

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO E007 OF 2023

**FRANCIS MWAU KAMAKYA.....
PLAINTIFF**

VERSUS

NDUNDA KITAKA.....1ST DEFENDANT

AIMI MA KILUNGU..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the Defendants claiming the following reliefs:
 - a. **An order for cancellation of the title deed Konza South/Konza South Block 4 (Aimi Ma Kilungu) 1310 registered in the name of Ndunda Kitaka the 1st Defendant.**
 - b. **A declaration order that the Plaintiff is the owner of the property known as Konza South/Konza South Block 4 (Aimi Ma Kilungu) 1310.**
 - c. **A permanent injunction do issue restraining the Defendants whether by themselves, their representatives, servants, agents, and/or assigns from selling, alienating, transferring, trespassing and in any other manner whatsoever interfering with or otherwise dealing with the property known as Konza South/Konza South Block 4 (Aimi Ma Kilungu) 1310.**
 - d. **Costs of this suit and any other order this court.**
2. The 1st Defendant filed a statement of defence and counterclaim in which he sought the following reliefs:

- a. **That the Plaintiff's suit against him and 2nd Defendant be dismissed with costs.**
 - b. **An order of declaration do issue declaring that the 1st Defendant herein is the legal owner of all the property known as Konza South/Konza South Block 4 (Aimi Ma Kilungu)1310.**
 - c. **That an order of permanent injunction do issue restraining the Plaintiff either by himself, his relatives, agents and/or any persons acting under his instructions from laying claim, entering into and/or in any other manner dealing with the property known as Konza South/Konza South Block 4 (Aimi Ma Kilungu)1310.**
 - d. **The costs of the counterclaim be awarded to the 1st Defendant.**
 - e. **Any other relief that this honourable court deems fit and just to grant in the circumstances.**
3. The 2nd Defendant which was duly served with summons to enter appearance neither entered appearance nor filed a defence.

Plaintiff's Case

4. The Plaintiff testified that he is an original member of the 2nd Defendant who held 25 shares in the company. He was member number 1220. By virtue of his shares, he was allocated an agricultural plot measuring 10 acres being plot number 397. He was also allocated a commercial plot being plot number 1508.
5. The Plaintiff is a truck driver based in Mombasa. He went and put up a temporary structure on the 10 acre land and has been grazing his animals on the land after securing the land with a live fence of sisal plants. In or around 2022, he found that the 1st Defendant had trespassed on to his land and put his son in the temporary structure of mabati which he had put up. The 1st

Defendant was alleging that he had purchased the land from him at Kshs.600,000/=.

6. The Plaintiff went and reported the trespass to Salama police station where he was given an occurrence book (OB) number. The Plaintiff later learnt that the 1st Defendant had obtained a title deed for plot number 397 which now became LR No. Konza South/Konza South Block 4 (Aima Ma Kilungu) 1320 (suit property).
7. The Plaintiff stated that the 1st Defendant has not collected the title issued in his name from the 2nd Defendant's offices because there is a dispute over the suit property.

1st Defendant's case

8. The 1st Defendant adopted his witness statement dated 23rd October, 2023 and filed in court on the same date. He stated that he purchased the suit property from the Plaintiff and paid the full purchase price. He stated that he entered into a sale agreement dated 8th November, 2009. He stated that he has been in peaceful occupation of the suit property since then until 2016 when the Plaintiff sued him in Machakos CMCC No. 45 of 2016 which suit was later dismissed for want of prosecution.
9. The 1st Defendant stated that the Plaintiff has always known about his possession of the suit property and that he was surprised that the Plaintiff had reported him to police a fact which he was not aware of.

Plaintiff's Submissions

10. The Plaintiff filed his submissions dated 7th November, 2025. He submitted that he had proved that he did not sign either the undated agreement which he obtained from the offices of the 2nd Defendant or the one dated 8th November, 2009 which was produced by the 1st Defendant. He further

submitted that the 1st Defendant had admitted that he purchased the suit property from the father of the Plaintiff. The Plaintiff stated that he had not authorised his father to sell the suit property to the 1st Defendant.

11. The Plaintiff submitted that his father could not sell what he did not have. He relied on the case of **Daniel Kiprugut Maiywa –vs- Rebecca Chepkurgat Maina (2019) eKLR** where it was stated as follows:

“The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; for example, where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under avoidable contract”.

