



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 421 OF 2017

FRANCIS MBURU KAMAU.....PLAINTIFF

VERSUS

METHI & SWANI FARMERS COOPERATIVE

SOCIETY LIMITED.....1ST DEFENDANT

PETER NGUGI MUNGAI.....2ND DEFENDANT

ELIJAH KIMANI KIMUYU.....3RD DEFENDANT

PETER NDEGWA MACHARIA.....4TH DEFENDANT

STANLEY THUO(All sued as officials of HOPE SELF

HELP GROUP).....5TH DEFENDANT

REGISTRAR OF LANDS MURANGA.....6TH DEFENDANT

JUDGMENT

1. The Plaintiff sued the Defendants vide a Plaint filed on the 17/10/14 and later amended on the 5/4/18. He sought orders as follows;
 - a. Permanent injunction restraining the Defendants by themselves agents' invitees and or servants from entering trespassing alienating and or selling the property known as MITUBIRI/WEMPA/BLOCK2/2411.
 - b. An order cancelling title No MITUBIRI/WEMPA/BLOCK2/2411 registered in favour of Hope Self Help Group.
 - c. A mandatory injunction compelling the 1st, 2nd and 6th Defendants to register the title in favour of the Plaintiff.
 - d. An eviction order against the 3rd, 4th & 5th Defendants.
 - e. General damages for trespass and fraudulent misrepresentation.
 - f. Costs of the suit.
2. The Plaintiff has pleaded fraud on the part of the 1st and 2nd Defendants. Para 19 contains the particulars of fraud.
3. The 1st and 2nd Defendant filed a statement of defence on the 3/2/16 where they denied the Plaintiff's claim and averred that the title deeds were prepared by an agent whom the 1st Defendant contracted. That the role of allocating and determining which ballot is registered under which plot was that of the surveyor and the Land Registrar and not the 1st and 2nd Defendants. They deny knowledge of the sale of the land between the Plaintiff and one Peter Lewis Karanja.
4. The 3rd and 5th Defendant denied the Plaintiffs claim through their statement of defence filed on the 31/1/18. In it, they averred that they are legal owners of the suit land on which members of their group have duly constructed their homes thereon. That they purchased the land from Bernard Murigi Karanja who was a member of the 1st Defendant Company and held a ballot No 1724. Maintaining that they are

strangers to the Plaintiff's averments, they contend that the Plaintiff's claim is against 1st and 2nd Defendants.

5. The 6th Defendant denied the Plaintiff's claim in a statement of defence filed on the 31/7/15 and averred that it is a stranger to all the allegations made by the Plaintiff.

The Plaintiff's evidence.

6. PW1 – Francis Mburu Kamau testified and informed the Court that he purchased the suit land from Peter Karanja Lewis on or about the 4/8/2009. He produced an agreement of sale dated the 4/8/2009. Peter Lewis Karanja was a member of the 1st Defendant under membership No 2284 under ballot No 1725. He also held a share certificate No. 4000 issued by the 1st Defendant on 25/1/88. He paid the full purchase price in the sum of Kshs 240,000/- at the offices of the 1st Defendant in the presence of the 2nd Defendant and the 1st Defendant's chairman. The share transfer was executed then and paid a transfer fee in the sum of Kshs 3000/- to the 1st Defendant to cater for the transfer of the shares to the Plaintiff. He paid another Kshs 500/- to the 1st Defendant to cater for survey fees and title processing. Thereafter the names of the seller were crossed and substituted with his on all the receipts, ballot paper and share certificate. That he was shown the plot by the seller in the company of the 2nd Defendant and the chairman of the 1st Defendant and assured that the titles would be processed. His name was inserted in the list of members' register as against ballot No 1725, however the plot number is missing on the said members register.

7. It was in 2013 that he noticed construction going on the land and upon carrying out a search at the lands office at Muranga found that the suit land was registered in the name of Hope Self Group whose officials are the 3rd -5th Defendants. He stated that he reported the matter to the police whereupon the 2nd Defendant was charged with forgery and uttering false documents with intent to defraud. He produced the proceedings together with the judgment in the Criminal case No 1115 of 2013.

