



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 8 OF 2017

(FORMERLY NAIROBI CIVIL APEAL 44 OF 2016)

JOSEPH MBURU NDEKEIAPPELLANT

VERSUS

RUTH NJERI MUTUEMA.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court

at Thika delivered by Hon. L. Komingoi (CM) on 19th April 2016)

JUDGMENT

The Respondent herein **Ruth Njeri Mutema** filed MELC Suit No.76 of 2014, at the Chief Magistrates Court Thika. The claim was against the Appellant herein and she sought for the following orders;

- a) That a Permanent Injunction be issued against the Defendants either by themselves, agents, servants or employees from selling, buying, transferring, disposing, trespassing and or interfering in any other manner with land parcel No.Chania/ Ngorongo/ 1443.*
- b) A declaration that the 1st and 2nd Defendants transfer of land parcel Chania/ Ngorongo/1443 into their names is void ab initio due to fraud and any resultant transfer thereof to the 3rd Defendant is also void.*
- c) An order of cancellation of the 3rd Defendant's title in Chania/Ngorongo/ 1443, and the same to revert back in the Plaintiff's name.*
- d) That the Original Title Deed to the suit land be immediately returned to the Plaintiff.*
- e) Costs and interest of the suit.*
- f) Any further relief as the Court may deem fit and just to grant.*

In her statement of Claim, the Plaintiff (Respondent) averred that the 1st and 2nd Defendants are her daughters while the 3rd Defendant is the purchaser of the suit land. That she is the sole bonafide owner of the suit property having acquired it **vide Succession Cause No.329 of 1999**. Further in **November 2014**, she found out that the suit land was being sold to the 3rd Defendant without her knowledge and consent and further that the 1st and 2nd Defendants had illegally sold the suit land having gotten the title deed illegally. That the Defendants made her sign the transfer documents without her knowledge.

She particularized illegality by the Defendants as; fraudulently and illegally taking the title deed of the suit land, making her sign the transfer forms in their favour, working in cohorts to defraud her, taking advantage of her when she could neither see properly nor read properly, purchasing the suit land without carrying out due diligence by the 3rd Defendants; having the suit land transferred in his name despite knowledge of a Court Order. Therefore, she sought a permanent injunction and cancellation of the 3rd Defendant's title to the suit property.

The suit was contested and the Defendants filed a defence and Counter claim and sought for;

a) *A permanent order of injunction to restrain the Plaintiff, her servants and agents from entering, interfering with or trespassing on land parcel number Chania/ Ngorongo/1443.*

b) *Any other order that the Court may deem fit.*

In their statement of Defence, the Defendants (Appellants) denied all the allegations made in the Plaintiff and averred that the 3rd Defendant is the bonafide purchaser for value and that the Plaintiff was the previous owner after succeeding the Estate of the 1st and 2nd Defendants' father, but sometime in **March 2014**, on her own volition, she expressed her desire to transfer the suit property to the 1st and 2nd Defendants as a gift in the presence of two witnesses.

That the Plaintiff then summoned the Chief of Ngorongo area and informed him of her intention to transfer the suit property to the 1st and 2nd Defendants and sought for **Kshs. 10,000/=** processing fee. That on **7th May 2014**, they proceeded to the Land Control Board in **Kanjuku area** and the Plaintiff gave consent to transfer the land. Further, on the **14th of May 2014** the Plaintiff in the Company of the 1st and 2nd Defendants proceeded to the Law Firm of **M/S Mwaniki Warima & Company Advocates**, and the transfer deed was duly executed in their favour on her own volition. That the 1st and 2nd Defendants then became registered owners of the suit property, and they developed the land and then decided to sell it. That when they informed their mother of their intention to dispose of the suit land, their mother directed them to give something small to **Joseph Mburu Mutema** and **Irene Wangari Mutema**.

They averred that they found the 3rd Respondent who was willing to purchase the suit property. The 3rd Defendant averred that upon due diligence, he found the 1st and 2nd Defendants were the registered owners of the suit property and he denied that a cause of action has accrued against him.

