



REPUBLIC OF KENYA



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Karuga & another v Gathitu & 19 others (Environment and Land Case 33 of 2013) [2025] KEELC 5763 (KLR) (1 August 2025) (Judgment)

Neutral citation: [2025] KEELC 5763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE 33 OF 2013**

**A OMBWAYO, J
AUGUST 1, 2025**

BETWEEN

ANNA WANJIKU KARUGA 1ST PLAINTIFF

DORIS WANJIRU THUO 2ND PLAINTIFF

AND

**FRANCIS KINGORI GATHITU & 19 OTHERS & 19 OTHERS & 19
OTHERS DEFENDANT**

JUDGMENT

1. The Plaintiffs commenced the present suit vide an amended Plaint dated 18th February, 2022 against the Defendants seeking the following orders:
 - a. Vacant possession
 - b. Eviction orders against the Defendants from Plot No. 95 Kijabe-hill (Subukia) (New Number L.R No. Nakuru/Subukia/95)
 - c. General Damages for loss of user
 - d. Cost of the suit.
 - e. Any other relied that this Honourable court may deem fit and just to grant.
 - f. Any other order the Honourable Court deems fit.
2. The Defendants filed their further amended Defence and Counter-claim where they denied the allegations in the plaint and sought for the following orders:



- a. A declaration that the Defendants now Plaintiffs are the lawful owners of the land title number Nakuru/Subukia/95 and the Plaintiffs now Defendants have no legal right to deal with it whatsoever and the title deed issued to the Plaintiffs now Defendants be cancelled forthwith.
- b. Perpetual injunction restraining the Plaintiffs now Defendants herein, their servants and or agents from entering, trespassing, ploughing, selling and or dealing with land title number Nakuru/Subukia/95 in any manner whatsoever.
- c. Costs of this suit

Plaintiffs' case

3. Eliab Muchiri Kamau testified as PW1 where he testified that he had the file in relation to plot No.95/ Subukia Settlement Scheme. He testified that the plot was allotted to Alfred Munga. He adopted that Plaintiffs' supplementary list of documents filed on 23rd November, 2022 being documents No. 2 to documents no 42 as PEX 2 to PEX 42 as his evidence in chief. He went on to state that Munga was the first allottee and added that they paid a land bond of Kshs10,000/=. He testified that he applied for another loan for her daughter. He testified that there was no other allotment. He testified that the loan was paid and that there was a discharge and a transfer. He was referred to documents at page 40(33) where he stated that there was a transfer of land on 21st October, 1983. He testified that the transferee was Nyarigi Motor Spares. He added that the transfer was signed by Ogoli for Kshs140,000. He also testified that the LCB consent was made by Alfred Macharia Munga for Nyarigi Motors. It was his testimony that Nyarigi motors spares ID No. was 0972954/63. He testified that it was referred to as a company with P O Box 1229 Thika. He added that there was no registration number. He also testified that the application was dated 21st October, 1983 while the consent was dated 15th December, 1983. He testified that it was transferred but not effected. PW1 testified that the charge was dated 15th October, 1987 in the name of Gladys Muthoni Wachira Munga and Nancy Mwangi.
4. He testified that there was no connection between Nyarigi and the charge but added that they were companies trading as Nyarigi Motors Spares. He testified that he had the certificate of clearance issued to Nancy Wambui Mwangi and Waithera Mwangi as administrators. It was his testimony that the charge had 3 names while the letter of clearance had 2 names. He produced the document as PEX43.
5. PW1 produced his witness statement filed on 21st January, 2025 as his evidence in chief. He testified that there was a cancellation of discharge of charge and a recall letter dated 4th March, 2011 and 2nd November, 2010 respectively.
6. He testified that there were complaints. He testified that the letter dated 2nd April, 1984 addressed to the Chair Nakuru, LCB for failure by John Mwangi Chege to pay the balance of Kshs. 70,000. He testified that the total acreage was 45 acres. He testified that the purchaser had breached the terms of agreement. He further testified that the letter by Keziah Munga dated 4th November, 2010 requested stoppage of any dealing of the plot.
7. He testified that a discharge of charge was issued to other parties and that the land was in the process of being subdivided. He also testified that he had a letter dated 5th March, 1991. He testified that there were no documents which showed that the Defendants bought 40 acres. He further testified that the discharge and transfer were cancelled. He testified that there was no letter from Nyariki responding to cancellation of discharge PW1 was referred to PEX 28, where he testified that Mugambi Imanyara was asked to be issued with cost to transfer on 1st February, 1995. He testified that there was a comment made earlier dated 19th December, 2023.