12. The Plaintiff further submitted that the 2nd Defendant was involved in the fraud as it transferred the suit property to the 1st Defendant when they knew that the person selling the same was not the owner. The name which was used in the agreement was that of the Plaintiff who was not present during the transfer but the 2nd Defendant went ahead to process title in the name of the 1st Defendant.

13. The 2nd Defendant had every reason to know that the two sale agreements which were produced before it were forgeries but it nevertheless went ahead to process transfer in the name of the 1st Defendant.

1st Defendant's Submissions

14. The 1st Defendant submitted that the Plaintiff failed to call the 2nd Defendant who had the documents relating to the suit property. He submitted that he had proved that he obtained his title in a genuine way. The title was processed in his favour by the 2nd Defendant.

Analysis and Determination

15. I have considered the evidence adduced by the Plaintiff and that of the Defendant. I have also considered the submissions by the parties. Though there was no evidence adduced of the existence of title to the suit property, both the Plaintiff and the 1st Defendant are in agreement that the same is in the 1st Defendant's name. The reason why the title was not released to the 1st Defendant is because there is a dispute about its issuance. However, this notwithstanding either party would have at least produced a search which is ordinarily obtained from the land registry.

16. The issues which emerge for determination are firstly, whether there was a sale of the suit property by the Plaintiff to the 1st Defendant. Secondly, whether the transfer of the suit property by the 2nd Defendant to the 1st Defendant was fraudulent. Thirdly, are the Plaintiff and the 1st Defendant entitled to their respective claims. Lastly, with order should be made on costs.

17. On the first issue, though the 1st Defendant had in his witness statement stated that he purchased the suit property from the Plaintiff, his testimony before court was that he purchased the suit property from the Plaintiff's father. The name of the Plaintiff's father is Kilundo Kamakya. A look at the undated sale agreement which was produced by the Plaintiff shows that the agreement does not contain the name of Kilundo Kamakya. Equally, the agreement dated 8th November, 2009 which was produced by the 1st Defendant does not have the name of Kilundo Kamakya as seller.
18. The two agreements which are not exactly the same are purported to have been executed before an advocate called Ann M. Kiusya who drew the agreements. In the undated agreement, it is not the identity card of the Plaintiff which was indicated. What was indicated was the serial number of his identity card. In the dated agreement of 8th November, 2009 the Plaintiff's correct identity card number was captured but only his first name was captured. The stamps of Ann M. Kiusya in both agreements were different.
19. There was no indication that the Plaintiff's father was selling the suit property on behalf of the Plaintiff. During cross examination, the 1st Defendant stated that when he signed the transfer form, the Plaintiff was not present. He stated that the transfer form was signed by the Plaintiff's father on behalf of him. He further admitted in cross examination that the Plaintiff was not present when the agreement was signed. He went on to state that it is the Plaintiff's father who signed the sale agreement on his behalf.
20. It is clear from the 1st Defendant's evidence that he dealt with the Plaintiff's father and not the Plaintiff himself. The Plaintiff's name and identity card were used yet he was not present and he had not authorized his father to sell the suit property on his behalf.

21. All the records held by the 2nd Defendant show that the suit property was recorded in the Plaintiff's name. The Plaintiff's father had no business selling the same to the 1st Defendant.
22. On the 2nd issue, there is no doubt that the transfer of the suit property was fraudulent. The 1st Defendant has admitted that the Plaintiff was neither present when the sale agreement was signed nor when the transfer was signed. There are two sale agreements which were obtained from the 2nd Defendant and the two were different. The burden of proving that the Plaintiff signed or was present was on the 1st Defendant. The 1st Defendant did not call Ann M. Kiusya to come and confirm who appeared before him.
23. The 2nd Defendant was aware that the person selling the suit property was not the owner but they effected transfer based on a fraudulent sale agreement. The fraudulent transfer was effected on 17th November, 2009 but the 1st Defendant paid Kshs.20,000/= for the transfer on 5th December, 2009.

Disposition

24. From the above analysis, it is clear that the Plaintiff has proved his case against the Defendants on a balance of probabilities. I allow his claim in terms of prayers (a), (b) and (c) of the Plaint dated 13th February, 2023. The Plaintiff shall have costs of the suit. On the other hand, I find that the 1st Defendant has failed to prove his counterclaim on a balance of probabilities. The counterclaim is dismissed with costs to the Plaintiff in the main suit.

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HON. E. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF APRIL, 2026.

In the absence of parties who were aware of the date of delivery of judgment.

Court assistant – Deodata.

ORIGINAL