



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT. NO. 393 OF 2009

JENNIFER JOY PLEASANCE.....PLAINTIFF

VERSUS

1. JEPHASON MAINA KARIOKI

2. ROBERT CIPRIAN LUCAS

3. JOHANNA MARIA LUCAS

4. SUBRANY WAMBOI YUSUF.....DEFENDANTS

JUDGMENT

PLAINTIFF'S CASE

1. By an amended plaint dated 4th March, 2010 and filed on 11th March, 2010, the plaintiff prays for a declaration that the purported registration of the 1st defendant and the subsequent registration of the 2nd, 3rd and 4th Defendants are illegal, null and void and do not confer any proprietary interest to any of the defendants over the suit property being **PLOT NO.KWALE/GALU KINONDO/15**; an order that the Land Register be rectified by deleting registration of the defendants and restoring the plaintiff's registered proprietorship; a mandatory injunction compelling the defendants themselves, their servants and agents at their costs to demolish the structures they have erected on the suit property and in default, the plaintiff to demolish and remove the defendants' materials at the defendants costs; and a prohibitory injunction restraining the defendants from entering, constructing, or in any other interfering with plaintiff possession and enjoyment of the suit property and its title.

2. The plaintiff's prayers are premised on the fact that at all material time the plaintiff was the registered and beneficial owner of the said parcel of land. It is the plaintiff's case that on or about 16th May, 2006, the 1st defendant's name was fraudulently entered in the register as the registered proprietor and on 13th March 2009, the 1st defendant purported to transfer the suit property to the 2nd, 3rd and 4th defendants. The plaintiff avers that the 1st defendant's registration was fraudulent, illegal and did not transfer/vest any interest from the plaintiff to the 1st defendant in the suit property as the plaintiff did not sell or dispose or transfer the said property to the 1st defendant.

3. The plaintiff avers that in view of the illegality, fraud and nullity of the purported registration of the 1st defendant, the 1st defendant did not acquire any proprietary interest that could be transferred by himself to the 2nd, 3rd and 4th defendants. That the purported registration of the 2nd, 3rd and 4th defendants as proprietors does not transfer or vest any proprietary interest to the 2nd, 3rd and 4th defendants and registration of the 2nd, 3rd and 4th defendants as proprietors and purported title issued under the purported registration is null and void.

4. The plaintiff testified before Mukunya, J on 11th March 2013. It was the evidence of the plaintiff that her property known as **TITLE NO.KWALE/GALU KINONDO/15** measuring 0.7 hectares was taken without her consent. The plaintiff gave the value of the property at the time at approximately Kshs.30 million. The plaintiff produced the title deed plus the transfer in her favour. The title deed is dated 7th October 1991 (P.exhibit 1).

5. It was the Plaintiff's evidence that she saw the property advertised for sale in the newspaper and purchased it and the property was transferred to her by the previous registered proprietors, Pauline Njeri West and Peter David Belford as Administrators of Ronald Arthur West deceased and Paulina Njeri West as proprietors in common. The said transfer dated 17th September 1991 was produced as P.exhibit 2.

6. The plaintiff also produced the Green Card (P.exhibit 3) in which entry No.4 was a transfer to the plaintiff while Entry No.5 showed the title deed was issued to the plaintiff.

7. Entry No.6 of the said Green Card indicated that on 16th May 2006, the property was transferred to one Jephason Maina Karioki the 1st defendant herein for Kshs.4,000,000/= and title deed issued on the same date (entry No.7). The plaintiff's evidence is that this was done without her knowledge as she has never met nor received any payment from the said Jephason Maina Karioki. The plaintiff denied giving out her identity card at Kwale and did not obtain consent from the Land Control Board and presidential consent to transfer the property to Mr. Karioki.

8. The plaintiff further stated that she showed them her title but they disputed it because they were holding a title they bought from Mr. Karioki. The plaintiff stated that if she had sold her property she wanted to see the title deed, the agreement from the previous owner, copies of Land Control Board and presidential consent and survey plan and area and other relevant documents to see if it was the correct property, but she was not shown any. The plaintiff noted that the transfer to Mr. Karioki was for Kshs.4,000,000/= yet in the sale agreement dated 7th March 2009 between Jephason Maina Karioki and Robert Lucas Ciprian, the purchase price was kshs.3 million. The plaintiff's evidence was that she did not expect a person who bought the property in 2006 for Kshs. 4 million to sell the same for Kshs.3 million, yet development in the area had improved. The plaintiff stated that in 2007 she had an offer of Kshs.10 million and produced the agreement for sale dated 7th December 2006 between her and Winair Aviation Limited as P.exhibit 4. The plaintiff urged the court to grant her the reliefs sought.

9. When cross-examined by Mr. Omollo, counsel for the 2nd, 3rd and 4th defendants, PW1 stated that the 1st defendant was the first person to take her property and registered himself on 16th May 2006. She admitted that the registration was done in Kwale and stated that the register must be the only one. PW1 stated that she reported the matter in 2009 to the criminal investigations department in Nairobi who promised to investigate the matter. She maintained that Jephason Maina Karioki perpetuated the fraud in Entry No.6 of the Green Card, adding that she did not know whether the 3rd and 4th defendants were involved. PW1 stated that all previous entries have been cancelled but her name in the register has never been cancelled. She maintained that her property has been taken by the current owners who are residing on the property.

10. On being cross-examined by Mr. Esendi, counsel for the 5th and 6th defendants, PW1 state that she discovered that there were strangers on the property in June 2009 and that she visited the property regularly, adding that some people were interested in purchasing it. She stated that they went to lands office and met Mr. Jambe. PW1 maintained that there was no transfer or consent from herself to the people on the property. That she reported the matter to the CID Nairobi. She denied receiving the sum Kshs. 4 million from the 1st defendant or anyone else.

