



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.193 OF 2017

(FORMERLY HCC NO.286 OF 2005)

JOAN NYOKABI NDUNGU.....PLAINTIFF

VERSUS

STANLEY MUTIMU NJOGU.....1ST DEFENDANT

GEROGE NGANGA WANYOIKE.....2ND DEFENDANT

DISTRICT LAND REGISTRAR, THIKA...3RD DEFENDANT

JUDGMENT

By an ***Amended Plaint*** dated ***20th February 2017***, the Plaintiff herein sought for the following orders as against the Defendants jointly and severally:-

- i. A mandatory order to the effect that the Plaintiff is the bona fide registered owner of the suit premise Ruiru East Block 5/66 and that any other title held by the 1st and/or Defendants fraudulent and therefore null and void.***
- ii. A mandatory order requiring the 3rd Defendant to cancel any title that might be in the 1st and/or 2nd Defendant's favour.***
- iii. A mandatory injunction restraining the 1st and 2nd Defendants' either by themselves, their agents and or servants from trespassing on, alienating or in any other way from interfering with the Plaintiff's quiet possession of the parcel of land known as Ruiru East Block 5/66.***
- iv. An order directing the District Land Registrar, Thika (3rd Defendant) to rectify the register in respect of parcel of land known as Ruiru East Block 5/66 by cancelling entries 4,5,6,7 and/or any other entry therein.***
- v. Damages for conversion and trespass and interest thereon at court rates from the date of filing suit till payment in full.***
- vi. Cost of the suit and interest thereon at Court rates from the date of filing suit till payment in full.***
- vii. Any other relief deemed just and expedient.***

In her statement of claim, the Plaintiff averred that she was the registered proprietor of ***LR Ruiru East Block 5/66***. She has continuously conducted official searches on the suit land and has confirmed that the suit land is still registered in her name. She averred that the registration was as a result of her dividend as a shareholder in a land ***Buying Company*** known as ***Kiambu Wendani Women Investors Limited***.

Sometime in ***2004***, she visited the suit land with the intention of putting up a perimeter wall, but was confronted with allegations that the suit land belongs to ***George Ng'ang'a Wanyoike***. She then applied for a Green Card with respect to the suit land which showed that the suit land had been transferred to the 1st Defendant and subsequently to the 2nd Defendant.

She averred that **entries No.4 - 7** in the **Green Card** showing changes of ownership from her to the defendants is fraudulent and illegal. She particularized the particulars of fraud by the Defendants as she has never relinquished her original title documents or transferred the suit land to any of the Defendants herein. She also alleged that she does not know the Defendants hence incapable of transferring any land.

She also particularized the 3rd Defendant's negligence and breach of Statutory duty as accepting fraudulent transfer documents, failing to notice that the transfer documents were fraudulent, failing to scrutinize the documents, failing to maintain proper records so as to avert fraudulent transactions and facilitating the fraudulent transfer of the suit property from the Plaintiff to the 1st Defendant.

She further averred that after she discovered the fraudulent deals she reported the matter to the police but no action was taken. She intends to put up developments on the suit land and Defendants are likely to interfere with her quiet possession and work, and the fraudulent acts amounts to conversion and trespass.

The suit is opposed and the 2nd Defendant filed its **Amended Defence** dated **11th April 2017**, and denied all the allegations made in the **Plaint**. He averred that the Plaintiff's interest in the suit property was extinguished around **20th July 1997**, when it was registered in the 1st Defendant's name and he was not obligated to inquire into the circumstances under which the Plaintiff or the 1st Defendant became registered or transferred the property before dealing in the land. It was his contention that he is a **bonafide** purchaser for value and is duly protected under the relevant laws and any claim that the Plaintiff may have is against the 1st Defendant or the Attorney General and therefore the suit is bad in law for non-joinder. He further denied the allegations of fraud and stated that he acquired the suit property from the 1st Defendant legitimately and for valuable consideration and as such cannot be trespasser on his own property.

