



Macharia (Suing for and on behalf of Peter Macharia Wambugu - Deceased) v Algama Limited & 2 others; Commissioner of Police & another (Interested Parties) (Environment & Land Case 2360 of 2007) [2024] KEELC 979 (KLR) (26 February 2024) (Judgment)

Neutral citation: [2024] KEELC 979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2360 OF 2007**

**JO MBOYA, J
FEBRUARY 26, 2024**

BETWEEN

JOHN WAMBUGU MACHARIA (SUING FOR AND ON BEHALF OF PETER MACHARIA WAMBUGU - DECEASED) PLAINTIFF

AND

ALGAMA LIMITED 1ST DEFENDANT

MOHAMED ADAN 2ND DEFENDANT

SAKINA ADAN 3RD DEFENDANT

AND

COMMISSIONER OF POLICE INTERESTED PARTY

HON ATTORNEY GENERAL INTERESTED PARTY

JUDGMENT

Introduction And Background

1. The original Plaintiff, namely, Peter Macharia Wambugu, [now deceased], approached the Honorable Court vide Plaint dated the 20th December 2007; and in respect of which same sought for various reliefs.
2. Subsequently, the Plaint dated the 20th December 2007; was amended and thereafter further amended culminating into the Further Amended Plaint dated the 16th August 2022; wherein the Plaintiff has sought for the following reliefs;
 - i. Permanent injunction to restrain the 1st, 2nd and 3rd Defendants from interfering with the Plaintiff's quiet and un-interrupted possession of all that property known as Land Reference Number 7785/617 [I.R No. 56570] in Runda Estate, Nairobi.



- ii. Declaration that the Plaintiff's deceased father is the legal owner of Land Reference Number 7785/617 [I.R No. 56570] in Runda Estate, Nairobi.
 - iii. The Land Registrar is hereby ordered to effect the registration of the Title Deed for Land Reference Number 7785/617 [I.R No. 56570] in Runda Estate, Nairobi, in the name of the Plaintiff and do rectify their records accordingly.
 - iv. Costs of this suit and Interest therein at court rates.
 - v. Any other or further relief that this Honorable court may deem fit to grant.
3. Upon being served with the Further Amended Plaint, the 1st, 2nd and 3rd Defendants filed a Statement of Defense and Counterclaim dated the 5th April 2023; and in respect of which the named Defendants sought for the following reliefs; [verbatim]
- i. The Plaintiff's suit against the 1st, 2nd and 3rd Defendants be dismissed with costs.
 - ii. If the Plaintiff holds a Certificate of Title over the property Land Reference Number 7785/617 [I.R No. 56570], that certificate should be declared void and nullified.
 - iii. A declaration be issued that the Plaintiff violated the Defendants' Constitutional protection of the right to property as guaranteed vide Article 40 of the Constitution 2010.
 - iv. A declaration be issued that the 1st Defendant is the Legal owner of the property known as Land Reference Number 7785/617 [I.R No. 56570].
 - v. The Plaintiff does pay General Damages to the 1st, 2nd and 3rd Defendants for violating their right to own property.
 - vi. A permanent injunction be issued restraining the Plaintiff from trespassing or in any way interfering with the 1st Defendant's rights to quiet and peaceful possession of the property known as Land Reference Number 7785/617 [I.R No. 56570].
 - vii. Costs of the suit and counterclaim.
4. Suffice it to point out, that the subject matter came up for pretrial directions on the 29th June 2023; whereupon the Parties intimated to the court that same have since filed and exchanged all the requisite bundle of documents and witness statements. Furthermore, the Parties also confirmed that the matter was now ready for hearing.
5. Premised on the intimation by the advocates for the respective Parties, the Honorable court proceeded to and confirmed the matter ready and ripe for hearing.

The Parties' Cases:

A. Plaintiff's Case:

6. The Plaintiff's case revolves and gravitates around the evidence of one witness, namely, John Wambugu Macharia, who testified as PW1.
7. It was the testimony of the witness that same [witness] is a son, as well as the Legal Administrator of the Estate of Peter Macharia Wambugu, now deceased.