8. In respect to plot No MITUBIRI/WEMPA/BLOCK 2/631, the witness stated that he did not take possession of the same, as the said plot is nonexistent on the ground. In response to the said title, he informed the Court that though the title is dated the 20/6/11, it bears the new features of titles registered under the Land Registration Act that came into being in 2012 meaning that there is a possibility that the title was registered later than 2011.

9. In cross examination by the learned Counsel of the 3rd -5th Defendant the witness stated that Hope Self Group are in occupation of the land and further that ballot No 1724 corresponds to plot No MITUBIRI/WEMPA/BLOCK 2/2411 on the map

10. PW2 – Joel Odhiambo Akumu stated that he is a practicing land surveyor who has been appointed by the Surveyors Licensing Board to handle the matters previously dealt with by the late Olweny, who carried out the survey of the land. He produced the authority letter marked as PEX8 in that regard. He also produced a letter dated the 2/5/16 by the late Olweny addressed to the Land Registrar Muranga confirming that the owner of parcel No MITUBIRI/WEMPA/BLOCK 2/2411 is the Plaintiff. He also produced the survey map for MITUBIRI Wempa Block 2 sheet No 6 marked PEX10 prepared by Olweny and captures among others plot MITUBIRI/WEMPA/BLOCK 2/2411. He confirmed that PEX 10 is the Registry Index Map (RIM) for the MITUBIRI/Wempa Block/2. He also confirmed that ballot No 1724 is not on the map and therefore cannot correspond with plot No MITUBIRI/WEMPA/BLOCK 2/2411. Further, he stated under cross-examination that he personally perused the original sheet 6 at the Ruaraka Survey head office and confirmed the authenticity of the same although he did not purchase the said map.

11. The witness further explained that the nexus between the ballot No 1725 and plot No MITUBIRI/WEMPA/BLOCK 2/2411 is the letter dated the 2/5/16 written by Mr. Olweny. He confirmed that the Land reference numbers are issued by the Director of Survey. He confirmed that Mr. Olweny commenced the survey in 1988 and completed the work in 1989. When referred to sheet No 2 containing parcel No MITUBIRI/WEMPA/BLOCK 2/631, the witness stated that he was not aware of such a plot.

12. PW3 – Hiram Njoroge adopted his statement dated the 16/5/18 and informed the Court that he was the chairman of the 1st Defendant. That the 2nd Defendant was his secretary whose principle duty was record keeping. He confirmed that he knows PEX10 (RIM) sheet 6, which contained ballot No 1725 against plot No MITUBIRI/WEMPA/BLOCK 2/2411. He confirmed that the said land belongs to the Plaintiff. He explained that he was present when the Plaintiff came to the office with the seller of the said land Peter Lewis Karanja to effect the transfer to the Plaintiff. That the transfer form dated the 4/8/19 was executed by the seller and the Plaintiff and witnessed by him and the 2nd Defendant. He explained that on verifying the receipts, ballot and share certificate as authentic the name of the Plaintiff was entered in the register by cancelling the name of the seller and replacing with the new owner on the same documents. He informed the Court that it was the responsibility of the 2nd Defendant to ensure that the titles of the members were processed and issued to them. He stated that KENJAP was the agent whose work was to collect the titles from the lands office and deliver to their office for collection by the members. He confirmed that the Register marked PEX No 6 was prepared by the 2nd Defendant in 2009, as he is familiar with his handwriting. He confirmed that the ballot 1725 is for plot MITUBIRI/WEMPA/BLOCK 2/2411 even though the register was left blank on the column denoting land parcel Number(RIM). Explaining that the previous officials did not hand over the documents in the office, they had to reconstruct the register using information (payment receipts, share certificates, ballot cards) provided by the members who were contacted through Inooro and Kameme radio stations. In respect to ballot 1725, the Plaintiff produced the receipts for purposes of reconstructing the members register.

13. In cross-examination by the advocate representing the 3rd to 5th Defendants he stated that the register contained the ballot 1725 but the RIM No was left blank but from his knowledge, the said 1725 corresponded to RIM 2411 as stated in PEX No 10 (RIM sheet No 6). He explained that he has never seen the documents relied by the 3rd to 5th Defendants. He stated that he did not sign any documents in respect to the 3rd and 5th Defendants. That he does not know who Bernard Murigi Kinyanjui is. That it was the responsibility of the secretary to submit the RIM together with members register to the Land Registrar for the issuance of titles.