8. Upon cross examination by Waiganjo for the Defendants, PW1 stated that he was the Deputy Director of D DLAS where he had worked for 29 years. He stated that Subukia Settlement scheme was under Nakuru office which had a file for plot No 95 Subukia. He admitted that he did not have the file and that he had never seen it. He also admitted that he did not know what was in the file. He stated that the property was allocated to one Alfred Munga but admitted that he did not have the allotment letter. He stated that when they allocated land, they would charge as evidenced by the charge dated 30th August, 1974. He stated that that the charge was cancelled but admitted that it was not signed. He stated that the charge in the file was at folio number 18 in the name of Gladys Muthoni Mwangi and Gladys. He admitted that it had no stamp for cancellation but was dated 15th October, 1987. He stated that Folio number 15 was the official transfer form from the office. The document is from our office and stamped by the Registrar. He confirmed that in the transfer Alfred Macharia Muga was the transferrer of plot number 95 Subukia to Nyarigi Motor Spares.
9. He stated that Folio number 16 was a letter dated 14th October, 1987 to the DLA&S Nairobi. He further stated that there was only one charge prepared in their office on 15th October, 1987 and executed on 15th October, 1987. He added that Folio 17 was a receipt voucher from the chief accountant. He also stated that Nyarigi Motor Spares paid conveyance fees. PW1 stated that the name was changed on 26th October, 1987. He stated that he had the application for consent to transfer and consent for subdivision at Folio No. 16A. He added that the acreage was 45 acres. He stated that Folio 12 showed that the owners of Nyarigi Motor Spares were; Nancy Wangui, Waithera and Gladys Muthoni trading as Nyarigi Motor Spares. He stated that Folio 15 was addressed to John Mwangi Chege. He stated that he did not know how the letter came to their office. He stated that Alfred Macharia Munga sold 25 acres but admitted that there was no copy of sale agreement. He admitted that his file did not have a sale agreement. He further stated that their father sold land to Nyarigi Motorsparses. He also stated that the consent was never withdrawn.
10. PW1 further stated that Folio 21 was the letter from the P.C. which requested that investigations be done. He stated that investigations were carried out but admitted that he did not have a report. He stated that the purchase price was paid. He added that 36 (a) was the clearance certificate which was issued after one paid the loans. He also stated that it was transferred on 23rd June, 2005 and signed by the relevant offices. He stated that they prepared the discharge dated 11th August, 2005 which they forwarded to Nakuru for registration. PW1 stated that the allocation of the plot was for Nancy Mwangi and Waithera Mwangi in 2005. He also stated that what remained was processing of title. He stated that Folio 36 was dated 2nd November, 2010 which documents came from Honourable James Oregoo and addressed to P K Mwangi. He admitted that there was no record that the settlement office communicated to Nancy. He also admitted that there was a confirmation of grant. He stated that he was not aware how the document got to their office. He confirmed that it referred to plot No 95 issued on 9th November, 2000. He admitted that he had no letter of administration of Alfred Macharia Munga. He also admitted that he did not have proper documents for transfer. PW1 confirmed that the office had transferred the plot to Nancy. He stated that he had pointed numerous anomalies in the file. He added that he did not have the ground status. He stated that he did not know the person currently on the ground.
11. Upon cross-examination by Macharia for the 3rd Defendant, PW1 confirmed that a transfer had been executed by Alfred Munga Macharia to Nyarigi motors. He stated that there was a charge issued by the office for Nancy Wangui Mwangi and Waithera Mwangi. He admitted that there was no notice of cancellation of discharge. He also admitted that he did not have any record of discharge.
12. Upon re-examination, he stated that there were anomalies in the file. He further stated that Alfred Munga signed the transfer on 21st October, 1983, the board sat on 31st October, 1983 and that on