The Plaintiff filed a reply to Defence and Defence to Counter claim wherein she denied all the allegations made in the Defence and reiterated the contents of her Plaintiff. It was her contention that the 3rd Defendants title is tainted with illegality and as such it should be annulled.

During Viva Voce evidence **PW1 Ruth Njeri Mutema** testified that the late **Peter Mutema** was her husband and she filed a Succession Cause over his Estate. She produced a confirmed grant as Exhibit 1. Further that she has 10 children and that her father in law gave her land parcel **No.Chania/ Ngorongo/1443**. However, she denied selling nor giving it to any of her children. That she had kept the title deed in her house, but someone stole it together with other title deeds and she reported the theft to **Kanjeria Police Post**. She produced a copy of the Police abstract as Exhibit 2. She further denied signing any Land Control Board Consent or attending the Board. She alleged that she did not know how to read or write and she always thumbprinted her documents. Further that she stays with one of her son **Mburu**, but her daughters **Monicah and Ndono** stay in Gatundu, but they always visit her at times.

She further denied Knowing **Mwaniki Warima** Advocate nor signing any transfer document before him. She denied knowledge of any sale agreement nor taking her passport size photo to him. That when the buyer discovered that she had not given them the land to sell, he demanded his money back. That though the 1st and 2nd Defendants sold the suit land, she had never given any of the plots left behind by her husband to any of her children. However, her late husband had shown **Kagiri Mburu and Ndekei** where to farm but the land that the Defendants sold was given to her by her husband. Further that her husband had given the girls commercial plots which they sold with her Consent.

Further that the 3rd Defendant is a neighbour who wanted to buy the suit land. She denied going to the Chief to inform him that she had given the 1st and 2nd Defendants the land in issue and that the area Assistant Chief went to her house and asked her to inform her Advocate to withdraw the case and in return the Defendants would give her **Kshs.1,000,000/=** but she declined the offer.

She further testified that **Wambui Dorcas** has cultivated the land while together they have grown Napier grass and that there is no one time that she had told her to remove the Napier grass as she wanted to transfer the suit land to the 1st and 2nd Defendants.

On cross examination, she testified that her son **Ndekei** had to take her to the Land Control Board but denied that she had signed any transfer forms. That when she was looking for money, she discovered that the title deeds were missing. She confirmed that she had legally transferred one parcel of Land to her son **Ndekei** and that her husband had given her sons some parcels of land though he did not leave any written Will. However she did not know whether her son **Joseph Mburu Mutema** signed the sale agreement as it showed that the 1st and 2nd Defendants sold the suit property. Further that she has never received any money from the said sale though the suit land shows the name of the 3rd Defendant. She urged the Court to cancel the said title deed.

On re-examination she confirmed that she instructed her Advocates to file the suit and that she thumb printed the same.

PW2 Simon Kagiri Mutema testified that his mother inherited the suit land from his father and denied that their mother gave it to 1st and 2nd Defendants as a gift. That when his father was alive, he gave him the land where he stays and his mother transferred it to him. That they discovered that the 1st and 2nd Defendants had cautioned the suit land and later sold it to the 3rd Defendant to pay back one **Zachariah**. He denied ever taking his mother to an Advocate called **Warima Mwaniki** to sign transfer form and that the area Chief ever informed them that the Plaintiff wanted to transfer the land to the 1st and 2nd Defendants.

On cross examination, he stated that he is the eldest son and his Mother consults him beforehand when she wants to do something that deals with his father's property. He denied that the 1st and 2nd Defendants bought the suit land from his mother and that he coerced his mother to change her position. Further that he took his mother to the police and she reported she had lost **Kshs. 10,000/=** and the title deeds. Further that his siblings were aware when his mother transferred his property to him.

On re examination, he stated that his father gave him the parcel of land that his mother transferred and that the 1st & 2nd Defendants obtained the Land Control Board Consent from **Kanjuku** instead of **Ngorongo**.