8. On the other hand, the witness testified that by virtue of being the Legal Administrator of the Estate of Peter Macharia Wambugu, now deceased, same is privy to and knowledgeable of the facts pertaining to and concerning the subject matter.
9. Other than the foregoing, the witness intimated to court that one Peter Macharia Wambugu, now Deceased, entered into and executed a sale agreement with the 1st Defendant over and in respect of the suit property.
10. It was the further testimony of the witness that upon entry into and execution of the sale agreement, Peter Macharia Wambugu, now Deceased, paid the deposit in accordance with clause 2.1 of the sale agreement and thereafter paid the balance of the purchase price, which was duly acknowledged and confirmed by the 1st Defendant.
11. Additionally, the witness testified that upon receipt of the entire purchase price, the 1st Defendant duly executed the requisite transfer instrument, over and in respect of the suit property, culminating into the transfer and registration of the suit property in the name of the Deceased.
12. Furthermore, the witness averred that upon the transfer and registration of the suit property to and in favor of the deceased, the deceased entered upon and took possession of the suit property. In any event, the witness averred that on or about the year 2007, the deceased advertised the suit property for sale and that upon the advertisement, the 1st, 2nd and 3rd Defendants' herein proceeded to and lodged a Caveat emptor.
13. It was the further evidence of the witness that as a result of the Caveat emptor, which was lodged and registered by the 1st, 2nd and 3rd Defendants, the deceased herein was denied the opportunity to deal with and/or dispose of the suit property.
14. Furthermore, the witness testified that arising from the offensive actions and/or activities by the 1st, 2nd and 3rd Defendants, the deceased was constrained to and indeed filed the instant suit, seeking to protect his rights and/or interests over the suit property.
15. Other than the foregoing, it was the testimony of the witness that despite the filing of the instant suit, the 1st, 2nd and 3rd Defendants proceeded to and interfered with the occupation and possession of the deceased. At any rate, the witness averred that currently the suit property is under the occupation and possession of the 1st, 2nd and 3rd Defendants.
16. Be that as it may, the witness testified that the suit property lawfully belongs to and is thus the property of the Estate of the deceased.
17. Other than the foregoing, the witness alluded to the witness statement dated the 24th April 2023; and thereafter sought to adopt and rely on the said witness statement. Instructively, the contents of the named witness statement were therefore adopted and constituted as the Evidence- in -chief of the witness.
18. On the other hand, the witness alluded to the List and Bundle of documents dated the 25th September 2008, containing four [4] documents and which, the witness sought to adopt and produce before the Honourable court.
19. Suffice it to point out that the documents at the foot of the List dated the 25th September 2008; were thereafter admitted and produced in evidence as Exhibits P1 to P4, respectively.
20. Furthermore, the witness also adverted to a Supplementary List and Bundle of documents dated the 24th April 2023, containing two [2] documents. However, the witness herein confirmed that despite



the Supplementary List of documents alluding to two [2] documents, only one [1] documents had been filed before the court.

21. Based on the foregoing, the witness implored the court to adopt and admit the single document as Further Exhibits before the court.
22. Pursuant to and at the instance of the witness, the single document at the foot of the Supplementary List dated the 24th April 2023; was admitted and produced as Exhibit P5.
23. Further and in addition, the witness adverted to the Further Amended Plaintiff dated the 16th August 2022; and sought to adopt and rely on the contents thereof; as well as the reliefs sought thereunder.
24. On cross examination, the witness averred that same has since tendered and produced before the court a copy of the sale agreement, as well as the transfer instrument, which were executed by the Parties. In any event, the witness also testified that the deceased proceeded to and fully paid for the purchase price.
25. Whilst under further cross examination, the witness averred that the purchase price was agreed in the sum of kes.3, 500, 000/= only, which amount the witness contended was duly paid to and in favour of the vendor.
26. Other than the foregoing, it was the testimony of the witness that the deceased first and foremost paid the deposit in the sum of kes.350, 000/= only. In any event, the witness added that the deposit was paid in accordance with the terms of the Sale agreement.
27. On the other hand, the witness testified that upon the payment of the total purchase price/ Consideration, the 1st Defendant surrendered all the completion documents, including the original Certificate of title. In this regard, the witness averred that the suit property was ultimately transferred to and registered in the name of the deceased.
28. Notwithstanding the foregoing, the witness averred that the transfer instrument, which had been executed by and on behalf of the 1st Defendant, has since been tendered and produced before the court.
29. It was equally the testimony of the witness that prior to and or before the transfer and registration of the suit property in the name of the deceased, the 1st Defendant herein surrendered her certificate of title to the deceased and thereafter the suit property was transferred to the deceased.
30. On further cross examination, the witness averred that even though same has tendered and produced before the Honourable court a copy of the Certificate of title, same [witness] admitted that there is also another Certificate of title, which has equally been submitted to the court.
31. Other than the foregoing, it was also the testimony of the witness that the transfer and registration of the suit property in the name of the deceased, was fully carried out and undertaken.
32. Whilst under further cross examination, the witness admitted that even though same alluded to the payment of the stakeholders sum; as well as the balance of the purchase price, same however conceded that no evidence has been tendered or produced before the court to show that the impugned payments were made.
33. Besides, it was the testimony of the witness that even though same is the lawful owner of the suit property, neither himself nor his deceased father was able to pay rates in respect of the suit property. In fact, the witness stated that no Rates payments receipts have been tendered before the court.
34. As concerns possession of the suit property, the witness stated that the suit property is currently under the possession and occupation of the 1st Defendant and not otherwise.