After various Applications, the matter was finally set down for hearing and proceeded by way of *viva voce* evidence wherein the Plaintiff called one witness and the 2nd and 3rd Defendants each called one witness.

PLAINTIFF'S CASE

PW1 - Joan Nyokabi Ndung'u, the Plaintiff herein adopted her witness statement dated **21st February 2013**, and produced in evidence the list of documents and marked as exhibit 1. She testified that the suit land is **Ruiru East Block 5/66**, and she became the registered owner in **1988**. It was her evidence that she was part of **Kiambu Wendani Women Investors Limited**, and they purchased a block of land and the land was subdivided into various plots and that is when she got her plot. That she was **number 15**, in the list of the members of the Company. She testified that the area is now built up but at the time it was an open area. She further testified that she did not fence the suit land in **1988**, but later. In the year **2003**, her son informed her that the land had beacons and when she confirmed that it had been encroached on, she reported the matter to the police and fenced it.

Upon conducting a search, she found that the land was still in her name, however the Green Card showed another person's name. In the **year 1997**, the Green Card was changed to **Stanley Mutimu** and in **2004**, it changed to **George Nganga Wanyoike** and she denied ever selling the suit land and alleged it was changed as a result of fraud. It was her evidence that the acquisition of the suit land by the 1st and 2nd Defendants was not legal and stated that she has never built on the suit land because of the case. She urged the Court to allow her claim and cancel the entries on the Green Card and revert it back to her name.

On cross examination by the Advocate for the 2nd Defendant, she testified that in the year **1990**, there were poles in the suit land but no development and she and her son went to fence it but she did not meet **Peter Kungu Wanyoike**. She reported the matter to the police in **1990's** and she denied the Investigating Officer at Ruiru was **Boniface Mukura** or ever meeting him. She further denied visiting the 2nd Defendant's Advocate's office with her son and recording any statement at the Police. She further denied being shown the change from her name to **Stanley Mutimu Njogu** in **1997**. She further testified that the plot was never sold to her and she was on the land and had fenced it.

It was her further testimony that in the **year 2005**, she filed a suit in **Nairobi** and served the **Summons** via **Kenya Times** on **28th April 2005** and the Summons were issued on **10th August 2005**, wherein she proceeded with the matter and got Judgment and the 2nd Defendant's title was cancelled and hers reinstated. Afterwards the Judgment was set aside, and she has never tried to serve the 1st Defendant. She stated that the registration on the Green Card was fraudulent and the registration was due to negligence and breach of duty by the **Land Registrar**, but she has not sued the Attorney General nor the Land Registrar.

It was her further evidence that they did not trace the 1st Defendant and though he was served with Summons, he has never appeared and the Certificate of official search indicating him as the owner was illegal since the records show that she has a title deed and denied transferring the land to **Stanley Mutimu Njogu** or shielding him and also stated that she reported the matter to the police but no action was taken.

In re-examination, she testified that she discovered about the encroachment in **2004** and her husband assisted her in fencing and followed up of the matter at the Police Station but the Police could not trace the Defendants hence they were not charged. She further denied knowing **Peter Kungu Wanyoike**, or suing him as his name is not in the Green Card. She stated that she did not know the 2nd Defendants Advocate nor gone to his office and testified that the issue of the Summons is a legal matter that she had left to her Advocates. It was her evidence that she had no case against the Attorney General as the changes were done by the District Land Registrar and she denied knowing about the **Sale Agreement** and nothing that prevented the 2nd Defendant from availing **Stanley Mutimu Njogu** in Court.