PW3 Dorcas Wambui Mutema, stated that the Plaintiff is her mother and that she has planted Napier grass on the suit land. Further that her mother has never told her that she had given the suit land to her sisters but she later learnt that the 1st and 2nd Defendants had sold the suit land to the 3rd Defendant. She confirmed that their father had given them a plot which they sold and shared the money. Further that when her mother went to transfer various parcels of land to her brothers, she informed them. She denied that the area Chief asked them whether they had consented to their mother selling the suit land. Further that their Land Control Board is at **Ngorongo Market Centre** and that the 1st and 2nd Defendants had tried to sell the property but when the buyer discovered they did not have authority they paid him back the money.

On cross examination she stated that she was aware of when her mother went to the Land Control Board to transfer the parcels of land to her brothers, but that she did not attend the Land Control Board over the suit land. She denied ever consenting to the transfer of the suit land to the 1st and 2nd Defendants.

PW4 Elizabeth Wanjiru, stated that she is a member of **Ngorongo Chania Land Control Board**, and that she has been a member since **2011**. She confirmed that they meet at **Ngorongo Chania Market Centre**. It was her testimony that they interrogate the members of a family in a transaction and all family members must be present and the area Chief has to okay the transaction. She acknowledged knowing the Plaintiff and all her children and denied giving consent to **Ndekei** nor seeing the Plaintiff and her children. She further disowned the Consent purportedly given by the Board as there was no consent issued over the suit land.

That when she heard that the land had been sold, she went to the Chief's office and informed him that would not be possible. She then called the buyer and told him not to give more money to the children. That **Kanjuku Land Board** does not cover the land transaction in **Ngorongo** as she was the one supposed to introduce the matter to the Board.

On cross examination, she confirmed that the Plaintiff Is her relative and that she did not have the minutes of the Land Control Board. Further that the suit land is ancestral land and as a leader she could not allow the Plaintiff's rights to be infringed as she did not see the Plaintiff attend the Land Control Board for the Consent. She disowned the Land Control Board Consent's stamp as she did not see the parties appear. That on the **5th of July 2014**, she was in the Land Control Board meeting and disowned the letter written by the Chief.

On re-examination, she testified that she became a member of the

Land Control Board in **2011** and bears no grudge and that the letter

written by the Chief is not genuine as it does not contain all the details.

DEFENCE CASE

DW1 Anne Ndono Mwaura, stated that in **March 2014**, her mother called her together with her two sisters and a brother and gave them the title deed and told them that if they sell the plot, they should share it with **Joseph** and **Irene**. That they went to the Chief together with the Plaintiff and **Joseph Mburu** and the Plaintiff confirmed that she had given them the Suitland and the Chief then gave them the letter. Further that on the **7th of July 2014**, they went to the **Land Control Board** at **Chania** and they were given a **Consent** which she produced as Exhibit 1. Further that they then transferred the land to themselves and when they found a buyer, they sold it and transferred it to him after taking him to the **Land Control Board** and they got the consent to transfer. That **Joseph Kiboro** incited the Plaintiff after they had failed to give him **Kshs. 200,000/=** from the sale. She further testified that no one objected at the Land Control Board.

On cross examination, she stated that they were given the suit land by the Plaintiff in the presence of **Monica, Irene** and **Joseph Kiboro**. That they had been given a parcel of land which they sold and they had gone to the Chief of **Ngorongo** together with their mother and **Joseph Mburu**, but the other six siblings were not present. They also went to the Land Control Board in **Ngorongo** where **Waharo** is the Chairman and **Elizabeth Wanjiru** member. That the transfer forms were effected by one **Mwaniki** who is a broker and that they never went to **Mwaniki Warima Advocates**, but only gave him the forms. Further that though it is indicated that they went to **Mwaniki Warima Advocate** to effect transfer, they did not know any Advocate by that name. She acknowledged that when they sold the land to the 3rd Defendant, the Plaintiff was not present

On re examination, she stated that they went to Chania Land Control Board and not **Kamwangi**.