35. It was the further testimony of the witness that the suit property is situated and/or located within Runda Estate, in the City of Nairobi. In any event, when asked further, the witness contended that same is not a member of Runda Resident Association.
36. Whilst under further cross examination, the witness testified that same has filed the instant suit seeking to protect the deceased's rights and/or interests thereunder. Nevertheless, the witness confirmed that the suit property has never been under his custody, care and/or possession.
37. Finally, the witness averred that even though same has tendered and produced before the court a copy of the Certificate of title, showing that the deceased was/is the registered owner, same has since sought for an order to compel the Land Registrar to transfer and register the suit property before the court.
38. Based on the foregoing, it was the testimony of the witness that same is therefore entitled to the reliefs sought at the foot of the Further Amended Plaintiff.
39. On examination by the court, the witness stated that same has neither tendered before the court a copy of the Bankers cheque towards the payment of the deposit of the purchase price nor the balance of the purchase price. In any event, the witness also averred that same has not tendered any evidence to demonstrate that the purchase price was ever paid to and in favor of the 1st Defendant.
40. Other than the foregoing, the witness also testified that same has neither been paying rates over and in respect of the suit property.
41. Additionally, the witness testified that same [witness] has also not been paying rates to the City County Government of Nairobi. In any event, the witness averred that the suit property is indeed ratable.
42. Other than the foregoing, it was the testimony of the witness that neither the Deceased nor himself has been in occupation of the suit property or at all.
43. With the foregoing testimony, the Plaintiff's case was duly closed.

B. 1st, 2nd and 3rd Defendants' Case

44. The 1st, 2nd and 3rd Defendants' case is also premised on the Evidence of one witness, namely, Mohamed Adan. Same testified as DW1.
45. It was the testimony of the witness that same is the 2nd Defendant in respect of the suit herein. Furthermore, the witness averred that same is also a Director of the 1st Defendant company alongside the 3rd Defendant.
46. As concerns the subject matter, the witness averred that same is privy to and conversant with the facts attendant thereto. Furthermore, the witness averred that in respect of the instant matter, same has recorded a witness statement dated the 5th April 2023, which witness statement, the witness sought to adopt and rely on as his Evidence in chief.
47. For coherence, the witness statement dated the 5th April 2023; was thereafter adopted and admitted as the Evidence- in -chief of the witness.
48. Additionally, the witness alluded to a List and Bundle of documents dated the 5th April 2023, containing 34 documents and which the witness similarly, sought to adopt and rely on as Exhibits in the matter.
49. Suffice it to point out that in the absence of any objection to the documents, same were admitted and produced in evidence as Exhibits D1 to D34, respectively.



50. Other than the foregoing, the witness herein intimated to the court that the 1st, 2nd and 3rd Defendants had also filed a Statement of Defense and counterclaim dated the 5th April 2023. For good measure, the witness invited the court to consider the Statement of Defense and counterclaim and to rely on same.
51. On cross examination, by Learned counsel for the Plaintiff, the witness pointed out that the Certificate of title which has been produced and tendered before the court by the Plaintiff herein is a forgery. Furthermore, the witness added that the 1st Defendant company has neither entered into nor executed a sale agreement with one Peter Wambugu Macharia, now deceased.
52. It was the further evidence of the witness that even though the Plaintiff herein has tendered and produced a sale agreement, which is purported to have been executed by and on behalf of the 1st Defendant, the witness pointed out that neither the signature of the 1st Defendant nor his Co- Director, is contained in the impugned sale agreement.
53. Whilst under further cross examination, the witness averred that the signature alluded to and contained in the body of the sale agreement tendered before the Honourable court on behalf of the Plaintiff do not belong to any of the Directors of the 1st Defendant.
54. At any rate, the witness averred that at no point in time has the 1st Defendant sought to sell and/or dispose of the suit property. Other than the foregoing, the witness averred that if the 1st Defendant had sought to sell and transfer the suit property to and in favor of the deceased, then the 1st Defendant would have been obliged to surrender the original Certificate of title, to facilitate the transfer and registration of the suit property in the name of the deceased, which is stated not have been the case.
55. Further and in addition, the witness testified that the transfer instrument tendered and produced by the Plaintiff, does not also bear the signature of any of the Directors of the 1st Defendant. Finally, the witness averred that the 1st Defendant did not receive any purchase price or at all from the deceased, over and in respect of the suit property.
56. With the foregoing testimony, the 1st, 2nd and 3rd Defendants' case was duly closed.