11. PW2 Thomas Mukhwana is a practicing valuer. He got instructions to value **LAND PARCEL NO.KWALE/GALU KINONDO/15** and visited the site on 28th August 2013 and prepared a valuation report which he produced as P.exhibit No.5. He stated that he was to give the valuation on the undeveloped site value which he valued at Kshs.26 million.

12. During cross-examination, he stated that he based his report on other comparables though he did not mention the comparables in the report. He further stated that he checked at the Kwale Land Registry but was unable to get the land particulars because the Green Card was missing.

1ST DEFENDANT'S CASE

13. The 1st defendant failed to enter appearance nor participate in this matter.

2ND, 3RD AND 4TH DEFENDANTS' CASE

14. In their defence dated 8th December 2009 the 2nd, 3rd and 4th defendants stated that according to the register the plaintiff was the registered owner of the suit property until 16th May, 2006 when the property was transferred to the 1st defendant. They further stated that they purchased the suit property from the 1st defendant for a consideration after carrying out a search which revealed that the 1st defendant was at the time the registered proprietor and that there were no encumbrances against the title. It is the 2nd, 3rd and 4th defendants' contention that they are innocent purchases for value without notice of the alleged fraud and that their title to the suit property is valid. They denied being trespassers to the suit premises, adding that they have even before commencement of this suit entered upon and have possession of the suit property and have constructed permanent structures thereon.

15. DW1, Subrany Wamboi Yusuf, the 4th defendant herein testified on 22nd February 2017. She stated that she was the wife to the 2nd defendant. It was her evidence that sometime in January 2009, they made enquiries from various people whether there was a plot available for sale in Diani. She stated that around February 2009, a man came to them and told them there was a plot for sale. That they were taken to the plot and upon seeing it, they inquired about the owner. They gave out their telephone number which was allegedly given to the owner, who is said to be the 1st defendant who talked with them and they met the following day at the plot. They were shown the original title deed and they took a copy. DW1 stated that on 12th February 2009, they went to Kwale Land Registry and applied for an official search which they obtained on 13th February 2009. That the Certificate of official search showed the 1st defendant as the registered proprietor.

16. DW1 produced the sale agreement dated 7th March, 2009 (D.exhibit 1); transfer dated 7th March 2009 (D.exhibit 3) title deed dated 13th March 2009 (D.exhibit 5), certificate of official search dated 13th March 2009 (D. exhibit 6; certified copy of Green Card (D.exhibit 7); photographs (D.exhibit 8); and letter dated 12th October 2009 (D.exhibit 9). DW1 stated that they had agreed with the 1st defendant on a price of Kshs.3,800,000/= but they settled at Kshs. 3 million when they discovered that part of the plot was Kaya Kinondo forest, which is a national monument. That there was also a road in between, leaving only one acre. They instructed their advocate who prepared the agreement for sale (D.exhibit 1) which they executed. Later a transfer was executed in the presence of a lawyer. That the 1st defendant also signed the transfer and confirmed receipt of Kshs.3 million from them DW1 added that the transfer was registered on 13th March 2009 after they had obtained letter of consent dated 4th February 2009 from the Land Control Board which she produced as D.exhibit 4.

17. DW1 stated that before they purchased the property, they went to a lawyer by the name Lynette Oketch while Ambwere advocate was acting for the seller. She denied acquiring the property through fraud, maintaining that they lawfully purchased it. DW1 stated that she saw the Green Card which showed the name of the 1st defendant and was satisfied that the 1st defendant was the owner. She added that the issue of the Land Control Board consent was handled by their lawyer.

18. During cross-examination by Mr. Ndegwa counsel for the plaintiff, DW1 confirmed that among the documents she produced, there was no national identity card, telephone number and email address of the 1st defendant. She stated that she did not know the home or place of work of the 1st defendant. She also confirmed that she did not see any agreement or transfer or any other document entered into between the 1st defendant and the plaintiff. On being shown the Letter of consent of the Land Control Board dated 4th February 2009 (D. exhibit 4), DW1 confirmed that there was no application for consent to the Land Control Board and did not have a receipt for such application. She added that the consent letter is written to the 1st defendant and admitted that there was some cancellation in the name which was not counter-signed. DW1 also confirmed that the letter of consent was dated 4th February 2009 while the agreement for sale was dated 7th March 2009, but added that the reason the consent was dated 4th February 2009 was because there was an earlier agreement for Kshs.3.8 million which was abandoned when part of the land was found to be Kaya Forest and a new agreement for sale entered. She however did not have a copy of the agreement in which the purchase price was Kshs.3.8 million. She also admitted that she did not have any document showing that part of that land was Kaya forest, neither did she have minutes of the Land Control Board. She also confirmed that the letter of consent showed a consideration of Kshs.3.8 million though with some overwriting which was not counter-signed. The said letter of consent had a signature but no name of the chairman.

19. On being shown the transfer dated 6th March 2009, (D.exhibit 3), DW1 confirmed that the same showed it was signed on 6th March 2009 whereas the agreement was made on 7th March 2009. That the transfer signed on 6th March 2009 was not signed by the Land Registrar and did not have PIN Number of the purchasers. DW1 also admitted that her name is not in the agreement for sale dated 7th March 2009, and stated that her husband, the 2nd defendant is the one who signed it. She however confirmed that she had no evidence of marriage between her and the 2nd defendant. She also confirmed that she had no document signed by her and the 3rd defendant. She also confirmed not having any evidence of payment made by them to the 1st defendant.