DEFENCE CASE

DW1 – Peter Kungu Wanyoike, testified that he recorded a he recorded a statement dated **21st November 2014**, and adopted it as evidence in Court and also produced his bundle of documents as exhibits. He stated that **George Nganga Wanyoike** is his younger brother and he has the **Power of Attorney** to represent him and produced it as exhibit in Court. He stated that he was informed about the construction in the year **2004**. Then he went to the ground and found **Mr. Njiri** and he took him to the Advocate's office where they were briefed on what transactions had taken place. He met with one **Njiri** who is the Plaintiff's son. After the property was transferred but later **Bonface Mukala** a Police Officer called him to discuss the matter. He took him to the Defendants advocate and he wrote a statement and no charges were preferred against him and he was informed that the Plaintiff did not record a statement.

He testified that he had not carried any developments on the land but he had fenced it and the Plaintiff demolished it and that is why he was called. He urged the Court to dismiss the case and revert the suit property back to him.

On cross examination he testified that the 2nd Defendant has been in **Japan** since **1998**, and comes back occasionally though he has not attached any document to show it. He testified that the 2nd Defendant came to Kenya to buy the property but he had an assignment that he could not come to Court. It was his evidence that he cannot be arrested on behalf of **George** since fraud is a crime.

It was his evidence that the Plaintiff was the first registered owner of the suit property in **year 1988**, and they do not doubt that and the 2nd Defendant bought the suit land from the 1st Defendant. He met the seller **Stanley Mutimu Njogu**, when he saw an advertisement in the Newspaper and he was supposed to give him completion documents. According to the **Sale Agreement**, they had already received some documents as at **12th March 2004**, and on signing on the title was available.

He further testified that the **Land Control Board Consent** and registration was done on **27th February 2004**, and they had not signed the **Sale Agreement** then the transfer of land was signed and dated **1st March 2004**, and they had deposited the purchase price with the Advocates and **George Nganga Wanyoike** signed the **Sale Agreement** though he cannot remember if he was in the country.

He testified that his brother visited the suit property and it was vacant and no old fence existed. He met **Njiri** in **2004**, when he was demolishing the fence that they had put up and he took them to his Advocate and did not report the matter to the police. His lawyer explained to them and the Plaintiff stated that she did not sell the suit land. He stated that there is a furniture shop and the tenant leased the property from the Plaintiff and she is now in possession of the suit land. He stated that they have not filed a Counter claim and he has never told the 1st Defendant that they have a problem with the land, or wrote any letter to him nor has he seen a **Sale Agreement** between the Plaintiff and the 1st Defendant. He also stated that there is no transfer from the Plaintiff to the 1st Defendant and they did not ask for it. He stated that the Plaintiff had reported the matter to the police and she is the current registered owner of the suit property and he still owns the land but he cannot confirm if the 1st Defendant fraudulently acquired the suit land.

In re examination, he stated that he took possession in **2004**, and that is when he came to learn of the claim by the Plaintiff. He found the Plaintiff's son destroying his perimeter wall and the matter was reported to the police station. He testified that the claim of the land was made in the year **2011**, and he learnt that the Plaintiff had gotten orders against him. He went to Court and they were set aside and the *status quo* maintained and when he sought for an injunction, the *status quo* was maintained and the Plaintiff is in possession of the suit land. He urged the Court to dismissed the Plaintiff's suit with costs.

3rd DEFENDANT'S CASE

DW2 - Benard Leitich, the **District Land Registrar, Thika** testified that he was summoned to give a report concerning **LR Ruiru/Ruiru East Block5/66**. He stated that the property was in the name of the Government of Kenya and on **12th January 1988**, a register was opened and the property transferred to **Joan Nyokabi Ndungu**, and title deed issued. On **20th July 1997**, a transfer was done to **Stanley Mutimu Njogu** and a title deed was issued. The consideration was **Kshs.150,000/=**. Further on **24th March 2004**, a transfer was done in favour of **George Nganga Wanyoike**, at a consideration of **Kshs.900,000/=** and a title deed issued on the same date. A dispute arose and the court issued a restriction and on **24th April 2008** a decree was registered and all restrictions lifted. On **24th November 2011**, an order of injunction was registered until **HCC No.286 of 2005**, was heard and determined and he availed the certified copy of the register. He further testified that he did not find the other documents in the file and that the matter has been contentious and maybe there was interference with the records.