Parties' Submissions:

A. Plaintiff's Submissions:

57. The Plaintiff herein filed written submissions dated the 8th December 2023; and in respect of which same has raised, highlighted and canvassed three [3] salient issues for consideration by the Honourable court.
58. Firstly, Learned counsel for the Plaintiff has submitted that one Peter Macharia Wambugu, now Deceased, lawfully entered into and executed a sale agreement with the 1st Defendant, over and in respect of the suit property.
59. Furthermore, Learned counsel for the Plaintiff has submitted that the sale agreement which was entered into and executed between Peter Macharia Wambugu , now Deceased, and the 1st Defendant was reduced into writing and same was duly executed by and on behalf of the respective parties. For clarity, Learned counsel for the Plaintiff has invited the court to take cognizance of the sale agreement dated the 26th June 2001.
60. Based on the foregoing, Learned counsel for the Plaintiff has contended that the sale agreement which was entered into and executed between Peter Macharia Wambugu, now deceased; and the 1st Defendant



herein, meets and complies with the provisions of Section 3(3) of the [Law of Contract Act](#), Chapter 23 Laws of Kenya.

61. Secondly, Learned counsel for the Plaintiff has submitted that even though the sale agreement which was executed by and on behalf of the 1st Defendant does not show that the signature of the Directors were duly attested to, lack of attestation of a signature does not vitiate and/or void a sale agreement, either as contended by the 1st, 2nd and 3rd Defendants or at all.
62. In support of the contention that lack of attestation of a signature does not vitiate and/or void a sale agreement, Learned counsel for the Plaintiff has cited and relied on the case of Mamta Peeush Premlal Mahajani vs Yashwant Kumar Mahajan [sued as the Executrix of the estate of Krishanlal Mahajan] (2017)eKLR.
63. Thirdly, Learned counsel for the Plaintiff has submitted that upon the sale and transfer of the suit property to and in favor of the deceased, the deceased entered upon and took possession of the suit property and hence, the rights of the deceased being rights of a person in possession of the property, constitutes Equitable rights which are binding on the suit property.
64. Based on the position that the deceased entered and took possession of the suit property, Learned counsel for the Plaintiff has invited the Honourable court to find and hold that the rights of the deceased pertaining to the suit property are therefore worthy of being protected and vindicated.
65. In support of the submissions pertaining to the rights of a person in occupation of a property, learned counsel for the Plaintiff has cited and relied on the holding in the case of Peter Mbiri Michuki vs Samuel Mugo Michuki (2014)eKLR.
66. Lastly, Learned counsel for the Plaintiff has submitted that insofar as the deceased bought and acquired the suit property, the Estate of the deceased therefore ought to be facilitated to enjoy and benefit from the rights attendant to ownership of the designated property.
67. Consequently and in this regard, Learned counsel for the Plaintiff has invited the Honourable court to find and hold that the Plaintiff has established and demonstrated a case worthy of attracting an order of permanent injunction.
68. To this end, Learned counsel for the Plaintiff has cited and relied on inter-alia the case of Giella vs Cassman Brown & Co Ltd (1973)EA 358; Mrao Ltd vs First American Bank of Kenya Ltd (2003)eKLR and Kenya Power & Lighting Company Ltd vs Sheriff Molana Habib (2018)eKLR, respectively.
69. Based on the foregoing submissions, Learned counsel for the Plaintiff has therefore implored the court to find and hold that the Plaintiff herein is entitled to the various reliefs sought at the foot of the Further Amended Plaint dated 16th August 2022.

B. Defendants' Submissions:

70. The Defendants' filed written submissions dated the 5th February 2024; and in respect of which same has raised, canvassed and highlighted four [4] pertinent issues for due consideration and determination by the Honourable court.
71. First and foremost, Learned counsel for the Defendants has submitted that even though the Plaintiff herein contends that Peter Wambugu Macharia, now deceased, entered into and executed a lawful sale agreement, the purported sale agreement is admitted not to have been executed in accordance with the provisions of Section 3(3) of the [Law of Contract Act](#), Chapter 23 Laws of Kenya.