- 15th October, 1983 John Mwangi Chege and Munga verbally confirmed that the remaining balance was paid. He stated that Folio number 15 was dated 2nd April, 1984. He added that their client had not been paid. He also stated that they were not shown any sale agreement by Nyarigi. He stated that in the application for consent one had to indicate the sale price which in this case was Kshs. 140,000. He also stated that the discharge was to Nancy and Waithera. PW1 stated that the transfer was done in 2005.
13. Keziah Njoki Munga testified as PW2 where her witness statement dated 12th February, 2025 was adopted as her evidence in chief. She testified that Annah Wanjiku Karuga and Doris Wanjiru Thuo were her elder sisters and administrators to her late father Alfred Munga's estate. It was her testimony that the plot belonged to her father Munga Macharia as the 1st allottee. She testified that he tried to sell 25 acres to Nyarigi motors for Kshs. 280,000/= where Nyarigi paid Kshs. 70,000. She testified that he was selling 25 out of 45 acres. She testified that her father died in February 1988 and that the agreement was done in 1983. She testified that they did not know the person on the land. She also testified that the balance was never paid. It was her testimony that the title was in the names of her two sisters. PW2 testified that the discharge was cancelled and issued to her sister.
 14. She testified that the application from LCB mentioned 45 acres. She added that the consideration in the discharge was different from the agreement.
 15. Upon cross examination by Waiganjo, PW2 confirmed that she was not an administrator of the estate of Alfred Munga Macharia. She stated that she went to the Director of settlement with Mary Munga where they made a complaint vide a letter dated 4th November, 2010. She admitted that Mary Munga was not the administrator of deceased's estate. She further stated that her sisters applied for letters of administration on 26th July, 2011 vide succession cause number 131 of 2010. She stated that the confirmation of grant had no other parcel other than plot number 95.
 16. PW2 stated that they never lived on the land since 1983. She stated that she got the information regarding sale of the 25 acres from her late father. She further stated that DLSSO said that the property was owned by Nyarigi, in 1991. She stated that her mother used to pursue the matter in Nairobi and that the office in Nairobi sought clarification on the ground. She admitted that she was not involved in preparation of the ground sketch report. She stated that they were assisted by Njenga Karume vide a letter dated 2nd January, 2010. PW2 admitted that when she wrote the letter dated 4th November, 2010, she was not the administrator of the deceased's estate of deceased. She further admitted that the property had been transferred on 21st October, 1983. She stated that she did not know her father's signature. PW2 confirmed that the receipt at folio 17 was a conveyance fee paid on 15th October, 1987. She added that there was a proposal to change in 1987. She further admitted that she had not seen a charge. She added that since 1987, there was no letter which demanded for money.
 17. Upon cross examination by Macharia, she stated that there were other people in the 1990's. She admitted that she did not have any agreement between her father and Nyarigi that he sold 25 acres. She also admitted that she had no application for subdivision. She stated that the property was sold at Kshs. 200,000 and that only Kshs. 70,000 was paid. She confirmed that she had no evidence that the Kshs. 70,000 had been refunded. She stated that there were 20 people in occupation. PW2 stated that a consent was issued to Nyarigi and that his father had visited the land board for transfer and a consent issued. She stated that a charge was cancelled.
 18. Upon re-examination, she stated that she complained in 2010 through the Director of Land Settlement. She added that there was a letter dated 18th February, 2002. She stated that the board meeting was held on 31st October, 1983 and that the transfer was signed on 21st October, 1983 and registered.



19. Anna Wanjiku Karugia testified as PW3. It was her testimony that Plot 95 belonged to her late father. She testified that her mother became the administrator but later together with her sister Doris Wanjiru Thuo, they became the administrators. She produced the confirmation of grant dated 28th July, 2011 as PEX 43. She testified that the title was in their names, she produced the title as PEX 44. She stated that there were people on the land and she prayed that they be evicted.
20. Upon cross examination by Waiganjo, she stated that the Defendant entered the land in 1995. She further stated that her mother knew about it in 1998 and went to the CID in 2010-2011. She added that she had left the documents with her sisters. She admitted that she never lived on the land. She stated that her mother used to work on the land but never lived there. She added that her father never lived on the land. She stated that his father had lived there in 1975 after which he left for Mugua. She confirmed that she had not seen documents produced by the settlement officer. She stated that Kezia followed the process. She also stated that her father never told them that he had sold the land. She added that she had heard that there was a dispute concerning the land and that she had left her mother and Njoki to deal. She confirmed that she had never gone to the ministry of lands and settlements. She stated that they went to the Lands office in Nakuru where they were issued with a title in the name of Dorothy Wanjiru Thuo. She stated that the land was never sold. She also stated that they have never ploughed as the land was a settlement scheme.
21. Upon cross examination by Macharia, PW2 stated that the land was 45 acres and that the Defendants were in occupation. She stated that they were given a green card and title. She admitted that she did not have the green card.
22. Upon re-examination, she stated that she was given the title. That marked the close of the Plaintiff's case.

