

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC CASE NO 24 OF 2020

KIPROP ARAP TUWEI
PLAINTIFF

VERSUS

STEPHEN KANJA WAHOME
DEFENDANT
THE CHIEF LAND REGISTRAR.....
DEFENDANT
THE REGISTRAR OF TITLES MOMBASA.....
DEFENDANT
THE ATTORNEY GENERAL
DEFENDANT

JUDGMENT

1. In the plaint dated 11th March 2020, the plaintiff seeks the following prayers:

- a) A declaration that all that parcel of land known as Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L. T36 Folio 141/1 is owned by the Plaintiff as the absolute freehold proprietor thereof.
- b) A declaration that neither the 1st, 2nd nor 3rd defendant had any legal and transferable interest in Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L. T36 Folio 141/1 since 24th December 1997 when the same was registered in the name of the Plaintiff and title deed issued to the Plaintiff;
- c) A declaration that the purported transfer of Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L.T36 Folio 141/1 to the 1st and 2nd Defendant through the 4th , 5th and 6th Defendants on 14th April 1981 was irregular, wrongful, fraudulent, illegal, null and void.
- d) A declaration that the purported transfer of Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L.T36 Folio 141/1 to 3rd Defendant through the 4th , 5th and 6th

Defendants on 15th October, 1992 was irregular, wrongful, fraudulent, illegal, null and void.

e) A declaration that the title deed issued to the 1st and 2nd Defendants on the 14th April 1981 by the 4th, 5th and 6th Defendants certifying that the 1st and 2nd Defendants were the absolute registered proprietor of Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L.T36 Folio 141/1 was irregular, wrongful, fraudulent, illegal, null and void.

f) A declaration that the Title Deed issued to the 3rd Defendant by the 4th, 5th and 6th Defendants on the 15th October 1992 certifying that the 3rd Defendant is the absolute registered proprietor of Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L.T36 Folio 141/1 was irregular, wrongful, fraudulent , illegal, null and void.

g) An order that the 4th and 5th Defendants do rectify the register in respect of Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L.T36 Folio 141/1 of Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L. T36 Folio 141/1/ by cancelling all the entries entered after 24th December 1977 when the Plaintiff was registered as the owner of the suit property.

h) An order that the 4th and 5th Defendants so rectify the register in respect of Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L. T36 Folio 141/ by reinstating the register records as at 24th December 1977 entered to show that the Plaintiff is the lawfully registered proprietor of Land Portion Number 2339 (Original Number 1935/211) free from all encumbrances.

i) An order of vacant possession and eviction of the 3rd Defendant from plot Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L.T36 Folio 141/1.

j) A declaration that the continued occupation and possession of the suit premises by the 3rd Defendant amounts to an act of trespass.

k) Damages for trespass and interest thereon at court rates.

l) A permanent injunction restraining the 1st, 2nd and 3rd Defendants by themselves, servants, agents and/or employees and/or through any one of them from entering, constructing on, using, occupying, leasing, transferring, charging, selling and/or in any other manner however and whatsoever dealing adversely with the suit property or any portion thereof known

as Land Portion Number 2339 (Original Number 1935/211) registered in Mombasa Registry in Volume L. T36 Folio 141/1. m) Costs of this suit and interest thereon at court rates.

2. In the body of the plaint the plaintiff's claim is that on or about the 24th of December 1977, he purchased land **Portion Number 2339 (Original Number 1935/211)** registered in the Mombasa land registry in **Volume LT 36 Folio 141/1** (hereinafter also referred to as "*the suit land*") from Malindi Estates Limited and became the registered proprietor thereof. He became the owner with indefeasible rights thereof and took possession of the property immediately and started developing it by planting trees thereon. He traveled to Germany in **1979** and left the original certificate of title with the late Don Omollo, his then advocate, for safe keeping. When he came back from Germany he found that the advocate Don Omollo had passed away. The office of the late Don Omollo promised to look for the plaintiff's certificate of title and hand the same over to him but to no avail. The plaintiff, after very many years, gave up and reported the loss of his title deed at the Malindi Police Station on 2nd October 2017 and was issued with **OB Number 10/2/2017**.
3. On or about 30th August 2018 the plaintiff visited the suit land and discovered that the 3rd defendant had taken possession of the same and had begun cutting down the trees the plaintiff had planted in **1977**. The plaintiff then conducted a search which revealed that on 14th April 1981 the 4th defendant in collusion with the 1st and 3rd defendants had fraudulently registered the 1st defendant as the purported owner of the

suit property on 14th April 1981 without involving the plaintiff in any way. The plaintiff avers that he has never sold or transferred the suit property to anyone including the 1st and 2nd defendants, and it is a mystery to him as to how they became the registered owners thereof; that on the 14th April 1992 the 3rd 4th and 5th defendants in collusion with the 1st and 2nd defendant fraudulently registered the 3rd defendant as the registered owner of the suit premises without the plaintiff's knowledge or involvement. The plaintiff avers that he has never sold the suit property to the 3rd defendant and it is also a mystery as to how the 3rd defendant became the registered owner the suit property. Particulars of fraud are set out in **paragraph 18** of the Plaint.