DW2 Vincent Warui Mwaura, the Assistant Chief **Ngorongo**, stated that two women visited his office and informed him that they wanted a letter to go to the Land Control Board. They later went back accompanied by the Plaintiff and **James Mburu Mutema**. That the Plaintiff confirmed that she had given the 1st and 2nd Defendants the suit land in the presence of the Chief and that the Plaintiff has never complained that the letter was not proper.

On cross examination, he stated that the letter to the Board is to confirm that they know the owner and the transferee and that they do not require the family as they only investigate when there is an issue. He testified that the District Officer is one and that the parties should go to **Chania Ngorongo** and not **Kanjuku**.

DW3 Patrick Mbugua Murwani, the Chief of Kanjura stated that **Monicah Wanjiku, Anne Ndono** and **Mburu Ndekei** visited their offices and wanted an introduction letter to the Land Control Board and he gave them the letter.

On cross examination, he stated that the Plaintiff appeared in his offices before to transfer other parcels of land but that he did not interview her with respect to the suit property. That for the suit land, the **Chania Land Control Board** has jurisdiction and that the suit property is partly ancestral .

On re-examination, he testified that he only needs a search to confirm ownership.

DW4 Henry Ngige Kungu, the Assistant Chief **Kairi** Sub location stated that on the **6th of May 2014**, he was the acting Chief of **Kairi** location. That the Assistant Chief of **Ngorongo** visited their offices and introduced the Plaintiff family as they wanted to go to the Land Control Board. It was his testimony that the Plaintiff was with her two daughters and son and when he asked for the search, the Plaintiff had the search and her Identify Card and he confirmed him that she was the owner of the suit property. That the Plaintiff confirmed that she wanted to give her daughter the suit land and he wrote a letter to the Chairman of the Board which he produced as exhibit.

On cross examination, he confirmed that the land is in **Ngorongo Sub location**. Further that **Kanjuku** is not in **Chania / Gituamba** ward as it is in Mangu location that one could not leave the Board at **Chania** and go to **Kanjuku Mangu**.

On re examination, he confirmed that the Chairman for **Chania** and **Gituamba** is one and that he saw the Plaintiff when she went to the office and that nobody raised an objection.

DW5 Nathan Wokau Njola, a member of the Land Control Board adopted his witness statement and stated that on **7th May 2014**, he was present at the **Land Control Board Meeting**, and he saw the Plaintiff who was transferring the suit property to her two daughters. That the Board being satisfied gave its consent. That nobody raised an objection on the transfer and the daughters appeared later stating they were transferring the suit property to the 3rd Defendant.

On cross examination, he stated that he has been a member of the board for five years and the Board has seven members. Further that the Chiefs letters inform them whether the person is the registered owner and after perusal of the documents, he gives the other Board members and after satisfaction, the **Consent** is granted. Further that they interviewed the registered owner but he did not have a register of what transpired on that particular day. Further that he does not sit on the **Mangu Board** and he did not know who sits there and that **Kanjuku** is far from **Chania**.

DW6 Joseph Mburu Ndekei, adopted his witness statement dated **8th December 2012**, and stated that **Kariuki Samuel** informed him that there was a land for sale and he did an official search at the Lands registry and found that the suit land belonged to the 1st and 2nd Defendants. After negotiations, the purchase price was arrived at **Kshs3.2 million** and a sale agreement was drawn after which he paid **Kshs.1.6 million** and the balance was also paid through **K Rep Bank**. Further that he attended the Land Control Board with the sellers and that nobody objected. That he was an innocent purchaser having bought the land while it was not cautioned and that there has been no criminal proceedings against anyone.

That he met all the requirements and the purchase price has not been refunded and they attended the Land Control Board in Ngorongo.

On cross examination, he stated that they went to Ngorongo Land Control Board and that **Kanjuku** is not within **Ngorongo** area and that he did not know the previous owner.

In re-examination, he stated that he was not aware of the earlier orders issued and that there is no Board at Kanjuku area,

After the *viva voce* evidence, the Parties filed their written submissions. The trial Court entered Judgment in favour of the Plaintiff (Respondent herein) plus costs and interest.