Defence Case

23. Nicholas Ikami testified as DW1 where he produced his statement dated 9th February, 2012. He also produced his list of documents with documents as DEX11 to DEX9 together with his supplementary list of documents DEX 20.
24. He testified that Plot No.95 belonged to Nancy Wangui Mwangi and Waithera Mwangi which they purchased through their agent Munene Investments. He testified that they have been in possession of the land since 1994. He added that the Plaintiff never complained to them before filing the suit. He was referred to DEX 20 where he testified that it came from the office of the permanent secretary and was dated 24th August, 2005 addressed to Nyarigi motors. He testified that in 2005, they were on the land.
25. He was showed DEX 21, a letter dated 18th January, 2006 where he testified that it came from the settlement office of land and was addressed to Nancy Wangui Mwangi. He testified that she sold the land to them and the reference was Nakuru/S/95. He testified that she was visit the office to collect the discharge of charge. He further testified that they did a search in Nakuru Settlement office and found that they did not have title deeds.
26. He was referred to FOLIO 36A where he testified that the plot belonged to Nancy Wambui Mwangi and Waithira Mwangi. He added that the letter was signed by settlement officers. He also testified that in 2004 and 2005 they were in possession. He testified that the discharge of charge was dated on 11th August, 2005. He testified that it showed that the land belonged to the ladies who sold to them.
27. It was his testimony that he did not know how the Plaintiff got the title. He testified that they wanted the title to be rectified from the Defendants names to theirs. DW1 testified that they sued the 3rd parties since they had not given them the title.



28. Upon cross examination by Macharia, he confirmed that he has been in possession since 1994. He stated that the land belonged to Nancy Wambui and Waithera Mwangi. He confirmed that he had seen the discharge of charge. He added that since 1993, nobody had interfered with his possession. He stated that he has since built on the land parcel. He also stated that they were never told the reason they were not given the title.
30. Upon cross examination by Matiri for the Plaintiff, DW1 stated that he bought the land. He stated that they had an advocate at gate house known as Julius Kinga. He further stated that the land was not sold by the Plaintiffs. He stated that he met Nancy Wambui and Waithira Mwangi together with the agent in 1974. He further stated that they did a search in 1994. He produced the letter as DEX21 which was done in 2006 by Pius Muindi the agent. He stated that there was no document in 1995 which showed that the land belonged to Nancy Wambui and Waithera Mwangi. He stated that the vendor in the agreement was Munene investments. He added that Nyarigi holdings Ltd was also a member and it received the money. DW1 stated that the land belonged to the Nancy Wambui's father, John Mwangi Chege who died in 1991. He went on to state that he bought the land in 1995 from Waithera Mwangi and Nancy Wangui.
31. He stated that the agent delayed in the transfers. He further stated that the land was to be transferred to the 3rd parties first before being transferred to them. DW1 stated that they placed a caution. He also stated that they sued Munene and Waithera at the Bahati Land Tribunal. He denied that they were misled.
32. Upon re-examination, he stated that they paid for the land and were in occupation. He added that the land was in the name of Nancy Wambui Mwangi and Waithera Mwangi. He stated that the first discharge had been given to Nancy Wangui Mwangi and Waithera Mwangi. He added that they had no issue with the administration. DW1 stated that the title should be issued to the Defendant. That marked the close of the Defence case.

3rd Party's Case

33. Waithera Mwangi testified as the 3rd party, where she adopted her statement dated 27th January, 2025 as her evidence in chief. She produced her documents as 3rd PEX 1-3rd PEX6. It was her testimony that the suit land belonged to her husband Mwangi Wa Chege. She testified that her husband had bought the land from Alfred Munga. She went on to testify that when Mwangi Chege died, he left her and Nancy Mwangi who was her co-wife in charge. She testified that they sold the land but that they did not know the name of the person.
34. Upon cross-examination by Waiganjo, she stated that they were the owners of plot No 95 Subukia as their late husband had bought for them. She denied that she knew Gladys Muthoni. She stated that Nyarigi motors belonged to their husband. She stated that they sold the land and that the purchaser was in possession. She admitted that they did not follow up on the title.
35. Upon cross examination by Matiri, she stated that she could not recall the time their husband bought the land. She stated that he paid Kshs. 280,000. She admitted that she had never visited or stayed on the land. She stated that she signed the transfers. She stated that she was in Nakuru in 1995 when the sale agreement was done. She stated that they sold the land before confirmation of the grant. She stated that she was not aware that the discharge of charge was cancelled. She added that the land belonged to her.
36. Upon re-examination, she stated that she was the 1st wife to Mwangi Chege while Nancy was the 2nd wife. She also stated that they sold the land when it already belonged to them. She added that the Defendants never complained.