20. Upon cross-examination by counsel for the 5th and 6th defendants, DW1 stated that the sale agreement was between the 1st defendant and the 2nd and 3rd defendants and herself. She confirmed that they did not make a request to the lands office and no officer from that office was present at the time of signing the agreement. DW1 confirmed that the 2nd and 3rd defendants are both German Nationals.

5TH AND 6TH DEFENDANTS' CASE

21. The 5th and 6th defendants filed their defence dated 30th November 2011 in which they deny the plaintiff's claim. They state that they are strangers to the comments in the plaint and in particular denied the particulars of fraud enumerated therein. They further deny that the plaintiff has suffered loss and damage.

22. DW2, Philip Makini, is the Land Registrar, Kwale County. He stated that the suit property was first registered in favour of Bakari Abdalla Mwabewa, Adidi Abdallah Mwabewa and Kasimu Salimu Mwabewa who were the first allottees from the Land Adjudication and Settlement office. They were registered on 15th November 1974 and issued with title documents. They later transferred the land on 20th May 1978 to Ronald West and Paulina West who were issued with a title deed on the same date. On 7th October 1991, Ronald West and Paulina West transferred the suit property to the plaintiff herein who was issued with title deed on the same date. DW1 confirmed that he had all the records which included the executed transfer and letter of consent.

23. DW2 further stated that the Green Card indicated that the property was transferred to the 1st defendant and title deed issued to him on 16th May 2006. He however clarified that the record did not have the relevant documents to support that transaction. In particular, DW2 stated that he did not have the transfer documents and consent to transfer from the plaintiff to the 1st defendant. He added that on 13th March 2009, the property was transferred to the 2nd, 3rd and 4th defendants and title deed issued on the same date. He stated that all records pertaining to this transaction were on the file.

24. DW2 further stated that the DCIO, Ukunda had put a restriction stating that nothing should be done on the register until investigation was completed. Also in the file was a letter dated 6th July 2009 from the plaintiff to the District Land Registrar who in turn wrote to the DCIO on 8th July 2009 to investigate the issue. A court order in this case was also registered by the plaintiff on 12th November 2009.

25. According to DW2, the current registered owners of the suit property are the 2nd, 3rd and 4th defendants. DW2 confirmed that there was no consent from the Land Control Board regarding the transfer from the plaintiff to the 1st defendant, a situation he termed as not normal. According to him, any transfer must have the transfer documents and the letter of consent from the Land Control Board. DW2 clarified that there were no records regarding the transfer from the plaintiff to the 1st defendant and could not tell why that was so. He added that copies of transfer documents are normally given to the parties, that is the seller and the purchaser. DW2 produced the Green Card as D.exhibit 10 and certified copy of the file as D.exhibit 11. He concluded by stating that if the court orders that they rectify the register, he will abide by the order of the court.

26. During cross-examination by counsel for 2nd, 3rd and 4th defendants, DW2 stated that as at 16th May 2006, the 1st defendant was the registered owner of the suit property. He confirmed that Entry No.6 was a consideration of Kshs. 4 million and was signed by the Land Registrar. He could however not tell whether there was a transfer or consent supporting that transfer as he did not find those documents in the file. He also confirmed that on 13th March 2009, there was a transfer from the 1st defendant to the 2nd, 3rd and 4th defendants, adding that there was no restriction at the time. He further confirmed that when one applies for official search, they do not keep a copy of the search

in the file. He added that the registered owners as per Entry No.8 were the 2nd, 3rd and 4th defendants.

27. On being cross-examined by counsel for the plaintiff, DW2 stated that he has never seen the transfer documents from the plaintiff to the 1st defendant and there was no document to show that the same were misplaced. DW2 clarified that to do a transfer, the requirements needed are: (i) transfer (ii) consent from the Land Control Board; (iii) receipt from collector of stamp duty to confirm payment of duty; (iv) copy of identity card (v) Pin Number and (vi) photographs of both the buyer and the seller. He confirmed that none of these documents were in the file yet they were supposed to be in the file, and he could not explain why. According to DW2, the Land Registrar could not have transferred the land from the plaintiff to the 1st defendant without the said documents.

28. The witness referred to a letter dated 13th March 2009 from L. A. Oketch and Company Advocates to Ambwere T.S. Associates in reference to the suit property. The letter stated that L.A. Oketch & Co Advocates went to the land registry on 11th March 2009 to lodge transfer documents. DW2 stated that the registered owner as at 11th March 2009 was the 1st defendant while the previous registered owner was the plaintiff. He stated that the Land Registrar asked for the transfer documents executed by both the 1st defendant and the plaintiff but that none were availed. He added that the transfer from the 1st defendant to the 2nd, 3rd and 4th defendants was registered on 13th March 2009, two days after the visit by L. A. Oketch & Co. Advocates.

29. DW2 confirmed that he had a letter dated 8th July 2009 from the Land Registrar to the DCIO, Ukunda reporting the complaint by the Plaintiff that her property was transferred without her knowledge.

30. When a question was put to him by the court, DW2 confirmed that the letter by L. A. Oketch & Co. Advocates was dated 13th March 2009 and was received by the District Land Registrar on 16th March 2009. He further clarified that the transfer in Entry No.8 was registered on 13th March 2009.

SUBMISSIONS

31. The parties filed written submissions and also appeared before me on 24th July, 2018 to highlight those submissions. In her submissions, the plaintiff urged the court to invoke its powers under Section 143 (1) & (2) of the now repealed Registered Land Act (Cap 300) to rectify the register of **PARCEL NUMBER KWALE/GALU KINONDO/15** because the names of the 1st to 4th defendants were entered in the register by fraud, neglect and defaults which the 2nd, 3rd and 4th defendants were well aware of. It was the plaintiff's submission that the title acquired by registration of the 1st to 4th defendants is illegitimate and ought to be rectified because the 1st defendant did not acquire the land for valuable consideration, the 2nd, 3rd and 4th defendants had knowledge of the omission, fraud and mistake of which the rectification is sought particularly that the plaintiff had not sold or signed any document to transfer any document to the 1st defendant and that the 2nd, 3rd and 4th defendants substantially contributed to the irregularity by their own neglect or default particularly by refusing to take notice of the glaring irregularities that constituted actual and constructive notice of the fraud, omissions and mistakes.