72. In particular, Learned counsel for the Defendants has submitted that the purported signatures on behalf of the 1st Defendant [which are contended not to belong of the directors of the 1st Defendant] are admitted not to have been duly attested either as required by the law or at all.
73. Consequently and in this regard, Learned counsel for the Defendant has submitted that the impugned agreement cannot therefore be relied upon to anchor a claim pertaining to and/or concerning any interests over and in respect of the suit property.
74. Secondly, Learned counsel for the Defendant has also submitted that one Peter Wambugu Macharia, now deceased, who purports to have purchased the suit property neither paid the purchase price or at all. In this regard, Learned counsel for the 1st Defendant has contended that in the absence of consideration, no lawful contract and/or agreement can ensue and/or arise.
75. In support of the foregoing submissions, Learned counsel for the Defendants has submitted and relied in the case of William Muthee Muthami vs Bank of Africa (2014) and Moi University vs Zaipeline & Another Petition No. 43 of 2018 [2022]KESC, respectively.
76. Thirdly, Learned counsel has submitted that one Peter Macharia Wambugu, now deceased, who is said to have acquired title to the suit property, did not acquire any lawful title thereto.
77. Furthermore, Learned counsel for the Defendants has submitted that there is no way that the named deceased could have acquired title to and in respect of the suit land without the original Certificate of title being surrendered.
78. Fourthly, Learned counsel for the 1st Defendant has submitted that even though the Plaintiff has tended and adduced before the Honourable court a Copy of the Certificate of Title; the Plaintiff has however failed and/ or neglected to place before the Honourable court any background documents [process documents], to demonstrate that same acquired lawful title.
79. Furthermore, Learned counsel for the Defendants has submitted that it was not enough for the Plaintiff herein to wave on the face of the court a certificate of title without more and thereafter imagined that the existence of such a title, would suffice to prove the validity of such title.
80. To support of the submissions that it was incumbent upon the Plaintiff to prove his title, Learned counsel has cited and quoted the decision in the case of Daudi Kiptugen vs Commissioner of Lands and 4 Others (2015)eKLR.
81. Fifthly, Learned counsel for the Defendant has submitted that contrary to the contention by and on behalf of the Plaintiff, the Defendant herein has tendered before the Honourable court cogent and credible evidence.
82. In this regard, Learned counsel for the Defendants has intimated to the court that the 1st Defendant has neither sold to nor transferred the suit property to Peter Macharia Wambugu, now Deceased; or at all.
83. In any event, Learned counsel for the Defendant has also contended that if there was any such transfer of sale, [which is not the case], the Plaintiff herein would have been in a position to place before the Honourable court credible evidence including a sale agreement duly executed by the 1st Defendant, payments of the consideration, as well as a copy of the Register of the Land.
84. Be that as it may, Learned counsel for the Defendants has submitted that no such evidence has been placed before the Honourable court and hence the Plaintiff's case ought and should be dismissed with costs.



85. Lastly, Learned counsel for the Defendants has submitted that the Defendants' title to and in respect of the suit property has never been surrendered to the Land Registry nor canceled in any manner whatsoever.
86. Other than the foregoing, Learned counsel for the Defendants has submitted that the Defendants herein, have tendered credible and believable evidence that the suit property lawfully belongs to and in favor of the Defendants.
87. Consequently and in view of the foregoing, Learned counsel for the Defendants has therefore invited the Honourable court to find and hold that the counterclaim by and on behalf of the Defendants, has been duly established and proved and hence same ought to be allowed.
88. In a nutshell, Learned counsel for the Defendants has invited the Honourable court to proceed and dismiss the Plaintiff's case; and venture forward to allow the counterclaim.

Issues For Determination:

89. Having reviewed the pleadings filed by and on behalf of the respective Parties, and upon taking into account the Evidence tendered [both oral and documentary] and finally upon consideration of the written submissions filed by and on behalf of the respective Parties, the following issues do arise and are thus worthy of determination;
 - i. Whether Peter Macharia Wambugu, now deceased; ever entered into and/or executed a lawful sale agreement with the 1st Defendant.
 - ii. Whether Peter Macharia Wambugu, now deceased and by extension his Estate acquired any lawful rights and/or interest over the suit property.
 - iii. Whether the 1st Defendant is the Lawful Proprietor of the suit property and if so, whether same is entitled to the requisite protection by the court.

Analysis And Determination

Issue Number 1 And 2 Whether Peter Macharia Wambugu, now deceased ever entered into and/or executed a lawful sale agreement with the 1st Defendant. / Whether Peter Macharia Wambugu, now deceased and by extension his Estate acquired any lawful rights and/or interest over the suit property.

90. The Plaintiff herein has contended that one Peter Macharia Wambugu, now deceased, who was his Father, entered into and executed a sale agreement with the 1st Defendant, pertaining to and concerning the suit property.
91. Furthermore, the Plaintiff herein, who testified as PW1 thereafter proceeded to and produced before the court a copy of the sale agreement dated the 26th of June 2001; as well as the transfer instrument, underpinning the sale, transfer and ultimate registration of the suit property in favor of the deceased.
92. Even though the Plaintiff tendered various and/or assorted documents before the court towards proving that indeed the deceased bought the suit property from the 1st Defendant, the Plaintiff herein however conceded during cross examination that the sale agreement which was tendered before the court did not bear the seal of the 1st Defendant company.