4. On or about the 11th October 2018, the plaintiff discovered that the 3rd defendant had entered into the suit premises and conducted unauthorized developments thereon and purported to have full possession of the suit premises to the exclusion of the plaintiff. By these actions of the defendants, the plaintiff has thus been deprived of the ownership, use and enjoyment of the suit property and has suffered loss and damage which is still continuing and for which the defendants are jointly and severally liable hence the present suit.

RESPONSES

5. The 3rd Defendant filed a defence dated 16th September 2020. In that defence, he admits that the plaintiff purchased the suit land from Malindi Estates Limited but that after owning the suit land between 1977 and

1981, the plaintiff relinquished such ownership rights and interest through his sale and transfer of the suit land to the 1st and 2nd defendants on 14th April 1981 vide documents of transfer executed between the plaintiff and the 1st and 2nd defendants for a consideration of Kenya Shillings 28,000/-, who later transferred the same to the 3rd defendant in 1991, and the transfer dated 15th October 1992 was registered in his favor. He also averred that Don Omollo, advocate never practiced as an advocate in Malindi in 1979. The conveyances were prepared and witnessed by B. O. Ochieng, advocate, practicing in the name and style of Ochieng and Opiyo Advocates. Don Omolo Advocate took over the firm of Ben Ochieng and Opiyo in 1985 after the sale agreement and eventual transfer of **Portion Number 2339 Original Number 1935 Stroke 211** to the 1st and 2nd defendants in 1981. (this court has noted the different numbers of the land parcel as quoted by the 3rd defendant “2339” and “2399”). The plaintiff has never paid any land rates to the defunct Malindi Municipal Council and/or the present Kilifi County Government in respect to the suit land. Fraud and collusion between the 3rd the 4th and 5th defendants is denied, and it is stated that they were just doing their constitutional duties upon an application for registration by the 3rd defendant which was made after a successful sale had been concluded. The 3rd defendant assumed possession of the suit property on 15th October 1992 and has since held the suit property with knowledge of the Plaintiff since then.

Defence of The 3rd Defendant

6. The Attorney General filed his defence dated 12th November 2020 on 13th November 2020 for the 4th, 5th and 6th defendants through Martin Munga, Senior Litigation Counsel. They stated that if any registration was done, then it was done with a requisite documents and any documents issued in the said process of registration were a lawful and accurate representation of the records; that the records in the possession of the 5th defendant with regard to the suit property were relied on in the transfer the suit property in the transactions mentioned in the suit. They denied fraud and illegality. He maintained that no Notice to Sue has been received in accordance with a mandatory provisions of Section 13A of the Government Proceedings Act.

Reply to Defence of The 3rd 4th 5th And 6th Defendants

7. The plaintiff filed a reply to defence dated 4th February 2021, reiterating the contents in the Plaint. He averred that notice in the **Section 13A** GPA was issued.
8. An amended plaint was filed on 17th May 2024 in which the 1st and 2nd defendants were struck out of the proceedings. The body of the Plaint was accordingly amended but statements and prayers against the two omitted defendants were still retained by the plaintiff even after the amendments. The prayers thus remained largely the same and there is no need to restate them here. However, with the two defendants out of the way, the 3rd defendant became the 1st defendant, and he filed a fresh and amended

defence dated 30th July 2024 incorporating a counterclaim. The counterclaim is against the plaintiff in the main suit only. The counterclaim reiterates the matters set out in the defence and seeks for the following prayers:

- a. A declaration that the plaintiff in the counterclaim is the *bona fide* registered owner of the parcel of land known as Portion Number 2339 original number 1935-211 registered in Mombasa registry in Volume LT 36 FOLIO 141/1;**
- b. A permanent injunction restraining the defendant in the counterclaim by himself servant's, agents or any other person claiming under his authority from laying claim to trespassing on to Portion Number 2339 Original Number 1935/211 registered in Mombasa registry in VOLUME LT36 VOLUME 141/1;**
- c. Costs of the suit;**
- d. Interest on the costs of the suit from the day of filing suit.**

9. In response to that defence and counterclaim the plaintiff filed a Reply to The Amended Defence and Counterclaim and Defence to Counterclaim. The reply to defence reiterated the matters in the plaint. The defence to counterclaim admitted existence of a criminal case lodged against the plaintiff which was purportedly terminated in an acquittal vide a ruling delivered on 27th October 2023 at Malindi.