32. The plaintiff submitted that she is entitled to judgment as against the 1st defendant as prayed in prayer (a) of the amended plaint since the 1st defendant did not file any defence. The plaintiff further submitted that judgment should also be entered against the 5th and 6th defendants since the Land Registrar (DW2) admitted that the Lands office did not have a transfer from the plaintiff to the 1st defendant. Further, that there was no explanation as to why the Lands office did not have the documents and that it was abnormal to register the 1st defendant without the transfer, consent of the Land Control Board and other accompanying documents.

33. The plaintiff urged the court to note that the 2nd, 3rd and 4th defendants did not make a claim as against the 1st defendant as a co-defendant despite their claim being that they acquired the interest they purport to hold through the 1st defendant. Further, that the 2nd, 3rd and 4th defendants did not report the clear fraud to the police even after being put on notice by the Land Registrar of the apparent irregularities with the purported title of the 1st defendant and the plaintiff confirming that she had not sold the property to the 1st defendant.

34. The plaintiff identified the following issues for determination:

- i. Whether the plaintiff was the registered owner of PLOT NO. KWALE/GALU KINONDO/15 as at 15th May 2006.**
- ii. Whether the plaintiff executed any transfer of land form in favour of the 1st defendant.**
- iii. Whether the entry dated 16th May 2006 purporting to register the 1st Defendant as the proprietor of the suit property extinguished the plaintiff's title. Alternatively, whether the said entry conferred a good title to the 2nd, 3rd and 4th defendants.**
- iv. Whether the Land Control Board issued a consent for the purported transfer of the suit property to the 1st defendant, and whether the document purporting to be the consent of the Land Control Board for the purported transfer from the 1st defendant to the 2nd, 3rd and 4th defendants is admissible as evidence that consent was issued in accordance with the Land Control Act.**
- v. Whether the plaintiff applied for presidential consent for the purported transfer of the suit property to the 1st defendant and whether any was issued.**

vi. Whether the 2nd, 3rd and 4th defendants are bona fide purchasers of the suit property for value without notice.

35. It was submitted that as at 16th May 2006, the plaintiff was registered as the proprietor of the suit property, having become the registered owner on 7th October 1991 upon a transfer upon valuable consideration of Kshs.800,000/= and was issued with a Title Deed (P.exhibit 1).

36. On the second issue whether the plaintiff executed any transfer of land form in favour of the 1st defendant, it was submitted that the plaintiff did not. That the evidence given by the plaintiff to that effect was not shaken by cross-examination or contradicted by any evidence from the defendants or otherwise. The plaintiff submitted that registering the 1st defendant as the registered owner without a transfer duly executed by the plaintiff was outrightly illegal and fraudulent because under Section 109 of the Registered Land Act (repealed), every disposition of an interest in land registered under that Act must be in the prescribed form and executed by the persons registered as proprietors.

37. On the third issue aforesaid, the plaintiff submitted that the fraudulent acts of the 1st defendant did not confer any title to him and he could not pass any good title to acquire to the 2nd, 3rd and 4th defendants. The plaintiff's counsel cited the case **of Arthi Highway Developers Limited –v- West End Butchery Limited & 6 Others (2015) eKLR** in which the Court of Appeal held that in cases where fraud is established, the registered owner is not divested of its title by the fraudulent acts and the fraudster does not acquire any title. The plaintiff urged the court to find that the entry dated 16th May 2006 purporting to register the 1st defendant as the proprietor of the suit property did not extinguish the plaintiff's title and did not confer a good title to the 2nd, 3rd and 4th defendants.

38. Regarding the issue of consent from the Land Control Board, the plaintiff submitted that the defendants did not allege that the Land Control Board issued consent for the transfer of the suit property to the 1st defendant, and therefore urged court to find that the Land Control Board did not give its consent for the purported registration of the 1st defendant as the registered owner of the suit property. It was further submitted that the documents purporting to be the consent of the Land Control Board for the purported transfer from the 1st defendant to the 2nd, 3rd and 4th defendants was questionable and cannot be relied upon by a court of law. It was pointed out that the evidence of DW1 confirmed that the 2nd and 3rd defendants were citizens of Germany, and Section 9 (1)(c)(1) denies the Land Control Board power to grant consent in any transaction to sell, transfer, lease, exchange or partition land to a person who is not a citizen of Kenya. Further, that there is evidence that the transaction for which the purported consent was issued was a sale of Kshs.3.8 million as shown in the face of the purported letter of consent which was not the same transaction as the sale of Kshs.3 million in the agreement for sale. Also that there is evidence that the other party to the transaction was one Japheson Maina Kariuki which is different from Kariuki in the purported title deed and transfer produced by the defendants as D.exhibits 2 and 3 respectively. In addition, there was no evidence that can be admitted under the Evidence Act that the Board sat and gave the consent in the first place. The plaintiff urged the court to find that the purported transfer from the 1st defendant to the 2nd, 3rd and 4th defendants was a nullity since the legal status of a controlled transaction for which the Board has not given consent is that it is a nullity. The plaintiff's counsel cited Section 6 (1)(a) and Section 9 of the Land Control Act

39. Regarding the issue whether there was presidential consent for the purported transfer of the suit property to the 1st defendant, the plaintiff submitted that at the time of the purported transfer there was a by-law that one could not transfer title to a beach property without the written consent of the president. The plaintiff denied applying for such consent and that the defendants did not allege that the same was given. The court was urged to find that the registration of the 1st defendant and the subsequent registration of the 2nd, 3rd and 4th defendants was illegal on account of not being supported by the presidential consent as required then.