The Appellant was aggrieved by the above determination of the Court and Decree thereon and he has sought to challenge the said Judgment through the **Memorandum of Appeal** filed on **22nd April 2016**. The Appellant sought for the setting aside of the Judgment delivered on **19th April , 2016** by **Hon. L. Komingoi, Chief Magistrate Thika**.

The grounds upon which the Appellant sought for the Appeal to be allowed are;

- 1. That the Learned Trial Magistrate erred in law by failing to consider that the Appellant was an innocent buyer.***
- 2. The Learned Trial Magistrate erred in both law and facts by disregarding the evidence of the Appellant and the Judgment /Order was against the weight of the evidence.***
- 3. The Learned Trial Magistrate misdirected herself in failing to appreciate that the Appellant statutory rights were being trampled upon and he was threatened with cancellation of his Title deed and imminent eviction***
- 4. That the trial Magistrate erred in law in failing to consider the evidence of the Appellant and his other witnesses in her Judgment,***
- 5. That the trial Magistrate failed to appreciate the fact that the appellant had been in occupation of the suit land since the transfer was effected***

The Appeal is opposed and the Respondent filed a **Replying Affidavit** sworn on the **23rd of July 2018**, and averred that the Appeal has no

merit as the trial magistrate considered all the evidence presented to her and noted that the appellant was not an innocent purchaser, as he was a neighbor and present during the sham meetings at the Chief's office and the Land Control Board where she was absent.

Further that the Appellant was part of the corrupt scheme and in her Judgment, the trial magistrate noted that no **Consent** was obtained from appropriate Land Control Board. That she had been advised by her Advocate that the law does not endorse a title obtained by a proprietor through fraudulent means which the proprietor is a party . Further that the appellant transferred the title to his name despite the existence of a Court Order as his advocate had already entered appearance. That the cancellation of the title was proper and the imminent eviction is inapplicable as the appellant has never occupied the sit land.

It was her contention that the magistrate noted that she never attended the Land Control Board and that the Advocate who purportedly signed the transfer did not do so as he maintained through a letter, Further that the Magistrate noted that she never signs documents but thumbprints them and denied ever signing the transfer forms. It was therefore her contention that there was no mistake be it legal or factual capable of invalidating the Judgment and the award given by the magistrate was appropriate. She urged the Court to dismiss the appeal with costs.

The Appeal was canvassed by way of written submissions to which the Court has now carefully read and considered.

This Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has also carefully considered the findings of the trial court, the submissions by the Counsels and finds as follows:-

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123 where the Court held that;**

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Ocean Freight Shipping Co. Ltd....Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995,** where the Court held that:-

“This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong”.

It is not in doubt that the Respondent was the owner of the suit property having been registered as such upon being granted letters of Administration for the Estate of her late husband. The 1st and 2nd Defendants in the lower Court had averred that their Mother had desired to transfer the suit property to them as a gift. To this effect, they sought the Consent of the Land Control Board in their area and they were granted the same. It was a common testimony amongst the witnesses that the suit property is in **Ngorongo area** and that, that is where the consent of the Land Control Board ought to have been sought. It was a further consensus that before a party could transfer the suit property, the party needed to have the Chief's letter and the same ought to have been presented before the Land Control Board before the Consent would be granted.

While the Respondent (Plaintiff) and her witness testified that they did not go to the Chief to get the letter it was the evidence of the Assistant Chief that the Respondent went to their offices with her daughters to get the letter to enable her obtain the Consent for transfer of the suit property. The Court notes that while the Assistant Chief testified that the Plaintiff went with her children, it was the Chief's evidence that the Children went to their offices without their mother. This Court therefore finds that it must weigh the two sets of evidence in order to determine which of the party is being truthful.