14. PW4- Peter Lewis Karanja stated that he sold the suit land to the Plaintiff and executed an agreement of sale dated the 4/8/09. He also confirmed that he handed over the payment receipts (for inter-alia survey fees, poles as well as contribution for building a nursery school),

ballot card for 1725 and share certificate No 4000 to the Plaintiff. That he signed the transfer form, which was witnessed by the Chairman and Secretary of the 1st Defendant. At the time of transferring the shares to the Plaintiff, the titles had not been issued. He stated that in all the documents he handed over to the Plaintiff, plot No MITUBIRI/WEMPA/BLOCK 2/2411 is not included because the plot numbers had not been allocated. He confirmed that he paid for the survey in 1979 and was issued with a receipt by the 1st Defendant, which he handed over to the Plaintiff.

15. DW1- Peter Ngugi Mungai adopted his witness statement dated the 28/7/18 and informed the Court that parcel No MITUBIRI/WEMPA/BLOCK 2/2411 belonged to Hope Self Help Group having been sold to it by Bernard Murigi Karanja between the years 2009- 2014. That the Plaintiff was allocated an alternative plot no MITUBIRI/WEMPA/BLOCK 2/631, which he has declined to take possession. He produced a list of documents marked DEX 1-8 in support of this defence.

16. He explained to the Court that he prepared the members register which contained the ballot no, RIM No and the name of the owner in that order. He stated that the survey numbers were assigned by the management of the 1st Defendant and did not know Mr. Olweny and only saw him in Court during the hearing of the criminal case. When showed PEX 10, he confirmed that ballot No 1725 is marked against plot No. MITUBIRI/WEMPA/BLOCK 2/2411. He stated that the Plaintiff was not assigned a plot number in the register only a ballot number. When pressed to explain why, he stated that he was not responsible for the issuance of the plot numbers as it was done by KENJAP. He stated that according to the Land Registrar, the ballot 1725 belonged to Mbugua Kabono but according to his register, it belonged to the Plaintiff.

17. DW2 – Peter Ndegwa Macharia stated that he was the chairman of Hope Self Help Group and the owners of the suit land. He stated that they were shown the land by the vendor Bernard Karanja in the absence of the officials of the 1st Defendant and the surveyor. That they acquired the land measuring 140 feet by 140 feet in 2010 from Bernard M Karanja. He informed the Court that he is not producing any documents to wit agreement for sale, receipts etc. between them and the seller. He confirmed that none of the officers of the self-help group has been charged with any criminal offence in respect to the suit land.

18. DW3- Bernard Mwirigi Karanja stated that he sold land to the 3rd Defendant and surrendered all the documents to its officials and visited the offices of the 1st Defendant where he was paid Kshs 500,000/- as purchase price and signed the transfer form the same day. That he showed the 3rd Defendant the land. His ballot was 1724 and at the time of sale, the land reference numbers had not been given nor titles issued.

19. In cross-examination by the Plaintiffs Advocate he stated that he did not enter into any agreement for sale with the Hope Self Help Group. That he nevertheless signed a transfer form in the offices of the 1st Defendant in the presence of an employee and the 2nd Defendant. He stated that he did not produce the said transfer in Court either. He informed the Court that he could not remember his membership number in the 1st Defendant's company.

20. The Plaintiff submitted that the title of the 3rd -5th Defendants is impeachable under section 26(1) of the Registered Land Act. That the Plaintiff proved in evidence the ballot, No 1725 corresponded with plot no MITUBIRI/WEMPA/BLOCK 2/2411 as shown by the survey report and the evidence on record. Further that the 2nd Defendant was charged and found guilty of 3 counts of forgery uttering false documents and fraud in a criminal case at Kigumo Court in relation to the said suit land. He urged the Court to admit the evidence in the criminal proceedings under section 34 (a) of the Evidence Act.

21. In respect to the 1st and 2nd Defendant's claim that the Court lacks jurisdiction to hear the matter the Plaintiff submitted that Art 162(2) and section 13 of the Environment and Land Court Act empower this Court to determine the issue on title as is the case in the instant suit.