EVIDENCE

10. Trial proceeded by way of oral evidence in which the plaintiff testified and adopted his witness statements dated 11th March 2020 and 19th February 2024. He also produced documents in his list dated 11th March 2020 as P.Exh 1 to 5 and the ones in the list dated 17th May 2024 as P.Exh 6 to 7. He stated that he purchased the land and was registered as the owner thereof. He planted trees on the land and then went to Germany

for 1 month and left the title with Omollo, an advocate. When he came back the said Omollo was deceased. He reported the matter to the police. He never got back the title to the land. Then the police called him. He went and found the 1st defendant at the police station. He was arrested on the basis of fraud and charged in court.

11. On cross-examination by Mr. Nyongesa, he stated that he has lived in Malindi since 1977 and that he and Mr Kanja, the 1st defendant, have been acquaintances over a long period. He could not remember the year in which he traveled to Germany. He still has his passport to date but he has not produced it before Court. He never wrote any letter to the advocate to convey to him the title. He just gave him the title. He was then working in Malindi at the Snake Park. He does not know if Mr. Kanja knew how to speak in German. He did not recall going to the office of B.O. Ochieng and Company advocates with the two Germans together with Mr. Kanja. He maintained that he used to pay land rates for the plot every year. However, he does not have anything to show that he paid rates. He remembered being a driver and a security guard to one Mama Victoria in the 1970s and the 1980s. During that time Mr. Kanja used to call him "*boiyo*". He came back from Germany after a one month stay but he did not report to the police until **2017**. He used to visit the suit land between **1979** and **2017**. He never used to see Mr. Kanja around the land. He never sold the land to the two Germans. He does not even know them. When shown PExh1, he admitted that it is the title that he gave to Omolo,

advocate. He admitted that he was charged in court with giving false information.

12. Upon cross-examination by Mr. Munga he denied ever selling the land to the two Germans in the year 1981. He stated that during that, year he was in Kenya. He has never gone to lodge a caveat against the title. He also never engaged the Land Registrar over the matter.
13. Upon re-examination by Ms Oloo is stated that he doesn't know John Ochieng, advocate. He maintained that he never went to Ochieng's office with the two Germans or that he ever sold the land to anyone. With the close of the evidence of PW1 the plaintiff's case was also marked as closed
14. DW1 the 1st defendant gave evidence on the same day as PW1. He stated that he has dwelt in Malindi since **1969** and that he has been a businessman in the town. He also adopted his witness statement dated 30th July 2024 as his evidence-in-chief. He also produced documents in his list of documents dated 30th July 2024 as **D. Exh1** to **D. Exh.28**. He stated that he and the plaintiff have been acquaintances; that the plaintiff told him that he wanted to sell the suit land to some Europeans for Kshs 28,000/- having bought it earlier for Kshs 3,000/-. By then the 1st defendant was a tourist and safari operator. He took the two Germans and went to an advocate. The advocate office was near the Police Station. His name was B Ochieng. The plaintiff was in that office then. An agreement was made and the plaintiff signed it and he was paid his money by the

said Germans. The Germans gave **DW1** their original conveyance which they had made with the plaintiff. DW1 produced the original conveyance in court and it was then returned to him after the court verified it was an original. **DW1** conducted a search in **1991**. A conveyance was prepared for him by Jared Magoro, Advocate. He spoke to the Germans. They told him to be paying rates for the land. He used to pay rates for the land. The plaintiff came to know that the Germans had died and went to the police in 2017. The 1st defendant made a search in Germany and came to know they had died. By the time the plaintiff reported to the police that his documents were lost in order to get an abstract, he did not know that the 1st defendant had purchased the suit land and had documents. The plaintiff had also by then sold the land twice to other people. According to **DW1**, the plaintiff used to work at the Snake Park at Malindi and he came to **DW1** wanting to sell the land to the two Germans. B. Ochieng and Dan Omollo also happened to be the 1st defendant's advocates. According to the 1st defendant, he followed the due process and purchased the land and the plaintiff has never paid any rates for the suit land.

15. upon cross-examination by Mr Munga, he stated that his advocates never reported to him of any handicaps during the registration of the transfer into his name; that there was no indication that the sellers - the two Germans - were not the real owners. He stated that he has been in occupation of the suit land and has planted trees thereon. When he went to the Police Station, 2 people had been defrauded on the basis that they

were being sold the suit land. He was summoned to the police station as the owner of the suit land and he told the police that the land belonged to him. The Police informed him that someone was selling the land, and that person turned out to be the plaintiff.