That marked the close of the 3rd party's case.

Submissions

37. Counsel for the Plaintiff filed his submissions dated 29th April, 2025 where he gave a summary of the case and identified one issue for determination. Whether the Third Party purchased the land from the Plaintiffs, whether they acquired any good title capable of being passed to the Defendants. He submits that Alfred Macharia Munga (deceased) was the original allottee of Plot No. 95 Kijabe Hill Subukia (later known as Title No. Nakuru/Subukia/95). He also submits that the Plaintiffs are the registered proprietors of the suit parcel and that the third party has never had any title. He relied on Section 24, 25 and 26 of the *Land Registration Act*. He also relied on the cases of Ali Wanje Ziro Abdulbasit Abeid Said and Another (2022) eKLR and Penmaim Company Ltd V Likoni Community Development and 6 Others (2021) eKLR. It was his submission that none of the Defendants claim to have bought the land from the Plaintiffs but from the third party. He submits that the third party claimed to have bought the land. He relied on Section 3(3) of the *Law of Contract Act* and Section 38 of the *Land Act*. He submits that whereas there was a claim of an attempted sale of a portion of the land, no sale agreement was rendered in court as proof.
38. He submits that no interest in land can be sold unless through a sale agreement and in the absence of such, the court has nothing to gauge against the law to determine the validity of such sale. He submits that there was conflicting testimony and material evidence on the terms of the alleged sale, the portion sold and whether there was breach. He submits that the Plaintiff's father intended to sell 25 acres out of the 45 acres to John Chege but that the purchaser breached the terms when he only paid Kshs. 70,000 out of the total Kshs. 280,000 and failed or refused to pay the balance. He added that there was no evidence from the third party of payment of the balance. He also submits that the burden of producing the sale agreement lay on the Defendants and/or Third Party. Counsel relied on Section 107, 108 and 109 of the *Evidence Act*.
39. It was his submission that the documents produced by PW1 was full of contradictions as alleged the sale agreement and transfer which the witness admitted. He further submits that the third party never acquired any good title capable of being transmitted to the Defendants whether for the whole land or portion thereof. He submits that the Defendants failed to exercise due diligence and thus they cannot plead that they were innocent purchasers without notice as claimed in their defence. He added that the evidence before court showed that the third party never acquired any good title to the suit and none was passed by them to the Defendant. He also submits that there was no evidence of receipts or payment yet their claim was based on an alleged purchase from the Plaintiff.
40. He went on to submit that the third party had no title to the land and thus none was passed on to the Defendants. He submits that whereas Gladys Muthoni Mwangi was named in crucial documents used by the Third Party to aid their own transfer, the third party denied that she was the deceased's widow. He added that her role in the transaction remained a mystery. It was his submission that the Defendants produced receipts of money paid to the firm of Mugambi Imanyara and Co. Advocates which the third party during cross examination disowned the said lawyers. He also submits that the Defendants had realized that they had been duped into buying land by the third party who had no ownership rights over the suit land. He added that DW1 confirmed that he did not have any official search showing that the land belonged to the third party. He further submits that the Defendant claimed that the third party showed them the suit land but the third party during cross exam denied that she has ever been on the land.
41. He relied on Section 82(b) (i) of the *Law of Succession Act* and submits that according to the Defendants, they bought the land from the third party between 1994 and 1995 yet the Certificate of Confirmation