22. The 1st and 2nd Defendants submitted that the Court has no jurisdiction to determine a matter, which is in the province of the Cooperative Tribunal. They argued that the 1st Defendant Company is under liquidation and therefore no leave of the Court was obtained before filing the suit pursuant to section 228 and 241 of the Companies Act.

23. They submitted that the suit land belongs to the 3rd -5th Defendants and it is unclear from the record of the 1st Defendant what land parcel the Plaintiff was entitled to and that is the reason why the 1st Defendant allocated the Plaintiff an alternative plot no MITUBIRI/WEMPA/BLOCK 2/631 which he has declined to take possession. They argued that titles are issued against production of documents such as transfer forms, land control board consent photos and Kenya Revenue Authority Pin inter-alia which documents were not produced by the Plaintiff.

24. The 3rd -5th Defendant submitted that they purchased ballot No 1724 which gave rise to plot No MITUBIRI/WEMPA/BLOCK 2/2411. It denied any fraud on the part of the Defendants and wondered what the nexus between the Plaintiffs ballot No 1725 and their plot No MITUBIRI/WEMPA/BLOCK 2/2411 is. They argued that they are bonafide purchasers for value without notice and devoid of any fraud. The land they bought from Bernard M Karanja is the land they have taken possession and some of their members have even built houses thereon. In the absence of a list of members' ballot and plot numbers, they argued that the Plaintiff has no solid case against the 3rd -5th Defendants. That the Plaintiff has not adduced any evidence to demonstrate any wrongdoing or fraud on their part and urged the Court to dismiss the case.

25. Having reviewed the pleadings the evidence on record the submissions, the following issues fall for determination;

- a. Whether the Court has jurisdiction.
- b. Whether the 1st Defendant was wound up.

c. Whether the suit land was fraudulently registered in favour of the Self-Help Group.

d. Whether the 5th Defendant is a bonafide purchaser.

e. What orders may issue thereof.

26. First let me set out the undisputed facts as can be gleaned from the evidence;

a. That the Plaintiff and the 3rd -5th Defendant are laying claim to **LR MITUBIRI/WEMPA/BLOCK2/2411**.

b. The allocation of plot numbers was done by the Director Surveyor.

c. Kenjap Ltd only supervised collection of titles as an agent of the 1st Defendant.

d. The 2nd Defendant was the secretary of the society.

e. The membership register had ballot numbers together with plot numbers save for the Plaintiff's that did not have any.

f. The list of the members was kept by the 2nd Defendant as the secretary of the 1st Defendant.

Whether the Court has jurisdiction.

27. The 2nd Defendant has submitted that the High Court can only preside over appeals from suits preferred from the Cooperative Societies Act. That this case ought to be preferred to the tribunal established under the Act since the parties herein are members of the society.

28. The Plaintiff stated that this Court has jurisdiction under Section 13 of the Environment and Land Court Act and Article 162 to determine issues relating to land and cancel title.

29. Firstly, the 3rd and 4th Defendants as officials of the self-help group never presented any minutes, the Court cannot confirm if they were part of the membership of the 1st Defendant. Secondly, the subject matter relates to LR No **MITUBIRI / WEMPA/ BLOCK2/2411** where the Plaintiff seeks orders for cancellation and/or revocation of title, which can only be available under the Land Registration Act No. 3 of 2012. The relevant Court to deal with disputes under the Act is the Environment and Land Court.

30. Thirdly, the Environment and Land Court has exclusive jurisdiction under Article 165 of the Constitution to determine disputes relating to land. It is opined that the Cooperative Tribunal cannot order revocation of title; it may be limited to revocation of the disputed ballot and disputes falling within the definition of Section 76 of the Cooperative Act.

31. **In Republic v Gathaite Farmers Cooperative Society Ltd & another Ex-Parte Richard Nganga Kamiro[2013] eKLR** Korir J in 2013 held that;

“The defunct land disputes tribunals which had been created by the repealed Land Disputes Tribunal Act did not have jurisdiction over registered land, that the same position is applicable to the Co-operative Tribunal. In my view, the said Tribunal has no jurisdiction to make a decision that amounts to the revocation of title to land. It did not therefore have jurisdiction to revoke the Applicant's title to the land in question. At the moment, such matters ought to be dealt with by the Land and Environment Court. Previously such disputes were the preserve of the High Court and the Resident Magistrate's Court where the latter had pecuniary jurisdiction.”