16. Upon re-examination by Ms Oloo, he indicated that he was summoned by the OCS over a complaint; that both the plaintiff and the 1st defendant were asked to bring their respective documents to the police and the plaintiff brought false information to the police, and he was arraigned in court. He was however acquitted for lack of evidence when no witness turned up for the case. The 1st defendant stated that he was present as a translator at the sale between the plaintiff and the Germans.
17. Upon further cross-examination by Mr. Kilonzo, he stated that though he was present at the execution of the agreement between the plaintiff and the Germans, it was not necessary for his name to be reflected on the agreement but the plaintiff executed that agreement in his presence.
18. Upon re-examination by Mr. Nyongesa, he indicated that it was the plaintiff who introduced him to the advocate B.Ochieng as a translator.
19. With the close of the evidence of DW1, the 1st defendants case was also marked as closed.
20. Upon examination by the court, **DW1** stated that the plaintiff had already met the Germans by the time he informed him of his idea of selling the land to those Germans. Those Germans, however, turned out

to be the 1st defendant's clients whom the Plaintiff had met at the Snake Park and who by then were regular tourists to Kenya.

21. The 2nd, 3rd and 4th defendants never called in evidence in the case.

SUBMISSIONS

22. According to the entries on the CTS, only the defendants filed final submissions in this case.

23. The 1st defendant filed submissions on 31st July 2025. Counsel for the 1st defendant identified 3 issues for determination as follows:

- a. Whether the transfer of the suit property to Heimut Weisner and Ingeborg Wiesner and subsequently to the 1st Defendant was illegal, fraudulent and wrongful;**
- b. Whether the 1st defendant is a *bona fide* purchaser for value;**
- c. What orders should the court make.**

24. Regarding the 1st issue, the counsel urged that the plaintiff could not prove when he traveled to Germany because he never produced any copy of passport in evidence; that even if he traveled to Germany his evidence is that he stayed there for only one month; that Don Omollo advocate was not dead in 1977. To prove that he was not dead by then 1979 as alleged by the plaintiff in his pleadings, counsel urged that the 1st defendant had produced a copy of a letter from Don Omollo, dated **12th May 1994**. That in any event the said Don Omollo was not the plaintiff's advocate in 1979. That notwithstanding, he stated that the transfer documents from the plaintiff to the two Germans was prepared and witnessed by B. O. Ochieng, advocate, practicing in the name and style of Ochieng and Opiyo

advocates, and that Don Omollo took over the firm of Ben Ochieng and Opiyo in 1985 after the sale agreement and eventual transfer of the suit property to the two Germans in 1981; that in any event, it is not clear when the plaintiff discovered the alleged fraud; that paragraph **13** of his plaint simply says on 30th August of an unknown year he visited the suit property and discovered that someone had taken possession of the same.

25. Counsel then relied on **Sections 24, 25** and **26** of the Land Registration Act and submitted that the rights of a person who is registered as an absolute owner of land are limited only by **Section 25** which provides that the land shall be held by him together with all privileges appurtenant thereto but subject to matters stipulated in **Section 28**. Title can be challenged on the basis of fraud; that the plaintiff has not put forth evidence in a proof the alleged fraud; that his claim remained mere generalized allegations in the pleadings; that it is not sufficient for the plaintiff to just state that he did not sell the suit property without providing evidence to that effect.

26. Counsel relied on **Section 107** of the Evidence Act which provides that he who asserts proves, and added that the plaintiff had produced a copy of an indenture in his name dated 24th December 1977, a certificate of official search dated 11th October 2018 showing that the 1st defendant is the registered proprietor, a copy of an application for postal search dated 24th September 2018 and a police abstract dated 2nd October 2017; he urged that nothing in the **4** documents showed that there was any fraud.

27. He pointed out that both the plaintiff and the 1st defendant admitted that they have known one another since the 1980s; that it was the plaintiff who approached the 1st defendant and told him that he wants to sell the land to the two Germans; that the 1st defendant produced the original conveyance between the plaintiff and the two Germans; that though the plaintiff denied the authenticity of that conveyance he never presented any handwriting expert evidence in court to prove that the signature transferring the suit property from himself to the two Germans was not his.
28. The 1st defendant relied on **Josephat Mulwa Mukima v Jesse Nganga Gakobo & 11 others [2020] KEELC 3059 (KLR)** for the proposition that it was incumbent upon the plaintiff to prove his case by measuring the necessary evidence to support it.
29. It was further urged by counsel for the 1st defendant that the plaintiff failed to include the party he accuses of fraud; that the plaintiff's claim of fraud is against the 2 Germans yet no claim has been brought against the two; that no suit has been filed against the estate of the two Germans despite the 1st defendant having proved to the court that they were both dead; that this was significant because fraud must first be established against the 1st buyer for it to succeed against the subsequent buyers like the 1st defendant. Counsel relied on **Lawrence Muriithi M'thika & 3 others v Munyi Murwathika & another [2021] KEELC 44 (KLR)**, for the proposition that fraud ought to have been proved first against the two

Germans if the transfer to the first defendant was to be effectively challenged. Counsel urged that overall there was no proof of fraud based on the evidence placed before the court and relied on **Francis Kipngeno Laboso v Kimutai Ngeno & 4 others [2019] KEHC 8654 (KLR) as well as Ndaa & another v Karisa & 3 others (Land Case 119 of 2017) [2022] KEELC 2549 (KLR).**

30. The plaintiff had never interfered with the 1st defendant's possession of the suit land for 25 years, and he also did not have any evidence of payment of rates for the suit property. That the Criminal case against the plaintiff was dismissed not on merit but for lack of evidence when witnesses failed to come and testify.