- of Grant showed that it was confirmed on 9th November, 2000 that is 5 years prior to the alleged sale. It was counsel's submission that the Defendants failed to exercise due diligence and thus could not plead that they were innocent purchasers without notice. He submits that the Third Party never acquired any good title to the suit land thus none was passed by them to the Defendant. He further submits that the Defendants are trespassers on the Plaintiff's land. He further submits that the Plaintiffs are the legitimate owners of the suit parcel as the original allottees. He added that there was no evidence to suggest that they fraudulently acquire the title. He also submits that the Defendants counterclaim had no legal or factual basis. He argues that if there was any fraud, the same was by the third party.
42. Counsel for the Defendants filed his submissions dated 27th May, 2025 where he relied on Section 107 of the *Evidence Act* and the case of *Palace Investment Ltd V Geoffrey Kariuki Mwenda & Another (2015) eKLR*. He submits that the SFT processed clearance certificate in favour of the Alfred Munga for the suit land and discharge of charge and transfer and issuance of title deed on 9th September, 2011. He submits that the Defendants denied any knowledge of the Plaintiffs who alleged that at the time they acquired the land, it was owned by the third party. He further submits that folio no. 12 showed that Nyarigi Motor Spares was a business name operated by Nancy Wangui, Mwangi Chege and Gladys Muthoni. He submits that the records availed by the SFT showed that until they changed the record and issued clearance certificate and discharge of charge in 2011, the suit parcel belonged to Nyarigi Motor Spares. He added that before SFT issued the discharge of charge and transfer in 2005, it sought clarification on settlement on the ground from the Director Land Adjudication and Settlement. He submits that the review, clearance, discharge and transfer of the suit land in favour of the Plaintiff was illegal. He added that such action could not have been done without according the third party and Defendants a hearing since the third party was on record as the owner of the plot and the Defendants in occupation. He added that there was no evidence of any investigation done by the Settlement Officer before further action was taken. He also submits that there was no evidence to show that Nyarigi Motor Spares was summoned to give evidence of how it acquired the plot. He relied on Article 40 of *the Constitution*.
43. He went on to submit that there was no charge on the suit land in favour of Alfred Munga Macharia as at 11th August, 2005. He submits that the charge in force was in favour of the third party. He argues that SFT bowed to political pressure and acted illegally. It was counsel's submission that the Plaintiffs failed to prove that they have a clean title which deserves protection by the court. He submits that the third party's legal documents were cancelled without giving her the opportunity to defend herself. He submits that the Defendants were in possession of the suit land as at 2011 thus enjoyed overriding interest. He relied on Section 143 of the Registered *Land Act*. He urged the court to dismiss the Plaintiffs suit and have the title deed held by them cancelled and a new title issued in favour of the third party to hold in trust for the Defendants.
44. Counsel for the Third Party on the other hand filed his submissions dated 20th June, 2025 where he identified one issue for determination being whether the plot number 95 Subukia Scheme was sold to Nyarigi Motors. He submits that the third party's husband who traded as Nyarigi Motors entered into an agreement with Alfred Munga for purchase of the plot. He submits that the property was first allocated to Alfred Munga by the Settlement Scheme in 1974 after which Munga executed a charge on the property which charge was cancelled on 30th August, 1974. He submits that the charge was cancelled for the reason that he intended to sell to the third party. He submits that a charge was executed by Gladys Muthoni, Waithira Mwangi and Nancy Mwangi who traded as Nyarigi Motor Spares. He added that on 11th August, 2005 the SFT executed a transfer for the suit land to Nancy Mwangi and Waithira Mwangi and on the same day a discharge of charge done. He submits that evidence from the settlement officer confirmed that the third party was the lawful owner. He further submits that it is



not in dispute that the third party sold the property to the Defendants who have been in occupation since 1994.

Analysis and Determination

45. I have considered the pleadings, evidence on record and submissions and I am of the view that the following issues arise for determination:
- a. Whether or not the Plaintiffs lawfully acquired L.R No. Nakuru/Subukia/95 the suit property.
 - b. Whether the Defendant is a bona fide purchaser for value.
 - c. Whether the Plaintiffs are entitled to the prayers sought.
 - d. Whether the Defendants Counter-claim is merited
 - e. Who should bear the costs of the suit.

Whether or not the Plaintiffs lawfully acquired L.R Nakuru/Subukia/95.