32. It is the finding of this Court that the jurisdiction of this Court has not been ousted.

Whether the 1st Defendant was wound up.

33. The Plaintiff reiterated in submissions that there was no evidence that the 1st Defendant is under receivership. It is opined that the 1st and 2nd Defendant did not discharge their burden of proof on this issue. It was similarly not addressed during evidence since the Plaintiff availed the society's Chairperson. Both officials of the Cooperative Society testified, there was no indication that the Company had wound up.

34. *In the case of Chumo Arap Songok v David Keigo Rotich [2006] e KLR* this Court held:

“The law is now settled, that parties to a suit are bound by the pleadings in the suit and the Court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties.”

35. There was no evidence presented before the Court that the company is wound up. The 1st Defendant failed to so adduce such evidence.

Whether the suit land was fraudulently registered in favour of the Self Help Group.

36. **Black's Law Dictionary** defines fraud as follows;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

37. In the cases of **Ratilal Gordhanbhai Patel V. Lalji Makanji [1957] EA 314** and **Umlila Mahindra Shah v. Barclays Bank International and Anor [1979] KLR** Courts have stated that fraud has everything to do with one's state of mind and intentions, and not the outcome of actions and that the standard of proof for fraud is very high beyond the usual standard of balance of probabilities in civil cases approaching but below proof beyond reasonable doubt.

38. I have examined the events, occurrences, transactions and conduct of the various actors in this case. It is undoubtedly clear that the 2nd Defendant played a central part in the scheme of things. He is central to the planning, orchestration and execution of the scheme of things that the Plaintiff and the 3rd -5th Defendants have found themselves in.

39. It is not in dispute that both the Plaintiff and the 3rd-5th Defendants both acquired ballot cards Nos 1725 and 1724 respectively. It is also not in dispute that the Plaintiff purchased the ballot before the completion of the survey and issuance of titles for the parcels of the land. The balloting is stated to have taken place in 1980s and members of the 1st Defendant were shown their lands. The members held payment receipts, share certificates and ballot cards to denote the documents of ownership of their plots. It would appear that the 1st Defendant had a loosely designed method in which members could sell their lands. The 1st Defendant approved the transfer of shares by witnessing the transfer form upon authenticating the payment receipts and the share certificates and the ballot card from their register. The transaction would take place in the offices of the 1st Defendant in the presence of its officials. The names of the new owner would then be cancelled on the documents and replaced with the new owner. The 1st Defendant maintained the register of members and their entitlements.

40. It is against this background that the Parties transacted with each other. Land being a tradeable commodity, the owners having made investments meant that there were sales and ownership changes even before the titles were issued. This is typical of the modus operandi of most of the land buying companies.

41. PW3 has informed the Court that the old officials did not hand over documents for the 1st Defendant to them and they had to reconstruct the register using vital documents such as payment receipts, ballot cards, share certificates and the plots on the ground as evidenced by the survey plan, which they obtained from the members. Members including the Plaintiff, were summoned through local radio stations to bring their documents for verification.

42. The evidence on record tendered by PW1, PW3, PW4, DW1 and DW3 all confirm that the 2nd Defendant was the central character in the cast. He was key in reconstructing the register when they took office. He maintained the said register and was the liaison person with Kenjap, the agency tasked to process the titles on behalf of the 1st Defendant, the surveyor and the members. In this case, he and the chairman witnessed the signing of the transfer form between the Plaintiff and Peter Lewis Karanja. He instructed the changes be made on the documents to reflect the Plaintiff as the new owner of ballot 1725. He accompanied the chairman to show the plot to the new buyer in the company of the seller. He was left with the Plaintiffs' documents for purposes of preparing the titles.

43. According to the evidence of PW2, PEX No 10 which is the survey map prepared by the late Olweny, the ballot No 1725 was issued against Plot MITUBIRI/WEMPA/BLOCK 2/2411. The 3rd – 5th Defendants did not produce any other survey plan to challenge this evidence. The Surveyor confirmed the authenticity of the survey plan. PW3, chairman of the 1st Defendant also confirmed the survey plan.