It was clear from the evidence of the witnesses that there is no **Land Control Board in Kanjuku area**, and that one would only go to the nearest area which is in **Chania**. While the Appellant as a Defendant in his evidence in the trial Court produced consent of transfer that bore the stamp of **Chania Land Control Board**, in their statement of Defence, the then Defendants had averred that they went to the Land Control Board in **Kanjuku area** and therefore this Court finds that the evidence of the Appellant in the trial Court was contradictory as it did not match their pleadings

Further PW4 Elizabeth had testified that she was a member of the Land Control Board in Chania and that having been the local leader of the area, she was the one who was obligated to introduce the parties as the suit property was in her area. She denied that the Respondent and her daughters ever appeared before the Board to give any such consent. On the Contrary, the Appellant had also called in DW5 to give evidence as a Board member and the said Board member had testified that the Respondent and her daughters had appeared before the Board and that they had identified them because he knew them and also because they had identification cards and as such since there was no objection, the Consent was granted.

This Court is faced with a peculiar situation where two people on each side had all claimed that something happened and in this instant, none of the parties presented before the trial Court the minutes of the Land Control Board and therefore it becomes a situation where one said this, and the other said something contrary.

The Court however notes that the witnesses that were called by the Appellant and who alleged that they were board members had all indicated that they sit in the board at the Chania area. It is therefore this Court's holding that as the Appellant (Defendant) in their Defence had claimed that they got the **Land Control Board Consent** in **Kanjuku** area, then their evidence become contradictory and as parties are bound by their pleadings, and since it was acknowledged in evidence that **Kanjuku** area is far from **Chania** area, then it cannot be that the two areas were confused with each other and the therefore court finds that the Respondent's witnesses were being truthful.

The Appellant herein bought the suit land from the Respondent's daughters who claimed to have been gifted the suit property by their mother. In order for the Appellant to have a good title, whoever had passed the title to him must also have a good title which they were in a position to pass. See the case of **Esther Ndegi Njiru & another...Vs... Leonard Gatei [2014] eKLR** where the Court held that;

‘The Defendant has tendered evidence through DW4 that the documents the 2nd Defendant used to process title in his name were fraudulent and were forgeries as they were not issued by Githunguri Constituency Ranching Co. Ltd as alleged..... On the basis of the evidence tendered I am satisfied that the 2nd Defendant fraudulently acquired title to the suit property and could not therefore have acquired a good title to the property. It would thus in my view follow that if the 2nd Defendant did not have a good title in the property he could not pass a good title to anybody else. Were the title still in the name of the 2nd Defendant the Defendant/Plaintiff in the counterclaim would be entitled to challenge the title under section 26(1)(a) of the Land Registration Act on the ground of fraud to which the 2nd Defendant was a party. On the first issue I would therefore hold and find that the 2nd Defendant to counterclaim did not hold a valid title to the suit property which he could sell and transfer to the Plaintiffs.

It is also important to note that the Appellant acquired registration of the suit land while the suit was still pending at the lower Court and in contravention of a **Court Order** and therefore going against the doctrine of **lis pendens**.

It is not in doubt that **Section 26 (1) of the Land Registration Act** provides that once a proprietor acquires registration of the property, the same is absolute and indefeasible. However the said provision of law has further gone ahead and provided instances in which the said registration is impeachable. See **Section 26(1)(a)&(b) of the Land Registration Act, 2012** which provides;

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

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

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

However this registration is not absolute as a person must prove that the said registration was one that was in accordance with the law and the laid down procedures. The Court of Appeal in the case of **Munyu Maina...Vs.. Hiram Gathiha Maina [2013] eKLR**, held as follows:

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

The Respondent had averred that the registration of the suit property to her daughters was acquired through **fraud** and to this effect she particularized fraud that had occurred. **Fraud** has been defined by the **Black's Law Dictionary, 10th Edition**, as follows;

“A knowing misrepresentation or know concealment of a material fact made to induce another to act to his or her detriment.”

It is therefore this Court's finding that if a party misrepresents facts, then they have committed fraud. It was the Respondent's contention that she did not sign the transfer document that enabled the 1st and 2nd Defendants in the trial Court obtain proprietorship of the suit property. Further she averred that her documents had been stolen and she had reported the said disappearance to the police and to this effect she produced a Police Abstract in which she had reported the said theft.