40. Regarding the issue whether the 2nd, 3rd and 4th defendants are bona fide purchasers of the suit property for value without notice, it was submitted that to benefit from the protection of Section 143 (2) of the now repealed Registered Land Act, the defendants must prove the purchaser-hood, valuable consideration, lack of knowledge of the omissions or fraud or mistake in consequence of which the rectification is sought, that the purchaser did not cause the omissions, fraud or mistake, and that the purchasers did not by neglect or default contribute to the omissions, fraud or mistake of which rectification is sought. It was submitted that the 1st defendant is not a purchaser and therefore cannot benefit from the doctrine of innocent purchaser since he has not pleaded innocence or otherwise. That he did not produce an agreement of sale between himself and the plaintiff and accordingly the 1st defendant is not protected by the doctrine of innocent purchaser. In any event, it was submitted, judgment ought to be entered against the 1st defendant since the trial was a formal proof as against him.

41. It was further submitted that the 3rd and 4th defendants did not produce agreement of sale between themselves and the 1st defendant hence are not protected by the doctrine of innocent purchaser since they are not purchasers. It was also submitted by the plaintiff's counsel that the 2nd defendant who is a party to the purported agreement is also not protected by the doctrine of innocent purchaser because the 2nd defendant became a transferee before becoming a purchaser. The purported transfer was signed on 6th March 2009 while the agreement of sale is dated 7th March 2009. That the interest purported to be acquired through the instrument of transfer is not based on the purported agreement of sale signed subsequently. It was further submitted that the 1st defendant did not have the legal capacity or competence to be a seller or to pass to a third party within the protection of Section 28 of the Registered Land Act (repealed) because the legal interest was vested in the plaintiff and was never validly transferred to the 1st defendant.

42. It was also the submissions of the plaintiff that the defendants failed to prove consideration which is a fundamental element of the concept of bona fide purchase. It was submitted that the defendants did not discharge their burden of proving that the purported consideration of Kshs.3,000,000/= actually moved from the 2nd defendant or any of them or their agents to the 1st defendant. That there was contradiction in the purported agreement of sale which showed the purchase price as Kshs. 3 million while the consent of the Land Control Board stated a figure of Kshs.3.8 million. In addition, it was pointed out the 1st defendant could not purport to sell the property for Kshs. 3 million when he had acquired the same for Kshs.4 million about three years earlier. The plaintiff's counsel urged the court to take judicial notice that the market value of property rises, adding that an offer to sell at a price that is below the market price should put a reasonable person on notice that there could be defects in the title of the purported seller, noting that PW2 had given the market value of the property at Kshs.26 million as at 13th March 2009.

43. It was further submitted that there was no admissible evidence under Section 63 (1) (d) of the alleged bona fides of the 2nd and 3rd defendants in purporting to buy the property for a paltry Kshs.3 million from a person who claimed to have bought it 3 years earlier for Kshs.4 million. The 2nd and 3rd defendants did not make witness statements nor appeared in court to testify. It was also submitted that the evidence of the 4th defendant cannot be admitted as evidence of the bona fides of the 3rd and 4th defendants because it is not direct oral evidence as required by Section 63(1)(d) of the Evidence Act. Further, that the evidence of the 4th defendant cannot be evidence of her own bona fides as a purchaser in the said transaction because she is not a party to the document purporting to be the agreement of sale.

44. It was the plaintiff's submission that the 2nd, 3rd and 4th defendants had knowledge that records of purported transfer by the plaintiff to the 1st defendant did not exist. This was confirmed by the correspondence between the defendants' advocates and the District Land Registrar. That there was also material difference in the name of the purported registered proprietor, 'Kariuki' while the purported title read 'Karioki' which ought to have triggered further investigations. The plaintiff concluded by submitting that the 2nd, 3rd and 4th defendants had actual or and constructive knowledge of the defects in the purported title of the 1st defendant. Relying on the case of **Alice Chemutai Too – v- Nickson Kipkurui Korir & 2 Others (2015)eKLR**, the plaintiff's counsel submitted that it was utter neglect of due diligence and basic prudence to purport to transact with a person one didn't know anything about and without requiring a copy of the National Identity Card. The plaintiff's counsel concluded by urging the court to follow the finding of the Court of Appeal in **Arthi Highway Developers Limited** (supra) and hold that the title of the Plaintiff was not extinguished and no good title passed by the fraud of the 1st defendant and that the 1st defendant did not pass any title to the 2nd, 3rd and 4th defendants since person with a fake or defective title could not pass any valid interest to third parties.

45. It was submitted by the counsel for the 2nd, 3rd and 4th defendants that there is no allegation of fraud made by the plaintiff against the 2nd, 3rd and 4th defendants in the plaint and that under the provisions of Section 143 of the Registered Land Act (repealed) the title of the 2nd, 3rd and 4th defendants should not be affected by any rectification. Counsel submitted that it is trite that Kenya follows the Torrens System of title which embodies three principles, namely, (a) the mirror principle where the register is a mirror of the state of title (b) the curtain principle which provides that a purchaser need not investigate the history of past dealings with the land or search behind the title as depicted on the register and (c) the insurance principle which means that the state guarantees the accuracy of the register as explained by Section 144 of the Registered Land Act (repealed) which provides the right to indemnity by the Government. The 2nd, 3rd and 4th defendants counsel relied on the cases of **Jane Ileri Maina –v- Mwanajuma Mohamed Mwajinga & 9 Others HCCC No.314 of 2010 (unreported); David Peterson Kiengo –v- Kariuki Thuo (2012) eKLR and Assets Co. Ltd –v- Mere Roihi (1095)AC 176**. It was the 2nd, 3rd and 4th defendants' submissions that they acquired good title because they purchased the property for valuable consideration, from the 1st defendant who at time was the registered proprietor of the property. They submitted that even if the 1st defendant's title may be impeached, they acquired better title than that of the 1st defendant and therefore their title cannot be impeached. They further submitted that the plaintiff's only remedy is in damages against the 1st defendant and also for indemnity against the Government under Section 144 of the Registered Land Act (repealed).