44. Armed with the survey plan (PEX 10) that contained both the parcel Number and the ballot number, location of the land on the ground and the ownership documents in the name of the Plaintiff, it is clear that the 2nd Defendant had knowledge of the parcel number. He did not explain why he prepared the register and left it blank. Perhaps this was to conceal the parcel number and cause confusion. It is in evidence that he tried to placate the Plaintiff by issuing him with a title for parcel No MITUBIRI/WEMPA/BLOCK 2/631 which is said to be nonexistent on the ground.

45. The 3rd -5th Defendants through their witnesses have stated that they appeared before the 2nd Defendant in 2010 to transact and were later given the land as MITUBIRI/WEMPA/BLOCK 2/2411 against a ballot of 1724. From the evidence on record, MITUBIRI/WEMPA/BLOCK 2/2411 had been assigned to ballot No 1725 as shown in the survey Plan/map and was not available. This is the land that the Plaintiff had purchased in 2009 from Peter Lewis Karanja and witnessed by the 1st Defendant and its officials. The Survey map was prepared in 1988.

46. I have seen the judgement of the Court in Kigumo CMCR case No 115/13 where the 2nd Defendant was charged and convicted on 25/10/16. The Court will take judicial notice that the said judgement remains in force as there is no evidence that it has been set aside or vacated. Guided by section 48 Section 47A of the Evidence Act states as follows;

“A final judgment of a competent Court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged”.

Such judgement disentitles the 2nd Defendant a defense of innocence in his fraudulent acts committed in this case. In the judgement, it was

found that the 2nd Defendant used the documents of the Plaintiff to register the suit land against ballot 1724 in the name of the 3rd-5th Defendants to pass it off as belonging to them thus depriving the Plaintiff of his land.

47. The Court relies on the proceedings in the criminal case as prima facie evidence of fraud in this suit. The 2nd Defendant has not contested it in any event and the facts subject matter and documents in the criminal Court are similar to what is before this Court.

48. In the case of **Elijah Makori Nyangwara vs Stephen Mungai Njuguna & Another [2013] eKLR**, Munyao J, held as follows:

“First, it needs to be appreciated that for **Section 26 (1) (b)** to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heading import 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 to have contributed to these vitiating factors. The purpose of **Section 26 (1) (b)** in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

49. It is the view of the Court that the Plaintiff has proved his case against the 2nd Defendant. It is also of the view that the evidence before this Court confirms that the 2nd Defendant left out the Plaintiffs land reference number despite being in possession of a ballot number and the RIM. The 2nd Defendant did not give an account for his said dealings, which eventually informed charges against him for uttering false documents, the membership register was also forged when he was the secretary of the society.

50. Evidence of fraud is also established vide the letter by the late M/s Olweny where the late surveyor confirmed to the land registrar that the suit parcel corresponded with ballot No. 1725. The Plaintiff produced the impugned membership register as PEX 10, which showed that his name was left out. The evidence of PW 2 was not contested, it is also strengthened by the fact that the late M/s. Olweny gave evidence in the Criminal trial.

51. The particulars of fraud have been proved since these dealings over the suit land were without the knowledge and consent of the Plaintiff. The Plaintiff also called the vendor who sold the suit land and ballot to him. There was no registration of title as at that time, consideration was duly paid and an agreement was produced confirming the disposition in the year 2009.

52. The 3rd & 4th Defendants did not exhibit a sale agreement. The vendor who allegedly sold it to them did not know the date of sale. The transfer forms were not produced and the share certificate were not cancelled to confirm transfer of the new owners as per the practice by the officials confirmed by the chairperson and the 2nd Defendant.

53. In the case of **Charles Karathe Kiarie & 2 others –Vs- Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR** the Court of appeal held that the evidence of fraud in the context of the Registration of Titles Act was considered by both the High Court and the Court of Appeal and found to have existed from the attendant primary facts and circumstances of the transaction in issue.

54. In respect to the alternative plot No MITUBIRI/WEMPA/BLOCK 2/631, it is to be noted that the same is not shown on PEX No 10 (RIM sheet No 6). PW2 stated in evidence that he could not vouch for the said plot. The Plaintiff has stated that it does not exist on the ground. The 1st and 2nd Defendant did not rebut this evidence by showing that indeed the plot exists and that the same was available for allocation to the Plaintiff in lieu of MITUBIRI/WEMPA/BLOCK 2/2411.