The Court has seen the said Police Abstract and confirms that indeed the Respondent had reported the said theft. Further it is worth to note that a transfer document is the instrument that passed ownership from one party to the other and therefore it is the said transfer that will enable the

exchange of proprietorship. The Court notes that in the absence of a transfer then, a party cannot acquire registration interests and if the said transfer is then defective, it would mean that no rights were passed.

In their defence, the Appellant and his Co-Defendants had averred that the Respondent together with her daughters had gone to the Law Firm of **Mwaniki Wairima & Company Advocates** and that they had the transfer stamped in their presence. The Respondent denied these allegations and testified that she did not know the said Advocate and denied ever appearing before him. DW1 in her evidence confirmed that

they did not appear before the said Advocate and that they had given the documents to a broker who had the same stamped.

Further the said Advocate had in a letter disowned the signature and denied ever witnessing or commissioning the said transfer. He further denied that the parties ever appeared before him. Consequently, the Court finds and holds that the transfer was not properly executed as the law requires that only qualified people can sign Conveyancing documents. The Advocate having clearly denied knowledge and signing of the said transfer document, then it would mean that the conveyancing document was executed by an unqualified persons contrary to **Section 34** of the **Advocates Act**, which provides;

“(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument

(a) relating to the conveyancing of property; or

(b) for, or in relation to, the formation of any limited liability company, whether private or public; or

(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or

(d) for the purpose of filing or opposing a grant of probate or letters of administration; or

(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or

(f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument: Provided that this subsection shall not apply to—

(i) any public officer drawing or preparing documents or instruments in the course of his duty; or

(ii) any person employed by an advocate and acting within the scope of that employment; or

(iii) any person employed merely to engross any document or Instrument.

It then becomes very clear to this Court whose narration of event the court should believe. It seems the Respondent has been truthful to her word. On the other hand the transfer of the suit property by the 1st and 2nd Defendants in the trial Court to themselves was most definitely procured through misrepresentation of facts and therefore fraudulently.

Though the Appellant had averred that he is an innocent purchaser for value and therefore the Court cannot impeach his title as it is indefeasible, it is clear that Courts have already held that there are instances in which a Court can impeach title to land and as such this Court finds that the Appellant does not have a good title as the 1st and 2nd Defendants did not have a good title, having procured the same fraudulently. See the case of **Elijah Makeri Nyangw’ra ...Vs... Stephen Mungai Njuguna & Another (2013) eKLR** where the court held that

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

For the first limb, it appears to me that the title of the 1st Defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1st Defendant was a party to the fraud or misrepresentation. Indeed, to me the 1st Defendant was an innocent purchaser for value. He was probably conned of his money by the 2nd Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2nd Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2nd Defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).

Is the title impeachable by virtue of section 26(1) (b)? 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 the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26(1) (b) is to remove protection from an

innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.

Taking into account the above holding of the court, this Court also holds and finds that the Appellant’s title was impeachable being that the persons who passed the title to him did not have a good title to pass as the same was acquired through fraud.

Section 80(1) of the Land Registration Act provides;

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

Therefore this Court finds and holds that the trial Court’s findings were in order and the trial Magistrate did not err.

Having now carefully re-evaluated and re-assessed the available

evidence before the trial court and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the same.

The upshot of the foregoing is that the Appellant’s Appeal is not merited and consequently the said Appeal is dismissed entirely and the Judgment and Decree of the trial court is upheld. On the issue of costs, the Court finds the same is granted at the discretion of the court. The Respondent being the successful litigant is therefore awarded costs of the Appeal.

It is so ordered.

Dated, Signed and Delivered at Thika this 20th day of November 2019.

L. GACHERU

JUDGE

20/11/2019

In the presence of

Mr. Tumu holding brief for Mr. Kanyi Kogi for Appellant

No appearance for Respondent

Jackline - Court Assistant.

L. GACHERU

JUDGE

20/11/2019