93. In addition, the Plaintiff herein also admitted and acknowledged that the signatures, which were entered on the sale agreement on behalf of the 1st Defendant, were similarly not attested by any witness present at the time of (sic) the execution of the sale agreement.
94. For the sake of brevity, it is appropriate to reproduce the salient aspects of PW1's testimony whilst under cross examination by Learned counsel for the Defendant.
95. Same are reproduced as hereunder;
- “The transfer on behalf of the company [1st Defendant] was never attested by any advocate. I also wish to state that there was no seal of the company”.
96. From the foregoing testimony, it is evident and apparent that the contention that the 1st Defendant herein, which is a limited liability company, duly executed the sale agreement as well as the transfer instrument, is doubtful.
97. Other than the question that the the transfer instrument was never sealed with the seal of the company, there is also the issue as pertains to the payment of the deposit of the purchase price; as well as the balance of the purchase price, if at all.
98. To start with, though the Plaintiff herein testified that the deceased paid the entire purchase price, no evidence pertaining to the payment of (sic) the deposit of the purchase price or the balance of the purchase price, [if at all], was ever tendered or produced before the court. Indeed, the only critical document which was produced before the court was a copy of sale agreement and the transfer instrument, which the Plaintiff admitted were devoid of the 1st Defendant's company seal.
99. At any rate, it is not lost on this Honourable court that in the course of his testimony, the Plaintiff who testified as PW1 is on record to have testified as hereunder;
- “I have not brought to court and/or produce before the court a copy of the bankers cheque that was used to pay for the deposit. I have also not brought to court a copy of the bankers cheque that was used to pay for the balance of the purchase price. I have not brought any evidence to prove that the payments of the deposit and the balance of the purchase price were made. I have not brought any evidence of payment of rates. I have not been paying any rates. Nevertheless, I do confirm that the plot in question is Rateable”.
100. To my mind, it is the Plaintiff herein who contended that the suit property was lawfully sold and thereafter transferred to and in favor of Peter Macharia Wambugu, now deceased.
101. Insofar as the Plaintiff made the foregoing averments, it was incumbent upon the Plaintiff to tender and place before the Honourable court plausible and cogent evidence to establish and demonstrate that indeed there existed a lawful and binding contract, which underpinned the transfer of legal interests to and in favor of the deceased.
102. Simply put, the burden of proving that there was indeed a valid and lawful contract between the deceased and the 1st Defendant, laid on the shoulders of the Plaintiff and not otherwise. [See the provisions of Section 107, 108 and 109 of the [Evidence Act](#), Chapter 80 Laws of Kenya].
103. Furthermore, it is not lost on this court that where one, the Plaintiff not excepted seeks to demonstrate the existence of a valid contract, same [Plaintiff] must inter-alia demonstrate that there was consideration which was paid at the foot of the contract in question. Suffice it to point out that consideration need not be enough; but same must be sufficient and must be in any event be proved.



104. To underscore the significance of consideration in a contract, it suffices to adopt and reiterate the dictum of the Court of Appeal in the case of William Muthee Muthami versus Bank of Baroda (2014)eKLR, where the court stated and held thus;

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach. It is elementary learning, that as a general rule, according to the common law doctrine of privity of contract, rights and obligations under a contract are only conferred or imposed on the parties to that contract.”

105. Similarly, the importance of consideration in a contract like the one that underpins the Plaintiff's claim beforehand was also highlighted and amplified by the Supreme Court of Kenya in the case of Moi University versus Zaippeline & another (Petition 43 of 2018) [2022] KESC 29 (KLR) (Civ) (17 June 2022) (Judgment), where the court held thus;

“37. It is trite that for any contract to be valid at law, it must meet certain elements commencing with offer and acceptance. The essential components of a contract as was observed by Harris JA in *Garvey v Richards* [2011] JMCA Civ 16 ought to ordinarily reflect the following principles:

“[10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

106. In my humble view, it behooves the Plaintiff herein to demonstrate and/or prove to the court that the consideration, which was alleged and/or alluded to at the foot of the impugned sale agreement was indeed paid. However, to the extent that the Plaintiff did not tender and/or adduce any such evidence, the obvious inference is that no consideration was paid.

107. Pertinently, I beg to underscore that in the absence of consideration [which has not been demonstrated], the contract if at all upon which the Plaintiff herein bases his claim to the suit property stood vitiated and voided.

108. Thirdly, it is also important to recall that DW1 testified and contended that upon looking at the signatures which were purported to have been affixed by the Directors of the 1st Defendant on both the sale agreement and the transfer instrument, same pointed out that the impugned signatures did not belong to the known Directors of the 1st Defendant company.