46. Counsel for the 2nd, 3rd and 4th defendants sought to distinguish the decision of the Court of Appeal in **Arthi Highway Developers Ltd. –v- West End Butchery Ltd** and others (supra) relied on by the plaintiff's counsel, stating that in that case the court was dealing with a case where fraud was established. Further, that it was over a determination on the application of Section 23 of the Registration of Titles Act (repealed) which is materially different from the provisions of Section 143 of the Registered Land Act (repealed). It was their submission that the 2nd, 3rd and 4th defendants who are the current registered proprietors of the suit property and who have possession and good title is protected from rectification under Section 143 of the Cap 300 (repealed.)

47. It was submitted by counsel for 5th and 6th defendants inter alia, that from the evidence adduced, it is clear that records pertaining the transaction from the plaintiff to the 1st defendant are not in the lands office registry and that neither the 1st defendant bothered to come to court to defend his position despite being served. Counsel submitted that it is absurd how the 2nd, 3rd and 4th defendants entered into an agreement to buy land which turned out to comprise a Kaya forest which is a monument site. That this raises eyebrows as to the purported title transferred by the 1st defendant to the 2nd, 3rd and 4th defendants.

48. Counsel for the 5th and 6th defendants further submitted that there was no due diligence done by the 2nd, 3rd and 4th defendants such as a thorough search of the property, both physically and records before they opted to purchase it. It was submitted further that it was questionable how the transaction was completed without consent to transfer from the Land Control Board. That the 2nd, 3rd and 4th defendants should have sought clarification from the 1st defendant or even call as witnesses the advocates who acted for them during the transaction. It was counsel's conclusion that the 2nd, 3rd and 4th defendants were negligent when doing the transaction and could have fallen into the trap of a conman (the 1st defendant) who furnished them with fake documents which were not even available in the Lands office. Counsel submitted further that the 5th defendant was not party to the fraudulent transaction and therefore is not to blame.

49. I have considered that pleadings, the evidence by all the parties and the submissions made. It is clear that the controversy revolves around the subject property known as **TITLE NO. KWALE/GALU KINONDO/15**, (the suit property). It is not disputed that as at 7th October 1991, the suit property was registered in the name of the plaintiff, the same having been transferred to her by the previous owners, Ronald Arthur West and Paulina Njeri West for a consideration of kshs.800,000/= . There is also not dispute that the plaintiff was issued with a title deed for the suit property on 7th October 1991. The plaintiff produced the transfer in her favour and the said title deed as p.exhibit 1 and 2 respectively. The plaintiff still holds and has in her possession the said original title deed.

50. The plaintiff adduced evidence to the effect that she did not sell or transfer the suit property to the 1st defendant who in turn purported to sell and transfer the same to the 2nd, 3rd and 4th defendants. The 2nd, 3rd and 4th defendants however allege that they purchased the suit property from the 1st defendant and the same was transferred to them and were issued with a title deed. They produced the sale agreement and transfer both dated 7th March 2009 and the title deed dated 13th March 2009 in their names as D.exhibits 1, 3 and 5 respectively.

51. As I discern it, the main issues which arise in this suit, and which I shall now set out to determine are as follows:

- i. Was the registration of Jephason Maina Karioki, the 1st defendant as the proprietor of the subject property on 16th May 2006 valid, can it be upheld in law and did it confer an indefeasible title to him?**
- ii. Was the registration of Robert Ciprian Lucas, Johanna Maria Lucas and Subrany Wamboi Yusuf, the 2nd 3rd and 4th defendants herein, as proprietors of the subject property valid, can it be upheld in law and does it confer an indefeasible title to them?**
- iii. Have the allegations of fraud against the defendants been proven?**
- iv. Who is the rightful owner of the suit property?**
- v. Whether rectification should be ordered.**
- vi. What other reliefs should be granted?**
- vii. Who bears costs of the suit?**

52. It will be clear from the evidence on record that on 7th October 1991, the plaintiff was registered as proprietor of the suit property. This was upon a transfer upon valuable consideration of Kshs.800,000/= as can be noted from entry No.4 in the copy of the Green Card which was produced as P.exhibit 3. On 7th October 1991, the plaintiff was issued with a title Deed, P.exhibit 1. On 16th May 2006, the 1st defendant was purportedly registered as the proprietor allegedly pursuant to a transfer for a consideration of Kshs.4 million. On the same date a Title Deed was issued to the 1st defendant.

53. The plaintiff adduced evidence to the effect that she did not sell or transfer the suit property to the 1st Defendant. This evidence was not controverted by any evidence from the defendants or otherwise. Registering the 1st defendant as the registered owner of the suit property without a transfer executed by the Plaintiff was outrightly illegal and fraudulent. Under Section 109 of the Registered Land Act (repealed), every disposition of an interest in Land Registered under that Act must be in the prescribed form and executed by the persons registered as the proprietors. The defendants do not allege that the plaintiff signed any transfer in favour of the 1st defendant. On the contrary, DW2, the Land Registrar Kwale confirmed that he did not have records regarding such transfer document and the consent to transfer from the Land Control Board as well as other relevant documents. In view of the foregoing, it is my finding and I hold that the Plaintiff did not execute a transfer in favour of the 1st defendant. Consequently, it is my finding and I so hold that the registration of Jephason Maina Karioki, the 1st defendant as the proprietor of the suit property on 16th May 2006 was invalid and cannot be upheld in law. In the absence of any valid transfer, such a registration did not confer an indefeasible title to him.