On cross examination by the Advocate for the Plaintiff, he stated that he got the information from the Green Card and produced his report as Exhibit 1. He stated that the Plaintiff was the first registered owner of the suit property and there was a sale and the property was transferred to **Stanley Mutimu Njogu**, and they maintain records. He was not able to obtain the transfer document and therefore he is unable to tell if **Joan Nyokabi Ndungu** transferred the suit property or not. He further testified that he was not able to trace any records for transfer to **George Nganga Wanyoike** though he has seen a **transfer** from **Stanley Mutimu** to **George Nganga**, However the transfer was not presented to their office, nor

received by their office as it should have a stamp from the Lands Office and payment of duty by affixing **Stamp Duty** stamp. Further during the transfer from **Joan** to **Stanley**, there were no photos produced hence he had no idea how the transfer was done from **Joan** to **Stanley**.

On cross examination by the Advocate for the 2nd Defendant, he testified that the search dated **11th March 2004**, reads **Stanley Mutimu Njogu**, as the proprietor and that it is in tandem with what was in the register. It was his evidence that there was a transfer to **George Nganga Wanyoike** and a title deed was issued, stamp duty paid and the monies paid as evidenced by the receipts were in order with the rates then. On **24th March 2004**, a title was issued in the name of **George Nganga Wanyoike** and he stated that he cancelled the transaction in respect of the 1st Defendant on the strength of the **Decree** and he is not aware if it was set aside. He stated that the transaction was relying on the register which is conclusive proof.

On the **10th July 2018**, parties were directed to file written submissions and in compliance with the said directions the Plaintiff through the **Law Firm of J. M. Njenga & Co. Advocates** filed her submissions on the **12th October 2018**, and submitted that she is entitled to the reliefs sought as she has proved her case against the 1st Defendant and by extension the 2nd Defendant beyond the balance of probabilities and orders sought ought to be granted in entirety.

She relied on various decided cases and provisions of law amongst them the case of **Njuwangu Holdings Limited versus Langata KPA Nairobi & 5 Others (2014)eKLR**, where the Court held that:-

“The standard of proving fraud in civil case, the Courts have consistently held, is higher than on a balance of probability. An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases. It is no doubt near there but is certainly higher than on a balance of probability and thus when a party in a civil matter makes an allegation of fraud against a party should he be prepared to tender and adduce evidence to prove the allegation of the required standard.”

She also relied on the case of **Godfrey N. Nyaga...Vs...Margaret W. Theuri & 3 Others (2015) eKLR**, where the Court held that:-

“There being evidence that the Plaintiff and the 1st Defendant were the first to be registered as the proprietors of the suit property and there being no evidence that registration in favour of the 2nd Defendant and his predecessors in entitlement, namely Dorcas and Monica, was lawful or bonafide, I find the Plaintiffs claim to have been proved on a balance of probabilities.”

The 2nd Defendant through the **Law Firm of Njuguna & Partners Advocates** filed his written submissions on **1st November 2018** and submitted that the Plaintiff has not proved her case against the 2nd Defendant and her suit ought to be dismissed with costs to the 2nd Defendant and asked the Court to reinstate entries number 4, 5, 6 and 7 in the register which had been cancelled.

He relied on various decided cases and provisions of law amongst them the case of **Charles Karathe Kiarie & 2 Others...Vs... Administrators of the Estate of John Wallace Mathare(Deceased) & 5 Others (2013)eKLR**, where the Court of appeal stated:-

“...This statutory presumption of indefeasibility and conclusiveness of title under Torrens system m can be rebutted only by proof of fraud and misrepresentation in which the buyer himself is involved.”