31. Relying on **James Karogo Njau v Walter Njau Muchunu & 6 others [2022] KEELC 2139 (KLR)**, the 1st defendant's counsel urged that the 1st defendant is a bona fide purchaser for value without notice and there is a legitimate and unbroken chain of title documents.

32. Counsel urged that the title to the suit property is registered under the repeal Registered Titles Act whereby an indenture and not a certificate of title is issued; that all the details are made on the indenture itself and the holder of an indenture is able to prove the root of title without filing other documents as is the case in other titles; that all that one needs to do is to look at the title itself to establish its genuineness. For this he cited the case of **Republic v Chief Land Registrar; Kamau (Ex-parte Applicant); Guyo & 4 others (Interested Parties) (Judicial Review**

**2 of 2022) [2023] KEELC 21242 (KLR) (2 November 2023)
(Judgment) Neutral citation: [2023] KEELC 21242 (KLR).**

33. He urged that in any event, the plaintiff had exhibited a certificate of postal search dated 11th October 2018 which proves that the 1st defendant was the owner of the property. The entries on the indenture file by the plaintiff himself showed that the 1st defendant was a registered owner of the suit land; that the DExh1 had all the hallmarks of registration: payment of stamp duty, date of receipt at the land registry, etc and these show that the due procedures were followed when the conveyance was being registered at the land registry. He relied on **Section 28** of the **Registration of Titles Act (Repealed)** for the proposition that a photostat copy held at the registry, which in this case the plaintiff himself obtained, shows that the title to the suit property had passed from the Germans to himself. He relied on the case of **Tight Solutions Limited v Kidege Investment Limited & 4 others (Environment and Land Constitutional Petition 24 of 2022) [2025] KEELC 263 (KLR)** and stated that the plaintiff had not proved fraud. He urged the court who uphold the 1st defendant's title.

2nd - 4th Defendants' Submissions

34. The 2nd to 4th defendants' submissions are dated **5th June 2025**, filed by one Martin Munga, Principal State Counsel. Mr Munga identified the issues for determination in this case as follows:

- a. Whether the 2nd and 3rd defendants acted within their mandate in the registration of the property;*
- b. Whether the register should be rectified by deleting the name of the 1st defendant and reinstating the plaintiff?*
- c. Whether the plaintiff entitled to the relief sought.*

35. Regarding the 1st issue, counsel stated that the plaintiff's claim lies in fraud in that he asserts that the 1st defendant used forged transfer documents which is submitted to the 3rd defendant for registration.

36. He stated that if any act was carried out by the 3rd defendant concerning the suit property, then it was executed in compliance with the legal authority vested in him by statute, that it was his duty to register the transfer presented; that the Land Registrar is absolved from any liability regarding acts executed by him in good faith by **Section 14(2) (5)** of the Land Registration Act 2022; the Land Registrar carried out his duties without getting involved in any fraud, collusion or bias. He relied on **Teresia Kamene Kinguu Versus Harun Edward Mwangi [2019]** eKLR for the presumption in law that all official acts are done properly and or procedures were lawfully followed. He urged that title is protected under **Section 26** of the Land Registration Act and relied on the case of **Alice Chemutai Too Versus Nixon Kipkurui Korir and 2 Others 2015** eKLR. Also, referring to **Civil Appeal Number 312 Of 2012 Emfil Limited Versus Registrar of Titles Mombasa and 2 Others 2014** eKLR, he submitted that no evidence has been presented to the court by the plaintiff to prove that the defendants participated in or facilitated the acquisition of the suit land through fraud.