54. That brings me to the second issue whether the registration of the 2nd, 3rd and 4th defendants herein as proprietors of the suit property on 13th May 2009 was valid and whether the same confer an indefeasible title to the 2nd, 3rd and 4th defendants. As already found, the entry dated 16th May 2006 purporting to register the 1st defendant as the proprietor of the subject property has not supported by any evidence and the law. The court was already held that the registration did not confer any title to the 1st defendant. The 2nd, 3rd and 4th defendant are basing their claim to the property on the alleged transfer from the 1st defendant to them.

55. There is no dispute that the 2nd, 3rd and 4th defendants never dealt with the plaintiff. The person with whom they dealt was not registered or not validly registered as the proprietor of the land in dispute. The 1st defendant was certainly a fraud who had no claim whatsoever to the land. The plaintiff was not divested of her title by the fraudulent registration of the 1st defendant as proprietor and the 1st defendant did not acquire any proprietary rights over the suit property. The consequence is that the 2nd, 3rd and 4th defendants were purchasers who did not deal with the lawful registered proprietor of the suit land. In the case of Arthi Highway Developers Limited (supra), the Court of Appeal held that the law does not protect a person who purports to purchase or receive a transfer from a person who is not the bona fide proprietor. The analogy under Section 28 of the Registered Land Act (repealed) is the rights of a person who purports to acquire property are protected subject to him acquiring the property by a valid transfer from bona fide registered owner. The 1st defendant never acquired the status of a proprietor within the meaning of Section 28 of the Registered Land Act (repealed). There was no legitimate transfer from the plaintiff to the 1st defendant.

56. The 2nd, 3rd and 4th defendants did not obtain a transfer from the plaintiff who was the registered proprietor. They obtained a transfer from the 1st defendant who had no claim to the land. It is therefore my finding that the 2nd, 3rd and 4th defendants do not hold any indefeasible title as the registration was not obtained validly. The 2nd, 3rd and 4th Defendants cannot invoke the provisions of Cap 300 (repealed) to say they obtained an indefeasible title.

57. Turning to fraud, the 2nd, 3rd and 4th defendants have submitted that neither was fraud pleaded nor was it proved to the required standard. 2nd, 3rd and 4th defendant submitted that no evidence was adduced linking them with fraud and that they were bona fide purchasers for value without notice, whose ownership of the suit property could not be defeated by the alleged fraud on the part of the 1st defendant.

58. In the case of **Denis Noel Mukhulo Ochwada & Another –v- Elizabeth Murungari Njoroge & Another (2018)eKLR**, the Court of Appeal held as follows:

“While we agree with the appellants that the title registered under the Registered Land Act was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By Section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while Section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act, which really does not afford the blanket protection that it did. Section 143 of the Act, which granted the court power to order rectification of the register provided as follows:

143 (1) subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) the register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default. The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party.”

59. In the instant case, the registration at issue was not a first registration which is shielded from challenge even if obtained by fraud or mistake. Accordingly, if the evidence on record indeed disclosed that the 2nd, 3rd and 4th defendants were registered proprietors of the suit property through fraud or mistake, the court has power under the Registered Land Act (repealed) to order rectification of the register.

60. The 2nd, 3rd and 4th defendants’ case is that they are bona fide purchasers for value without notice. In her evidence, DW1, the 4th defendant testified that they entered into an agreement for sale. She produced the alleged agreement of sale, D.exhibit 1. I have, perused the said agreement. The parties to the said document are the 1st defendant Jephanson Maina Karioki as the seller and Robert Lucas Ciprian, the 2nd defendant as the buyer. The 3rd and 4th defendants are not parties to that agreement. There was no other agreement between the 1st defendant and the 3rd and 4th defendants. Accordingly, the 3rd and 4th defendants are not protected by the doctrine of innocent purchaser since they are not purchasers in the first place.

61. The agreement of sale marked D.exhibit 1 is dated 7th March 2009, while the transfer is dated 6th March 2009. From the dates of these documents, the 2nd defendant became a transferee before becoming a purchaser. It is apparent therefore that the interest purported to be acquired through the instrument of transfer is not based on the agreement of sale signed subsequently.

62. The 1st defendant also did not have the legal capacity or competence to be a seller or to pass title to a third party within the protection of Section 23 of the Registered Land Act (repealed). This is so because the legal interest was vested in the plaintiff and was never validly transferred to the 1st defendant.

63. In her evidence, DW1 confirmed that she did not have evidence by way of cheque or otherwise paying the 1st defendant. She did not show any withdrawal of money or transfer. In addition, there was no receipt from the 1st defendant. There being no evidence by the 1st, 2nd, 3rd and 4th defendants that payment was made, it is my finding that the 2nd, 3rd and 4th defendants did not discharge their burden of proving that the purported consideration of Kshs.3,000,000/= was actually made by the 2nd defendant or any of them or their agents to the 1st defendant. The defendants therefore failed to prove consideration which is a fundamental element of the concept of bona fide purchaser.