Section 143(2) of the **Registered Land Act** which provides that:-

“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 Court has now carefully considered the available evidence and the exhibits thereon. The Court too has considered the rival written submissions, the cited authorities and the relevant provisions of law and makes the following findings:-

There is no doubt that the suit property herein **Ruiru/Ruiru East Block 5/66** was initially registered in the name of **Government of Kenya** on **12th January 1988** as is evident from the copy of the **Green Card** produced in court by the **Land Registrar, Mr. Bernard Leitich**. Further, there is no doubt that the said land was later registered in favour of the Plaintiff herein **Joan Nyokabi Ndungu**, on the same date **12th**

January 1988. The Plaintiff in her testimony alleged that she obtained the suit property by virtue of being a member of **Kiambu Wendani Women Investors Ltd**, which group had purchased a big portion of land in **Ruiru** and each member was later allotted a plot thereon. There is no doubt that the Plaintiff testified that she was a **member No.15** and by virtue of her membership, she was allotted plot **No.Ruiru/Ruiru East Block 5/66**. She produced a copy of the title deed issued in her favour on **12th January 1988**.

There is also no doubt as can be discerned from the copy of the Green Card that on **20th July 1997**, the suit property was transferred to **Stanley Mutimu Njogu**, and a title deed was issued in his favour then. Further the Plaintiff alleged that she never sold and/or transferred this suit property to the said **Stanley Mutimu Njogu**. There is also no doubt that on **24th March 2004**, the said **Stanley Mutimu Njogu**, who is the 1st Defendant herein transferred the suit property to **Geroge Nganga Wanyoike**, the 2nd Defendant herein. There is a **Sale Agreement** produced in court by the 2nd Defendant dated **12th March 2004**, and a title deed in favour of the 2nd Defendant issued on **24th March 2004**. The said registration was done under **Cap 300(now repealed)** and by virtue of **Section 27** of the said repealed Act, the 2nd Defendant became the absolute owner with all rights and privileges appurtenant thereon. **Section 27** of the **Registered Land Act Cap 300 (now repealed)** provides:-

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

However, the Plaintiff alleged that she discovered that the suit property had changed hands in the **year 2004**. She thereafter reported the matter to the police and later filed this suit in the **year 2005**. It is therefore not in doubt that the Plaintiff was the first private individual registered as owner of the suit property which registration was governed by the provisions of the **Registered Land Act Cap 300 (now repealed)**. She alleged that she did not transfer the suit property to **Stanley Mutimu Njogu**. By dint of **Section 28** of the said repealed Act, then the Plaintiff could not lose her parcel of land without her Consent or by operation of law. **Section 28** of **Cap 300 (repealed)** provides as follows:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever..”

It is not in doubt that the 1st Defendant has not entered appearance nor filed his Defence. It is also evident that the 2nd Defendant has not denied having purchased the suit property from **Stanley Mutimu Njogu**, the 1st Defendant. However, the 2nd Defendant alleged that he is an innocent purchaser for value and that his title is protected by virtue of the Torren system of land registration, wherein as a purchaser, he was not bound to go behind the register and find out how the registered purchaser had obtained the said registration.

It is also evident that this suit had first been heard *ex parte* and Judgment was entered in favour of the Plaintiff. Due to the said **Decree**, the subsequent registrations were cancelled and the Plaintiff is now the registered owner of the suit property. Further, the Court did maintain the *status quo* Order by dint of its Order issued on **30th March 2012**.

Therefore, the Plaintiff herein is the current registered owner of the suit property. However, it is clear that though the entries in the Green Card were cancelled, the 2nd Defendant is still holding a title deed over the suit property.

The Plaintiff by her **Amended Plaint** dated **20th February 2017** has sought for various reliefs among them an **Order directing the 3rd Defendant to cancel the title deeds issued to 1st and 2nd Defendants** and **rectification of the relevant register to revert the suit land back to the Plaintiff**.