46. It was the Plaintiffs case that the land was originally allotted to Alfred Macharia Mwiga (deceased) the Plaintiffs father. PW2 testified that the plot belonged to their father and that the title was currently in the names of her two sisters, the 1st and 2nd Plaintiffs as the administrators to his estate. She produced a confirmation of grant dated 28th July, 2011 (PEX 43) and the title deed (PEX 44). It was their case that their father had attempted to sell 25 acres out of the 45-acre plot to Nyarigi Motors for Kshs 280,000/= in 1983 but only Kshs 70,000/= was paid and the balance was never received. The Plaintiffs confirmed that a charge dated 15th October, 1987 was registered in the name of Gladys Muthoni Wachira Munga and Nancy Mwangi, trading as Nyarigi Motors Spares. The Deputy Director of Land Adjudication and Settlement (PW1) confirmed that there was a cancellation of discharge of charge dated 4th March, 2011, and a letter from Hon. Orenge dated 2nd November, 2010 which requested for intervention. PW1 confirmed that the discharge and transfer documents were cancelled. He also confirmed that there were numerous anomalies in the file regarding the transfer process such as Alfred Munga having signed the transfer on 21st October, 1983, but the board having sat on 31st October, 1983. He confirmed that there were no original documents, all tendered documents were photocopies and that the Certificate of Consent was never given. Anna Wanjiku Karugia (PW3) confirmed that the Defendants entered the land in 1995, and her mother only became aware of the same in 1998. She admitted that she never lived on the land, and that her mother only worked on it but never lived there while her father last lived there in 1975.
47. It was the Plaintiffs case that the third party never acquired a good title and was also in breach of the agreement.
48. The Defendant and Third Party on the other hand contend that Plot No. 95 Subukia Settlement Scheme belonged to Nancy Wangui Mwangi and Waithera Mwangi. DW1 contend that the Defendants have been in possession of the land since 1994 without any interruptions. 3rd PW1 confirmed that the suit land belonged to her husband, Mwangi Wa Chege, who bought it from Alfred Munga and that after her husband's death, she and Nancy Mwangi (her co-wife) became the owners. It was her case that they sold the land through an agent and thereafter gave the Defendants possession of the land. DW1 stated that they bought the land and paid for it vide a sale agreement with advocates. He also stated that they did a search in 1994, which confirmed that the land was proper. They contend that Folio 36A and a discharge of charge dated 11th August, 2005 showed that the plot belonged to Nancy Wambui Mwangi and Waithira Mwangi. The third party admitted that together with Nancy



Mwangi, they signed the transfers. She also admitted that they sold the land between 1994 and 1995, before the confirmation of grant. She also admitted that she had never been to the land and that she did not have a copy of the Sale Agreement or evidence of the Kshs.280,000/= payment. She confirmed that the Grant (TP Exhibit 1) was confirmed on 9th November, 2000 and that the administrators of the land sold it in 1994 and 1995.

Section 24(a) of the *Land Registration Act* provides that:

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

Section 25 of the said act provides:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in the Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register and that nothing in the section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Section 26(1) of the *Land Registration Act* further provides that:

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

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

49. It is not in dispute that Alfred Macharia Munga (deceased) was the original allottee of the suit parcel. The Plaintiffs produced letters of administration issued to them on 26th July, 2011(PEX43) which letters confirmed that they were the lawful administrators of the deceased estate. They also produced a title deed in their name issued on 9th September, 2011(PEX44) having been transmitted to them from their late father. PW1 confirmed that the deceased paid Kshs. 10,000 bond in terms of the allotment letter. It is this court’s view that the terms of the allotment letter were met. It is my opinion that the evidence on record showed that the suit parcel of land was registered in the Plaintiffs names therefore they were entitled to the protection under Sections 24, 25 and 26 of the *Land Registration Act* 2012.



50. In the case of *Dina Management Limited V County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) cited the case of *Munyu Maina V Hiram Gathiha Maina* [2013] KECA, where the court 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.”

51. The Defendants on the other hand contend that the Plaintiffs title was fraudulently acquired. It was their contention that they purchased 25 acres out of the 45 acres of the suit parcel from the Third Party between 1994 and 1995 through an agent. It was however clear from the evidence and testimony that there was no written sale agreement. In the case of *Joseph Owiti Odema V James Okoko Kadu* [2020] eKLR the court held as follows:

“That it is apparent that the sale agreement between the Defendant and the late Paul Opolo Odema was of (sic) before the amendment of Section 3(3) of the *Law of Contract Act* Chapter 23 of Laws of Kenya in 2003, which came into effect on 1st June, 2003 to provide that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. That in any case subsection (7) excludes the application of subsection (3) to contracts made before the commencement of the subsection. That the court of Appeal in *Peter Mbiri Michuki Vs Samuel Mugo Michuki* [2014] eKLR pronounced itself on a related matter as follows: “25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the Plaintiff/Respondent had to satisfy the trial Court that he either took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re- evaluated the evidence, we concur with the finding of the learned Judge that the Plaintiff/Respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous...”

52. It is trite law that Section 3(3) of the *Law of Contract Act* does not apply to contracts made before the commencement of the said sub section which came into effect on 1st June, 2003.

53. In the instant case the Defendant claims that they entered into an agreement with the Third Party for sale of part of the suit parcel between 1994 to 1995 which before the said sub-section took effect. It is therefore this court’s view that oral evidence as to the fact of sale was admissible.

Section 107 of the *Evidence Act*, Cap 80, states:

“Whosoever 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.”

Further, Section 108 of the Act states:

“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.”