37. In respect of the second issue, he submitted that the provisions of **Section 79** of the LRA do not envisage rectification that does not affect the right or interest of registered property holder; that rectification can only occur with a proprietor's consent unless the proprietor has by way of fraud or lack of property caused or substantially contributed to an error, a mistake or omission, or if it would be for any other reason unjust for the alteration not to be made; that it is only in such circumstances that the registered proprietor can be issued with a 90-day notice of the intention to alter the register after which the Registrar will alter the register, whereupon an aggrieved party may then relief in court; the kind of rectification by way of a court order occurs pursuant to **Section 80** of the said Act; that under that section, the Registrar does not have power to cancel the title of a registered proprietor unless with the express order of the court; that the plaintiff has not proved that there are any of the ingredients set out in **Section 80** in respect of his case. He relies on the case of **Kisumu Miscellaneous Number 80 Of 2008 Republic Versus Kisumu District Land Officer and Another 2010 eKLR** and **Mombasa Appeal Number 98 Of 2016 Supernova Properties Limited And Another Versus District Land Registrar Mombasa And Two Others Kenya Anti-Corruption Commission And 2 Others (Interested Parties) 2018 eKLR** for the proposition that it is only the court that can cancel or amend the registration where the court is of the view that the registration has been obtained through fraud or mistake. Mr Munga

concluded that the plaintiff is not entitled the reliefs sought and that the 2nd 3rd and 4th defendants should be absolved from any costs of the suit.

ANALYSIS AND DETERMINATION

38. The principal issues arising in this suit are as follows:

- a. Whether the transfer of the suit land to the 1st defendant ought to be cancelled and the land register rectified by deleting the name of the 1st defendant and reinstating the plaintiffs on grounds of fraud;**
- b. Who ought to bear the costs of the present suit.**

39. **Section 107,108 and 109** of the Evidence Act provide as follows:

“107. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

40. **Gladys Wanjiru Ngacha v Treresa Chepsaat & 4 others [2013]**

eKLR is authority for the proposition that fraud must be specifically pleaded and proved by way of evidence. The court in that case stated as follows:

“In R. G. Patel vs. Lalji Mankanji (1957) E.A. 314, the predecessor of this Court at pg 317 held:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs. Nyati (1984) KLR 425*, at pg 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact”.

41. In the case of **Koinange & 13 others vs Charles Karuga Koinange**

1986 KLR the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

42. Fraud therefore can not be inferred from the facts. It must be proved.

The principal reasoning behind this is that fraud is a state of mind. Just as a person can not be convicted of an offence if there is no *mens rea* in a criminal case, so should a person be set free if no intent of fraud in his mind is proved by the claimant in a civil case.

43. According to the holding in **R. G. Patel vs. Lalji Makanji(supra)**, the standard of proof applicable to fraud is not so heavy as to require proof beyond reasonable doubt, but ought to be something more than on a mere balance of probabilities.

44. The issue arising is whether the plaintiff has by his evidence established the elements of fraud in his case to the required standard as set out in **Lalji Makanji (supra)**.

45. And the plaintiff has a very interesting case. Simply put, according to him he purchased the suit land on or about 24th December 1977 and took immediate possession, and then went to Germany for one month in 1979, leaving his advocate, Don Omollo, with the title document; he returned to Kenya to find that his advocate had died in that period of one month, and that his title could not be found in his advocate's office by the people he found there. For many years from the year 1979, he never reported to the police as he had not given up. He remained under paralysis at his equivalent of Bethesda for **38** years, and finally, he rose up and reported the loss of the title document to the Malindi Police Station in February 2017 upon which he obtained an Occurrence Book Number. He did not stop at obtaining the OB Number. He visited the suit land on 30th August of an unknown year and found that the 1st defendant had taken possession of the same. He went further and conducted a search at the Land Registry Mombasa and to his shock he discovered that the 1st defendant had become the registered owner on 14th April 1992. On or about 11th October 2018, he discovered that the 1st defendant had entered into the suit property and conducted developments thereon. Having determined that the land was fraudulently transferred in succession, first to two Germans and subsequently to the 1st defendant, he lodged the present suit on 11/3/2020.
46. On the other hand, while denying fraud, the 1st defendant who is the principal actor among all the defendants, narrated his version of events;

that he has been operating as a tours and safaris operator in Malindi for decades since the 1970s; that he and the plaintiff have been acquaintances since the 1970s; that on 14/4/1981 he was approached by his two German friends and regular visitors to Kenya, Weimut Heisner and Ingerborg Weisner, to show them a lawyer for a land purchase transaction with the plaintiff which turned out to be for the suit land; that he recommended B. O. Ochieng of Ochieng & Opiyo Advocates of Malindi who also happened to be his advocates. He was present as a German language interpreter at the execution of the agreement between the plaintiff and the couple. The Germans entrusted him to take care of then suit property. Later in 1987, the Germans changed their desire to settle in Kenya and sold the 1st defendant the property. They also sent him the original agreement between them and the plaintiff. The Germans notified the Town Clerk that the 1st defendant was the new owner of the suit land for the purposes of dispatch of rates demands and settlement thereof. On 15th October 1992 the 1st defendant and the two Germans entered into a sale agreement before Mombasa Advocate Jared Magolo, and on 23/12/1992, he began paying land rates; that he has been in possession of the suit land ever since without any interference from the plaintiff until early 2017 when he was informed that a man had been seen cutting a tree and showing prospective buyers the suit land. After investigations, he found that it was the plaintiff committing those acts. In June 2016, he was summoned to the Malindi Police station and shown a man who had paid

Kshs 100,000/- to the plaintiff for the suit land. He presented his documents of ownership to the police. The plaintiff on the other hand claimed his documents were lost.