These prayers have been contested by the 2nd Defendant herein.

Having now delt with undisputed issues, the Court finds that the issues for determination are:

- i. Whether the title held by the Plaintiff over the suit property was valid or not.***
- ii. Whether the Plaintiff ever transferred the suit property to the 1st Defendant and/or any other person.***
- iii. Whether the 1st Defendant was ever a lawful owner of the suit property capable of transferring the same to 2nd Defendant.***
- iv. Whether the 2nd Defendant is an innocent purchaser for value.***
- v. Who is the lawful owner of the suit property.***
- vi. Is the Plaintiff entitled to the prayers sought?***

vii. Who is to bear the costs of this suit?

i) Whether the title held by the Plaintiff over the suit property was valid or not?

As the Court had observed earlier, the Plaintiff testified that she was a member of *Kiambu Wendani Women Investors Ltd*, which group had purchased a block of land in *Ruiru*. She also testified that she was *member No.15* and by virtue of her membership she was allotted the suit *Ruiru/Ruiru East Block 5/66*. That evidence has not been disputed by any of the Defendants herein. It is evident that after subdivision of the said block of land purchased by *Kiambu Wendani Women Investors Ltd*, the *Government of Kenya* became the 1st registered owner and later the suit property was transferred to the Plaintiff herein on *12th January 1988*. As the registered owner, the Plaintiff became the absolute owner who enjoyed rights and privileges appurtenant as provided by *Section 27 of Cap 300 (now repealed)*, which states:-

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

The Plaintiff therefore expected to enjoy the above stated rights absolutely without any interference. Again the Plaintiff alleged that she did not sell her suit property to anybody else not even the 1st Defendant *Stanley Mutimu Njogu*. As a registered owner, the Plaintiff's right could not be defeated except by operation of law or by her Consent. See *Section 28 of Cap 300(now repealed)*, which states:-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever..”

The above position has been replicated in *Section 25(1)* of the *Land Registration Act 2012*.

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever..”

There was no evidence called by any of the Defendants to dispute the Plaintiff's acquisition of the suit property in *1988*, as the first individual

registered as the proprietor thereon. The Court therefore finds that the Plaintiff's title herein issued on *12th January 1988*, is a valid title which is not capable of being defeated except as provided by the law.

ii) Whether the Plaintiff ever transferred the suit property to the 1st Defendant and/or any other person?

The Court has observed that the Plaintiff herein obtained her title deed on *12th January 1988* validly and her right over the said property could not be defeated except as provided by the law.

Further, the Plaintiff alleged that she never sold her suit property to the 1st Defendant and that she was shocked in the *year 2004*, when she discovered that somebody had fenced her suit property. It is evident from the evidence of both the Plaintiff and the 2nd Defendant that the Plaintiff did report the matter to the police and the police did summon the Plaintiff and 2nd Defendant over the ownership of the suit property. Though the 3rd Defendant alleged that the suit property was transferred to the 1st Defendant on *20th July 1997*, for a consideration of *Kshs.150,000/=*, the Plaintiff denied ever selling the suit property to the said *Stanley Mutimu Njogu*. The 3rd Defendant also observed some vital information was missing from the register on how the transfer was done. The 1st Defendant did not enter appearance nor file his Defence. The 2nd Defendant who allegedly purchased the suit property from the 1st Defendant did not avail the 1st Defendant for him to confirm how he had acquired the suit property.

The Court finds that without any evidence of *Sale Agreement* between the Plaintiff and the 1st Defendant, and without any evidence from the Lands Office of how the transfer was effected from the Plaintiff to the 1st Defendant, then ***it is evident that the Plaintiff herein did not transfer the suit property to the 1st Defendant nor any other person.***

Having now found that the Plaintiff did not transfer the suit property to the 1st Defendant, and there being evidence that the 1st Defendant got registered as the owner of the suit property on *20th July 1997*, then there can be no other explanation other than the said transfer and registration was done either fraudulently, illegally, unprocedurally or through corrupt scheme.