109. Furthermore, the witness ventured forward and stated that the impugned signatures were a forgery.



110. For ease of reference, it is appropriate to reproduce the salient aspects of the testimony by DW1 whilst under cross examination by Learned counsel for the Plaintiff. Same testified as hereunder;

“The sale agreement does not have my signature thereon. The signature on the sale agreement are not mine. The other signature does not belong to the other director of the 1st Defendant. The sale agreement was/is a forgery”.

111. On re-examination by Learned counsel for the Defendants, DW1 is on record to have stated as hereunder;

“The 1st Defendant did not transfer the suit property to the Plaintiff herein. If we were to transfer the suit property, we would have been called upon to surrender the original certificate of title. I can see the sale agreement but I wish to state that the signatures thereon don't belong to me or the other director of the 1st Defendant company”.

112. Suffice it to point out that DW1 contended that the impugned signatures, which were contained in the body of the sale agreement and the transfer instrument, relied upon by the Plaintiff did not belong to the Directors of the 1st Defendant.

113. However, despite the position that was taken by DW1, the Plaintiff herein did not endeavor to and or procure any Forensic examination of the impugned signatures versus the known signature of DW1, with a view to vindicating that indeed the impugned sale agreement was executed by the Directors of the 1st Defendant.

114. To the extent that the Plaintiff did not endeavor to demonstrate the veracity of the signatures that were contained in the body of the sale agreement and the transfer instrument, the Honourable court was left with the denial by DW1, whose evidence seems more credible and thus believable than the one tendered by the Plaintiff.

115. There is no gainsaying that in civil litigation, the burden of proof lies on the Claimant or better still, the person who would fail, if no evidence was tendered. For clarity, in respect of the instant matter, the person who was chargeable with the burden of proof was the Plaintiff and not otherwise.

116. To this end, it is imperative to highlight and reiterate the holding of the Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR, where the court stated and held as hereunder;

“With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence , when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1st respondent that:

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



117. Other than the foregoing decision, the import and tenor of the burden of proof and the person chargeable therewith was also highlighted and elaborated upon by the Supreme Court of Kenya in the case of *Dr. Samson Gwer & 5 Others versus KEMRI* (2020)eKLR, where the court held thus;

“(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

(50) This Court in *Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

118. Before departing from the issue herein, it is also important to underscore that it is not enough for a Party, the Plaintiff not excepted, to merely wave a certificate of title on the face of a court and thereafter imagine that the display [Exhibition], of such a certificate of title, would suffice to attract a positive order as pertains to the validity and legality thereof.

119. To the contrary, it behooves all and sundry, the Plaintiff herein not excepted, to place before the Honourable court the requisite background information, material and evidence in an endeavor to demonstrate that the Certificate of title was procured lawfully, legally and in accordance with the laid down procedures established under the law.

120. Short of that, a court of law is obliged to vitiate, nullify and/or cancel a certificate of title, which, is evidently not predicated on any lawful or legal foundation; or better still, one which was procured un-procedurally, illegally and contrary to lawful process.

121. In respect of the foregoing exposition, it suffices to cite the dictum of the Court of Appeal in the case of *Munyu Maina versus Hiram Gathiha Maina* [2013] eKLR, where the court held and stated thus;

“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. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."

122. Before departing from the subject issue, it is also imperative to restate and reiterate the erudite holding of the Court in the case of *Hubert L. Martin & 2 Others versus Margaret J. Kamar & 5 Others*[2016] eKLR , where the court held as hereunder;

" 31. A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."

With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.

123. Arising from the foregoing analysis, my answer to the twin issues which were highlighted herein before are two-fold. Firstly, the Plaintiff herein has neither established nor demonstrated that there existed any lawful sale agreement between Peter Macharia Wambugu, [now deceased] and the 1st Defendant or at all.

124. Secondly, having failed to place before the court any material to underpin the impugned certificate of title in favor of Peter Macharia Wambugu, now deceased, it is evident that the deceased neither acquired nor obtained any lawful rights to and in respect of the suit property.

125. For coherence and good measure, a Certificate of title can only be validated on the basis of legitimate background documentation [material], that underpins same and not otherwise.

Issue Number 3 Whether the 1st Defendant is the Lawful Proprietor of the suit property and if so, whether same is entitled to the requisite protection by the court.

126. On behalf of the Defendants, evidence was tendered by DW1, who demonstrated that the 1st Defendant herein was indeed the lawful and legitimate proprietor over and in respect of the suit property. Furthermore, DW1 tendered to and availed before the Honorable court a certificate of title which was registered in the name of the 1st Defendant and in any event which was duly certified on the 24th May 2019.

127. Besides, DW1 also placed before the Honourable court a certificate of official search generated and issued on the 2nd August 2021, which vindicated the transfer and registration of the suit property in the name of the 1st Defendant.