47. Material non-disclosures may go a long way into reducing the probative value of a testimony, and thanks to the feature of cross-examination in our justice system, these omissions can be quickly brought to light. In assessing the plaintiff's claim of fraud for merit, there are several material non disclosures that this court has noted. First, he never acknowledged having ever known the 1st defendant or his interactions with him until he was cross-examined; he never voluntarily spoke of his arraignment in court until he was cross-examined; further, if he took possession of the suit land in **1979**, he never disclosed the date, or at least the year on which the 1st defendant effectively dispossessed him of the suit land; for someone who needed to take extra care in view of alleged loss of the title to the suit land, he never kept record of evidence of his payments of land rates during the **38** years; neither did he lodge a caveat against the suit title at the lands office; finally he has no explanation for why he stayed for **38** years without reporting to the police.

48. The above omissions notwithstanding, the plaintiff's claim must be scrutinized for cogency of evidence in proof of fraud. The two Germans are not party to this suit, the case against them having been withdrawn. This court can only deal with particulars of fraud as pleaded against the

1st -3rd defendants. The pleaded particulars of fraud as extracted from the amended plaint dated 19/2/2024 are that:

a. Due to collusion on the part of the 1st and 3rd defendants, the suit land was illegally transferred from the plaintiff's name to the two Germans without his knowledge or consent and they had no legal interest capable of being transferred to the plaintiff;

b. Due to collusion on the part of the 1st, 2nd and 3rd defendants, the land was further illegally transferred from the names of the Germans to the 1st defendant without his knowledge; it is alleged that all along the 2nd 3rd and 4th defendants were aware that the two Germans had no legal interest in the land;

c. That the 1st defendant knew that the title in the plaintiff's name had not been extinguished and that any purported registration in the Germans' names was fraudulent;

49. The foremost issue for determination in this case, as seen in **paragraph 50** herein above, is simply whether the land was validly transferred to the two Germans by virtue of collusion between the 1st and 3rd defendants. A mere act of transfer of land *per se* is no evidence of fraud. It has to be coupled with *wrongful intent* on the part of a person with no rights or interests whatsoever to illegally acquire or dispose of the subject land and, invariably, fraudulently prepared documents, often involving forgery, calculated at sidestepping the registered owner or beneficiary or both, to grant the fraudster ownership they would otherwise not have had and which, owing to the fraud, is subject to cancellation by a court of law. When considered together, the forged documents and the lack of entitlement on the part of the culpable party, are sufficient proof of fraud against him in a matter.

50. Black's Law Dictionary states that

“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”.

51. In the present case, this court does not find any evidence of collusion between the defendants to transfer the land either to the Germans or to the 1st defendant. The 2nd - 4th defendants aver that the conveyance was registered as presented. I have not seen any evidence from the plaintiff demonstrating that the conveyance dated 14th April 1981 between the plaintiff and the two Germans was prepared at the 2nd -4th defendants' offices or at their instruction or with their involvement whatsoever, and I am inclined to believe, as submitted by Mr. Munga, Principal State Counsel for the 2nd - 4th defendants, that the 3rd defendant was merely doing his duty in registering it.

52. This court also has no evidence that the 1st defendant, though he was present at the execution thereof, had any hand in the preparation of the said conveyance to the Germans. No evidence has been given by the plaintiff that he ever took any steps against the defendants e.g. by reporting them to the Police for investigations over perceived fraud, or

that they were ever arrested and arraigned in court for the offence of fraud. The plaintiff's omission to immediately report to the police of to lodge a prohibitory *caveat* on the title after the alleged loss of title to the suit land to prevent its transfer to third parties for a period of **38** years is surprising. The very fact that the title was allegedly lost while in the hands of an advocate, if true, makes it all the more persuasive that the lodging of a *caveat* ought to have been advised by that advocate. Though the plaintiff claimed that the advocate was deceased as at 1979, the 1st defendant claimed that he was still alive as at 1994 and that he wrote a letter dated 12/5/1994. I have scrutinized the physical court record and the CTS and I have not found a copy of any such letter. Be that as it may, it was for the plaintiff to establish by way of evidence that his advocate Don Omollo had died, and he failed to do so. Nonetheless, perchance it is true that Don Omollo had died within that one month that the plaintiff allegedly stayed in Germany, he was not the only advocate in Malindi, and the services of lodging a *caveat* could have been undertaken by any other advocate, which was not done. Also, the plaintiff's claim that he went to Germany and stayed there for a month was not proved by way of production of any records of travel.