Black Law Dictionary, 9th Edition defines fraud as follows:-

“Fraud consist of some deceitful or wilful device, resorted to with intent to deprive of another of his right or in some manner to do him an injury....”

From the above description of fraud and given the fact that the Plaintiff alleged that she did not transfer the suit property to the 1st Defendant,

then the 1st Defendant obtained the said registration in his favour through fraud, illegally or through corrupt scheme, but not through proper operation of law legally or procedurally.

iii) Whether the 1st Defendant was ever a lawful owner of the suit property capable of transferring the same to the 2nd Defendant.

This Court has found and held that the 1st Defendant obtained transfer and registration in his favour through fraud or unprocedurally and not through the proper means of transfer of land. Therefore having obtained the suit property through fraud, illegally or unprocedurally, the 1st Defendant did not have a good title to pass over to the 2nd Defendant. The Court has also observed that the right of the Plaintiff over the suit property could only be defeated by operation of law. However, in this case, her right was defeated illegally and since the acquisition of the suit property by 1st Defendant was done fraudulently, then the Court finds that the 1st Defendant did not have a good title which he could pass over to the 2nd Defendant. It is evident that the 2nd Defendant has a title deed that is registered in his favour from the year 2004, and as provided by **Section 26(1)** of the **Land Registration Act**, he is deemed to be the **absolute** and **indefeasible** owner. However, the exceptions to the said **Section** being **26(1)(a)&(b)** provides that such title can be challenged if it was acquired illegally or unprocedurally.

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

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

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

Section 26(1)(b) provides that even if the registered owner of the suit property was not aware or involved in the illegal acquisition of the impugned certificate of title, the said title can still be challenged. This is because the root of a title is very crucial in determining whether a certificate of title is valid or not. It is not enough for one to dangle a certificate of title and then claim that the said ownership is absolute and indefeasible. See the case of **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, where the Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

See also the case of **Elijah Makeri Nyagw'ara....Vs...Stephen Mungai Njuguna & Another (2012) eKLR**, where the Court held that:-

“... It needs to be appreciated that Section 26(1)(b) of the Land Registration Act to be operative, it is not necessary that the title holder be a party to the vitiating facts noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme”. The heavy impact of Section 26(1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating facts. The purpose of Section 26(1)(a)(b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”.

Therefore in answer to the above framed issue, the Court finds that the

1st Defendant was never a lawful owner of the suit property capable of transferring it to the 2nd Defendant herein.

iv) Whether the 2nd Defendant is an innocent purchaser for value.

The 2nd Defendant alleged that he is an innocent purchaser for value and he should not be made to suffer. **Black Law Dictionary, 8th Edition** defines a ‘bonafide 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 infirmities or equities against the seller title over who has in good faith paid valuable consideration for property without notice of prior adverse claim”.**

However, as the Court has observed, the provisions of law in **Section 26(1)(b)** of the **Land Registration Act** is very clear that a certificate of

title acquired by a third party who was not a party to the vitiating factors can still be impeached. This provision of law provides protection of innocent owners of property who are in danger of losing their properties to land grabbers who quickly dispose off the property to third parties and the genuine owners have no recourse because of the doctrine of innocent purchaser for value without notice.

The 2nd Defendant purchased the suit property from the 1st Defendant who did not have a good title. The only recourse that he has herein is to seek for refund of the purchase price from the 1st Defendant herein who had acquired the suit property herein fraudulently. See the case of *Esther Ndegi Njiru & Another...Vs... Leonard Gatei (2014) eKLR*, the Court held thus:-

“In the present case the Plaintiffs cannot shield themselves with the title that they hold though without any doubt they were bona fide and innocent purchasers from the 2nd Defendant. The act of the 2nd Defendant of processing the title to his name using fake or forged documents were patently illegal and the 2nd Defendant must have known they were. The processing of the title in his name and thereafter selling the parcel of land to the unsuspecting Plaintiffs was illegal and unprocedural. The 2nd Defendant must have known what he was doing. He was simply a conman otherwise he would have appeared to defend and/or clear his name. While it is clear the title held by the Plaintiffs cannot be impugned under Section 26(1) (a) of the Act as they were not party to any fraud or misrepresentation the title is nonetheless impeachable under Section 26(1)(b) as the title transferred to them by the 2nd Defendant was obtained illegally and unprocedurally.

Whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and indefeasible. 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(b) 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 endeavor to ascertain the history and/or root of the title”.

The Court finds that though the 2nd Defendant claims that he is an innocent purchaser for value, he cannot defeat the Plaintiff’s ownership of the suit property.

v) Who is the lawful owner of the suit property?

Having found that the Plaintiff acquired her certificate of title validly and having found that the 1st Defendant who sold the suit property to the 2nd Defendant acquired his title fraudulently, illegally, unprocedurally or through corrupt scheme, and therefore the 2nd Defendant did not acquire a good title, the Court finds that the Plaintiff herein is the lawful owner of the suit property. As the rightful owner of the suit property, her rights are protected under Section 24(a) and 25(1) of the Land Registration Act 2012, which states:-

Sec.24(a)

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

Sec.25(1)

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”

After consideration of the available evidence, the Court finds that the Plaintiff herein is the lawful owner of the suit property herein.

vi) Is the Plaintiff entitled to the prayers sought?

The Court has found and held that the Plaintiff is the lawful owner of the suit property herein. The Court has further found that the 2nd Defendant did not acquire a good title as he purchased the suit property from the 1st Defendant who had obtained the transfer and registration of the suit property **unprocedurally, illegally, or through corrupt** scheme.

That being the case, the Plaintiff's right to the suit property had been defeated illegally but not through proper operation of law. With the above findings, then the Court finds that the Plaintiff is entitled to her prayers as sought in the **Plaint**.

The Plaintiff's certificate of title was issued under **Cap 300 (now repealed), Section 143** of the said repealed Act dealt with the issue of rectification of a register. The said Section is replicated in **Section 80(1)** of the **Land Registration Act**, which provides:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

The Court finds that the provisions of **Section 80(1)** of **Land Registration Act** applies herein and therefore the Plaintiff is entitled to the prayers sought in the **Plaint**.

vii) Who is to bear costs of the suit?

Though costs are ordinarily awarded at the discretion of the court as provided by **Section 27** of the **Civil Procedure Act**, the Court finds that costs do follow the event. The Plaintiff herein is the successful litigant and is entitled to costs of the suit herein.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved her case on the required standard of balance of probabilities. Consequently, **the Court allows the Plaintiff's claim as stated in her Amended Plaint in terms of prayers No.1 (ii), (iii), (iv), and (vi).**

There was no evidence adduced on the issue of damages and given that the suit property is still in the names of the Plaintiff and status quo were ordered to be maintained, then the **Court finds that the Plaintiff is not entitled to damages for conversion and trespass** as prayed in **prayer (v)** of the **Plaint**.

Further, the **Plaintiff is entitled to costs of the suit and interest thereon to be borne by the Defendants herein jointly and severally.**

It is so ordered.

Dated, Signed and Delivered at Thika this 25th day of March 2019.

L. GACHERU

JUDGE

25/3/2019

In the presence of

No appearance for Plaintiff

No appearance for 1st Defendant

Mr. Githiri holding brief for Mr. Njuguna for 2nd Defendant

Lucy - Court Assistant

L. GACHERU

JUDGE

25/3/2019

Court – Judgement read in open court in the presence of Mr. Githiri holding brief for Mr. Njuguna for 2nd Defendant and no appearance for Plaintiff and 1st Defendant.

L. GACHERU

JUDGE

25/3/2019