128. Additionally, DW1 also tendered and produced evidence before the court pertaining to and concerning the payments of rates to and in favor of the City Council of Nairobi [now defunct] and by extension the County Government of Nairobi. For good measure, there is no doubt that the 1st Defendant has continued to pay rates in respect of the suit property to date.
129. Other than the foregoing, it is worthy to recall that the 1st Defendant herein was indeed the registered proprietor of the suit property beforehand. In any event, it is not lost on the court that it is the 1st Defendant who was contended to have sold and transferred the suit property to Peter Macharia Wambugu, now deceased.
130. Nevertheless, whilst discussing issues number 1 and 2, the court found and held that there was no valid sale and transfer of the suit property to Peter Macharia Wambugu, now Deceased, or at all.
131. From the foregoing position, it is therefore common ground that having neither sold nor divested same of her rights to the suit property, the 1st Defendant thus remains the lawful and legitimate proprietor of the suit property.
132. Moreover, by virtue of being the lawful and registered proprietor of the suit property, the 1st Defendant is therefore entitled to partake of and benefit from the statutory rights and interest attendant to such ownership.[See Sections 24 and 25 of the [Land Registration Act, 2012](#)].
133. Notwithstanding the foregoing, it is also appropriate to underscore that the scope and extent of the rights and interests that inhere in the registered owner of land have hitherto been highlighted and elaborated in a legion of case Law.
134. Notably, the scope and extent of the rights that accrue in favor of a registered proprietor of land were highlighted in the case of Mohansons (Kenya) Limited versus Registrar of Titles & 2 others [2017] eKLR.
135. For coherence, the court stated and held as hereunder;

(18) As held by the Court of Appeal for East Africa held in *Moya Drift Farm Ltd. v. Theuri* (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. *Spry, V-P* at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Sir William Duffus, P. *ibid* at p.117 agreed with *Spry, JA* as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”



136. Arising from the foregoing, it is my finding and holding that by virtue of being the registered proprietor of the suit property, the 1st Defendant is therefore entitled to absolute and exclusive occupation, possession and use of the suit property.
137. Having found and held that the 1st Defendant is the lawful and legitimate proprietor of the suit property, it thus follows that the 1st Defendant is therefore entitled to the requisite protection including the grant of an order of permanent injunction to prohibit the Plaintiff herein from interfering with her [1st Defendant's rights and interests thereto].

Final Disposition:

138. Having calibrated upon the various issues, [which were enumerated in the body of the Judgment and upon taking into account the totality of the evidence tendered], this court comes to the conclusion that the Plaintiff has not proved his case to the requisite standards.
139. To the contrary, the Defendants herein and in particular the 1st Defendant, has placed before the Honorable court sufficient material to prove that indeed the suit property belongs to and is registered in her name.
140. Consequently and in view of the foregoing, I proceed to and Do hereby make the following orders;
- i. The Plaintiff's suit be and is hereby dismissed.
 - ii. The Counterclaim by the 1st Defendant be and is hereby allowed as hereunder;
 - a. The certificate of title in respect of Land Reference Number 7785/617 [I.R No. 56570] in Runda Estate, Nairobi bearing the name of Peter Macharia Wambugu, now deceased be and is hereby revoked, nullified and canceled.
 - b. Consequently and in view of clause (a) herein above the Chief Land Registrar be and is hereby ordered to expunge the certificate of title, if any, bearing the name of Peter Macharia Wambgu, now Deceased, from the records of the land registry.
 - c. A declaration be and is hereby issued that the suit property, namely Land Reference Number 7785/617 [I.R No. 56570] in Runda Estate, Nairobi, lawfully belongs to and is the property of the 1st Defendant.
 - d. There be and is hereby issued an order of Permanent Injunction restraining the Plaintiff, either by himself, agents, servants, employees and/or anyone acting on behalf of the Plaintiff from entering upon, remaining on, interfering with and/or otherwise dealing with Land Reference Number 7785/617 [I.R No. 56570] in Runda Estate, Nairobi, in any manner contrary to the rights and interests of the 1st Defendant.
 - iii. Costs of the suit be and hereby awarded to the Defendants.
 - iv. Costs of the Counterclaim be and are hereby awarded to the 1st Defendant only to be borne by the Plaintiff.
 - v. Any other relief not expressly granted is hereby Declined.
141. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF FEBRUARY 2024.

OGUTTU MBOYA



JUDGE

In the Presence of;

Court Assistant: Benson.

Mr. Warutere for the Plaintiff.

Mr. Wakaba for 1st, 2nd and 3rd Defendants.

N/A appearance for the 1st and 2nd Interested Parties'