55. The title is registered under both the Repealed Registered Land Act Cap 300 and Land Registration Act NO. 12 of 2012 .It was issued before the Land Registration Act was enacted in 2012. The 2nd Defendant did not call the evidence of the Land Registrar to prove that this parcel was regularly issued and is therefore a clean title despite any anomaly. The Court cannot shut its eyes to this.

56. It is the finding of the Court that the Plaintiff has proved fraud against the Defendants.

Whether the 3rd -5th Defendant are bonafide purchasers

57. **In Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR pronounced itself on the doctrine of bonafide purchaser for value without notice, it commenced off by definition as outlined in Black’s law Dictionary 8th Edition as:**

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

58. **In Katende v Haridar & Company Limited [2008] 2 E.A.173** where the Court of Appeal in Uganda held that:

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

- i. he holds a certificate of title;

- ii. **he purchased the property in good faith;**
- iii. **he had no knowledge of the fraud;**
- iv. **he purchased for valuable consideration;**
- v. **the vendors had apparent valid title;**
- vi. **he purchased without notice of any fraud;**
- vii. **he was not party to any fraud.”**

59. Similarly, in the case of **Samuel Kamere -Vs Land Registrar (2015) EKLR** where the Court of Appeal held that;

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

60. The 3rd -5th Defendants have stated that they carried out searches at the 1st Defendant and confirmed that the ballot belonged to the seller. No evidence of such search or the outcome was tabled before the Court. It is noted that the Self Help Group did not produce a Sale Agreement nor did the vendor have clear facts on date of the sale. There was no evidence of consideration having been paid or received either.

61. In the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** Munyao J once again addressed what constituted good due diligence and stated

“...I would not want to set any precedent that a person has any legal obligation to go beyond conducting an official search from the land registry so as to find the proper owner. That may be the legal obligation. However, there is no harm in going the extra mile and digging deeper into the title. In fact, it is probably advisable to do so, given the fact that this country is notorious when it comes to land scams, and land fraudsters have continuously been in the kitchen, creating new recipes for land con schemes. I would inform any prudent person wishing to deal with land, to go beyond the legal obligation of conducting an official search, and always prod a little more to find out if the person has good title to the land. It is not easy, but it is advisable to do so.”

62. **In the case of Richard Odual Opole –Vs- Commissioner of Lands & 2 Others (2015) eKLR, it was held that where there is a tainted and irregular procedure leading to the registration of the title, one cannot be a bonafide purchaser for value without notice.**

63. The 3rd – 5th Defendants had to prove that their title was issued regularly by the registrar under section 24 of the Land Registration Act, which provides. The documents relied on by the defence and produced by the Plaintiff have been impugned by the criminal Court as being part of the fraudulent dealings of the secretary.

64. Going by the reasons evaluated above the Court cannot hold that the 3rd -5th Defendants are bonafide purchasers for value. No value was exhibited in the transaction.

What orders may issue thereof.

65. Having held that the title in the hands of the 3rd-5th Defendants is tainted under section 26 (b) of the Land Registration Act, the Court proceeds to order for its cancellation and the same be registered in the name of the Plaintiff.

66. On the issue of trespass, **Black’s Law Dictionary 10th edition** defines trespass as;

“an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property. **Clark & Lindsell on Torts, 18th Edition on page 923** defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason”.

67. Trespass being actionable perse, the Plaintiff’s claim for damages for trespass is hereby allowed since the Defendant’s presence in the land is illegal and unauthorized. I order a sum of Kshs 100,000/- being nominal general damages payable to the Plaintiff.

68. In the upshot, the Plaintiffs claim succeeds and judgement is entered in his favour as prayed in the Plaintiff.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 30TH DAY OF APRIL 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Wanjiku HB Mr. Ngaywa

Mrs Magwa HB for Mugo Moses for the 1st and 2nd Defendants.

Kurubi HB for Waithira Mwangi for the 3rd – 5th Defendants.

6th Defendant – AG is absent

Kuiyaki and Njeri, Court Assistants