53. I have also considered the documents produced by the 1st defendant. The 1st defendant produced the very conveyance to the Germans which he stated had been executed by the plaintiff. This court ordered him to produce the original of that conveyance and he did, and comparison of

that original with the copy showed that the copy was made therefrom. During the pendency of these proceedings, and which omission was strange, the plaintiff never attempted to commission an expert examination of the said document to ascertain that the vendor's signature affixed thereon was not his. The contents on that conveyance mirrors **Entry No 2** in the copy of indenture dated 24/12/1977 produced by the plaintiff as P. Exh 1 which shows that the suit land was transferred by the plaintiff to the Germans. The failure to present expert evidence to establish that the signature on **D. Exh 1** was forged leaves this court with no option but to believe the 1st defendant's version of events, that the plaintiff as vendor and the **2** Germans as purchasers did indeed execute **D. Exh.1**, the conveyance of the suit land to the Germans in DW1's presence and at an advocate's office. Evidence of fraud has not been established as against any of the defendants in respect of that conveyance.

54. Regarding the second particular of fraud listed in **paragraph 50** herein above, it automatically follows that if no evidence was established as against the defendants or any of them in respect of the first conveyance to the Germans, the conveyance of the suit land to the 1st defendant can not be questioned by the plaintiff. Only the Germans could validly complain that the land was fraudulently transferred from their names to the 1st defendant, which has not happened in the present case. Besides, this court has examined the 1st defendant's records of payments

for land rates to the local authority issued in the names of either the 1st defendant or the Germans, rates clearance certificate; and correspondence between the 1st defendant and the Germans and other parties with regard to the suit land and it has come to the conclusion that all of them are genuine. The rates demand notes, rates receipts and clearance certificate borne by the 1st defendant date back many years. A perusal of the bundle reveals the 1st defendant to be a careful land owner who consistently paid his dues with regard to the suit land to the then Municipal Council of Malindi. On his part, the plaintiff, despite insisting that he has been paying the land rates every year, failed to produce even a single land rates receipt, clearance certificate, demand note or correspondence with regard to the suit land - not even any scrap of those documents for the period during which he remained owner- 1977-1981 (4 years). He cannot say that, like the title document, they were with his "deceased" advocate; in the opinion of this court, the plaintiff does not have them either because having no further interest in the land he surrendered those for the period he was owner to the Germans upon purchase, or that he lost them. He could not be having any receipts issued in his name between **1981** to date because during those years the land has been owned by other persons. I find it to be untruthfulness on the part of the plaintiff to state without any evidence that he was paying land rates for the suit land every year from the date it was registered in his name to the date he filed suit.

55. It is now a foregone conclusion that fraud not having been established in respect of the transfer to the two Germans, the question, as intimated in the third particular of fraud listed at **paragraph 50** herein above, of whether or not the 1st defendant knew that the title in the plaintiff's name had not been extinguished and that any purported registration in the Germans' names was fraudulent, does not arise; also, since fraud was not proved against the Germans, there is no need to belabor the issue of *bona fide* purchaser for value without notice in this suit as pleaded by the 1st defendant.


CONCLUSION

56. There is no evidence to support the plaintiff's claims of fraud and illegality and this court thinks this suit should be dismissed with costs. As for the counterclaim, the same evidence of the 1st defendant herein above supports his counterclaim adequately for it to be allowed. I therefore issue the following orders:

- a. The plaintiff has failed to prove his claim in the amended plaint dated 19th February 2024 to the required standard and the main suit is hereby dismissed;**
- b. The 1st defendant has proved his counterclaim on a balance of probabilities and it is hereby allowed;**
- c. A declaration is hereby issued declaring that the plaintiff in the counterclaim, Stephen Kanja Wahome, is the *bona fide* registered owner of the parcel of land known as Portion Number 2339 original number 1935-211 registered in Mombasa registry in Volume LT 36 FOLIO 141/1;**
- d. A permanent injunction is hereby issued restraining the defendant in the counterclaim, Kiprop Arap Tuei, by himself, servant's, agents or any other person claiming under his authority from laying claim to trespassing on to Portion**

- Number 2339 Original Number 1935/211 registered in Mombasa registry in VOLUME LT36 VOLUME 141/1;**
- e. The plaintiff in the main suit shall bear the costs of all the defendants of the main suit and of the counterclaim and interest on the costs of the suit from the date of taxation till payment in full.**

Dated, signed and delivered at Malindi on this 15th day of December, 2025.

A rectangular box containing a handwritten signature in blue ink, which appears to be "Mwangi Njoroge".

**MWANGI NJOROGE
JUDGE, ELC, MALINDI.**