64. In their defence, the 2nd, 3rd and 4th defendants admit that before purchasing the suit property, they carried out a search on the register of land relating to the suit property. DW1 in her evidence informed the court that they went to the lands office on 12th February 2009 and inspected the register. A certified copy of the register in the form of a Green Card was produced by both parties. The visit is also confirmed by a letter dated 13th March 2009 from L. A. Oketch Advocate, the advocate for the 2nd, 3rd and 4th defendants at that time. The letter states that she visited the Land Registry on 11th March 2009. According to the agreement of sale between the 2nd defendant and the 1st defendant the purchase price is stated as Kshs.3, 000,000/=. Entry No.6 of the register would have put any reasonable person on notice of the irregularities in the registration of the 1st defendant as proprietor because the 1st defendant was purporting to sell the property at Kshs.3,000,000/= whereas the 1st defendant had allegedly acquired the property for a sum Kshs.4,000,000/= on 16th May 2006, three years earlier. I agree with the plaintiff’s submissions that no prudent or reasonable person would expect to buy the property at kshs.3,000,000/= on 13th March 2009, 3 years after the seller had bought it for Kshs.4,000,000/= on 16th May 2006. It is common knowledge that the market value of property appreciates unless the seller wants to sell it at a throw away price for some reason. The market value of the property was put at Kshs.26,000,000/= as at 11th March 2009. An offer to sell at a price that is below the market price should have put a reasonable person on notice that there could be defects in the title of the purported seller.

65. From the evidence on record, it is clear that as at 11th March 2009, the 2nd, 3rd and 4th defendants were on notice that there was no evidence in the lands office that the plaintiff executed transfer to the 1st defendant. L.A. Oketch & Company Advocates who were acting for the purchaser wrote to Ambwere T.S. Associates, Advocates for the seller notifying them that upon lodging the transfer documents, they were instructed by the land registrar to avail copies of transfer documents executed by the 1st defendant and the plaintiff. They asked them to supply the same. There is no evidence that the same were availed. The question that arises is why and how did they proceed to effect the impugned registration before ascertaining the correct position by clearing the doubts that were raised. The only plausible explanation is that the said documents did not exist and the 2nd, 3rd and 4th defendants were aware but chose nonetheless to proceed to have their names registered fraudulently on the title of the suit property. In my view, the 2nd, 3rd and 4th defendants had knowledge of the fraud.

66. Moreover, the document purporting to be the consent of the Land Control Board for the purported transfer from the 1st defendant to the 2nd, 3rd and 4th defendants is questionable. There is cancellation that is in the name that is not counter-signed. In addition, the consent if any

could not have been given in accordance with the Land Control Act for the purported transfer for the reasons that the 2nd and 3rd defendants were foreigners, being citizens of Germany and the transaction for which the purported consent was issued was for a sale of Kshs.3.8 million not Kshs.3 million as the agreement of sale showed. There was also disparity in the names. The purported consent is in the name of Jephason Maina Kariuki while in the purported transfer and title deed the third name reads Karioki.

67. As already stated, it has not been shown how the 1st defendant had himself registered as proprietor of the suit property. There were no documents to support the registration in his name. I do not think it necessary to belabor the point that the title of the 1st defendant was improperly acquired. The 1st defendant must have acquired registration of the suit property by way of fraud. He obviously could not have perpetrated the fraud on his own and must have colluded with some officials in the Land registry. The 2nd, 3rd and 4th defendants cannot be said to be innocent either. The manner in which the registration was done in their names makes me conclude they knew that the 1st defendant's title was not genuine.

68. Having acquired title by fraud, the 1st, 2nd, 3rd and 4th defendants cannot be protected. Having considered all the arguments and having found and held that the 1st defendant's title cannot be upheld, and having nothing to transfer, I do not see how the registration in favour of the 2nd, 3rd and 4th defendants can be upheld. From the material before me, I find that the plaintiff has proved her case on a balance of probabilities as against the 1st, 2nd, 3rd and 4th defendants. I am prepared to give the 5th and 6th defendants the benefit of doubt that they as institutions, were not privy to the fraudulent transactions. Probably it was the work of some unscrupulous officers in those offices in concert with the 1st, 2nd, 3rd and 4th defendants. As for the plaintiff, she has succeeded in this case and the title has to revert back to her name. On costs, I do not see why the same should not follow the event. The plaintiff shall have costs to be borne by the 1st, 2nd, 3rd, and 4th defendants jointly and severally.

69. In the result, I make the following orders:

a) That the registration of Jephason Maina Kariuki and the subsequent registration of Robert Ciprian Lucas, Johanna Maria Lucas and Subrany Wamboi Yusuf over TITLE NO. KWALE/GALU KINONDO/15 was illegal, null and void and the same is hereby cancelled.

b) That the register of the LAND PARCEL NO.KWALE/GALU KINONDO/15 be rectified so as to remove the entries in favor of Jephason Maina Kariuki, Robert Ciprian Lucas, Johanna Maria Lucas and Subrany Wamboi Yusuf and the title to revert back to the proprietorship of Jennifer Joy Pleasance the plaintiff herein.

c) That a mandatory injunction do issue compelling the 1st, 2nd, 3rd and 4th defendants by themselves, their servants, and agents to demolish the structures they have erected on the suit property within sixty (60) days from the date hereof, in default, the plaintiff to demolish and remove the defendants' materials at the defendants' costs.

d) A prohibitory injunction restraining the defendants from entering, constructing, or in any other way interfering with the plaintiff's possession and enjoyment of the suit property and its title.

e) That the plaintiff shall have costs jointly and severally against the 1st, 2nd, 3rd and 4th defendants.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 21st day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Ndegwa for Plaintiff

No appearance for 1st defendant

Omollo for 2nd, 3rd and 4th defendants

Mrs. Waswa for 5th and 6th defendants

Yumna Court Assistant

C.K. YANO

JUDGE