54. It is this court's view that the Defendant alleges fraud on the part of the Plaintiff in acquiring the suit property. The onus is therefore on the Defendants to prove the same.
55. The Court of Appeal in Mombasa, Civil Appeal No. 312 of 2012- Emfil Limited Vs Registrar of Titles Mombasa & 2 others [2014] eKLR held as follows:
- “Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.
56. Further, the Court of Appeal in Arthi Highway Developers Limited V West End Butchery Limited & 6 Others [2015] eKLR held as follows:
- “It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427: ‘Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged ...’”
57. The third party relied on the transfer from Alfred Munga to Nyarigi Motor Spares (3rd PEX3) which led to them allegedly selling to the Defendants. I have keenly perused the transfer vis a vis the Certificate of Registration of Nyarigi Motor Spares (3rd PEX4). It is not in dispute that the business was registered on 19th June, 1984 while the transfer was done on 21st October, 1983. The question therefore begs, how can a transfer of the suit parcel take place before the business was even registered? It is my view that the same raises question marks which was never explained by the Defendants and the Third Party. In addition, it was not in contention that the purchase price was never paid in full.
58. The Defendants contend that the Settlement Fund Trustee issued a charge to Gladys Muthoni Mwangi, Waithera Mwangi and Nancy Wangui Mwangi. They contend that the charge was registered in favour of the said ladies and after clearing the loan, they were issued with a clearance letter (DEX30) and a discharge of charge done (3rd DEX5). PW1 confirmed that the office issued a charge with 3 names while the letter of clearance (PEX43) had 2 names. He admitted that there were anomalies and complaints regarding the suit parcel that led to the discharge of charge being cancelled. DW1 admitted that the discharge to Nancy Mwangi and Waithira Mwangi was cancelled and that they had never received any title deed. Notably, the complaint raised with CID did not yield any outcome since there was no report done on the same. The Third Party confirmed that her grant (3rd TP Exhibit1) was confirmed on 9th November, 2000 but that the suit land was sold between 1994 and 1995. It is this court's view that the same does not seem to add up since if this court is to go by the said evidence, it meant that the third party never owned the suit parcel to sell to the Defendants. It is therefore my opinion that the Third Party clearly lacked the capacity to sell the suit land to the Defendants.
59. As brought out above, it is a fact that the Defendant and Third Party's evidence and testimonies contained a lot of irregularities and inconsistencies which were left unanswered. The Plaintiffs on the other hand explained the root of their title which despite the issue of the charge to the Third Party, the same was successfully clarified by PW1 thus confirming that the Plaintiffs lawfully acquired the suit parcel.



60. In the circumstance, it is this court's view that the Plaintiffs discharged their burden to the required standard in proving that they lawfully acquired the suit parcel. I therefore find that the Plaintiffs have proved their case on a balance of probabilities.
61. Further, this court finds that the Defendants failed to establish fraud on the part of acquisition of the Plaintiffs title and thus, they failed to prove their case on a balance of probabilities.

Whether the Defendant is a bona fide purchaser for value.

63. In the case of Samuel Kamere V Lands Registrar, Kajiado [2015] KECA 644 (KLR) the court held as follows:

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

64. DW1 did not adduce evidence to show that they purchased the suit property from the third party. It came out clear from the evidence and testimonies that the Defendants failed to conduct due diligence before the alleged purchase otherwise if they did, they would have established that the Third Party had not lawfully acquired the suit parcel. It is this court's view that the Defendants failed to fulfil the requirements of a bona fide purchaser. This court therefore finds that the Defendant is not bona fide purchaser for value.

Whether the Plaintiffs are entitled to the prayers sought.

65. Having established that the Plaintiffs proved their case on a balance of probabilities, they are therefore entitled to the prayers sought.

Whether the Defendants Counter claim is merited

66. The Defendants having failed to prove their case to the required standard, their counterclaim is thus without merit.

Consequently, the Plaintiff's plaint is hereby allowed as prayed.

67. I therefore enter judgment in favour of the Plaintiff against the Defendants jointly in the following terms:
 - a. An order of vacant possession on Plot No. 95 Kijabe-Hill (Subukia) (New Number L.R No. Nakuru/Subukia/95) is hereby issued.
 - b. An eviction order is hereby issued against the Defendant to vacate the suit property within 60 days failure which the OCS Nakuru Police Station shall ensure compliance with the said orders
 - c. Kshs. 200,000/= being General Damages for trespass.
 - d. Costs of the suit be borne by the Defendants and Third Party. It is so ordered.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

NAKURU ENVIRONMENT AND LAND COURT

2025-08-01

