



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 109 OF 2008**

**HOBSON NYANGAU ONCHURU .....PLAINTIFF**

**VERSUS**

**GEORGE N. MOGOI .....1<sup>ST</sup> DEFENDANT**

**TOM O. MOGOI .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**1. Introduction, Pleadings and Background**

The plaintiff by a plaint dated 17<sup>th</sup> September 2008 claims to have purchased from the 1<sup>st</sup> defendant a portion of land parcel number **Central Kitutu/Daraja Mbili/2380** measuring 93 feet by 92 feet which was subsequently subdivided into land parcels **Central Kitutu/Daraja Mbili/2859** and **2860** though the subdivisions are yet to be registered. The plaintiff claims that the 1<sup>st</sup> defendant has not been able to effect transfer of the portion of land purchased by the plaintiff because the 2<sup>nd</sup> defendant who is a brother of the 1<sup>st</sup> defendant objected to the sale. The plaintiff avers that the 2<sup>nd</sup> defendant forcibly entered onto the portion purchased by the plaintiff and denied the plaintiff access and use of the same.

2. The 1<sup>st</sup> defendant entered a memorandum of appearance, on 24<sup>th</sup> September 2008 through the firm of J. O Soire & Co. Advocates and the record does not show the 1<sup>st</sup> defendant filed any defence to the plaintiff's claim. To the contrary the 1<sup>st</sup> defendant did not object to the plaintiff's claim and indeed the 1<sup>st</sup> defendant and the plaintiff entered into a consent vide a letter dated 25<sup>th</sup> July 2011 where the plaintiff and the 1<sup>st</sup> defendant agreed thus:-

**1. That judgment be and is hereby entered in favour of the plaintiff in terms of prayer (a) of the plaint.**

**2. This matter to proceed for hearing between the plaintiff and the 2<sup>nd</sup> defendant and upon conclusion the 1<sup>st</sup> defendant will execute transfer documents in favour of the plaintiff.**

3. The 2<sup>nd</sup> defendant objected to the adoption of the consent on the basis that it's effect would have been to remove the 1<sup>st</sup> defendant from the proceedings yet the 2<sup>nd</sup> defendant's claim as against the 1<sup>st</sup> defendant was that the 1<sup>st</sup> defendant had fraudulently purported to sell a portion of the parcel of land to the plaintiff which both the 1<sup>st</sup> and 2<sup>nd</sup> defendants had jointly purchased. The court vide a ruling delivered on 16<sup>th</sup> December 2012 declined to adopt the consent and directed that the suit be fixed for hearing.

4. The 2<sup>nd</sup> defendant for his part filed a statement of defence and counter claim dated 30<sup>th</sup> April 2009. The 2<sup>nd</sup> defendant alleges that he and his brother (the 1<sup>st</sup> defendant herein) jointly purchased land parcel **Central Kitutu/Daraja Mbili/2380** but the 1<sup>st</sup> defendant secretly caused the land to *be registered in his sole name*. The 2<sup>nd</sup> defendant pleads the following particulars of fraud against the 1<sup>st</sup> defendant;

**(i) The 1<sup>st</sup> defendant caused the land to be registered in his names when it was bought jointly with the 2<sup>nd</sup> defendant.**

**(ii) The 1<sup>st</sup> defendant obtained a title deed in his names when the title deed ought to have been in the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants.**

**(iii) The 1<sup>st</sup> defendant omitted to include the 2<sup>nd</sup> defendant as the joint registered owner of the suit land.**

**(iv) The 1<sup>st</sup> defendant secretly registered himself as the owner of the land.**

5. The 2<sup>nd</sup> defendant further states when he discovered the 1<sup>st</sup> defendant had secretly registered the land they had purchased jointly in his sole name, he on 23<sup>rd</sup> January lodged a caution and subsequently filed civil suit No. 54 of 2008 in the Chief Magistrate's Court at Kisii on 17<sup>th</sup> September 2008 where the court issued restraining orders against the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant thus denied having trespassed onto the plaintiff's land portion and/or causing any damage to the plaintiff's building materials as alleged by the plaintiff. Instead the 2<sup>nd</sup> defendant counterclaims from the plaintiff the sum of kshs. 17,270/= being the value of materials the plaintiff allegedly forcibly took away from the 2<sup>nd</sup> defendant's workers at land parcel **Central Kitutu/Daraja Mbili/2380** as pleaded under paragraph 12 of the defence and counterclaim.

6. Lady Justice Sitati while delivering her ruling respecting the adoption of the consent between the plaintiff and the 1<sup>st</sup> defendant on 12<sup>th</sup> November, 2012 directed the parties to fix the suit for hearing and at the same time to consider whether it would be prudent to consolidate this suit with Kisii HCCC No. 157 of 2010. Okong'o, J. on 26<sup>th</sup> February 2013 ruled that the two suits could not be consolidated as the claims in the two matters were at variance and hence consolidation was not feasible.

7. The suit was partly heard before Hon. Justice Okong'o on 11<sup>th</sup> February 2015 and 18<sup>th</sup> March 2015 when the plaintiff testified and closed his case without calling any witness. The 1<sup>st</sup> defendant also testified and closed his case without calling any witness. The 2<sup>nd</sup> defendant testified and was cross examined and reexamined before Okong'o, J. but when the matter was fixed for further hearing on 30<sup>th</sup> November 2015 Okong'o, J. had left the station on transfer and directions were taken that the suit proceeds for hearing from where Okong'o, J. had left. I heard the 2<sup>nd</sup> defendant's 3 remaining witnesses on 18<sup>th</sup> April 2016 and the parties subsequently filed their final written submissions whereupon I reserved judgment.

#### **8. Evidence by the parties;**

The plaintiff testified that sometime in January 2008 he came across a poster where a plot measuring 100feet by 100feet was advertised for sale at Daraja Mbili and that when he called the telephone number indicated on the advertisement the 1<sup>st</sup> defendant affirmed that indeed he was selling the plot. Subsequently the plaintiff met the 1<sup>st</sup> defendant who showed him the plot and after negotiations the 1<sup>st</sup> defendant agreed to sell him a portion of land measuring 92 feet by 93 feet for the consideration of kshs. 550,000/=. The plaintiff stated that he visited the plot with two of his friends and that at the plot they met a lady, one Lucy Bosibori who was in possession and who he later learnt was a sister of the 1<sup>st</sup> defendant. According to the plaintiff the lady confirmed the property belonged to the 1<sup>st</sup> defendant. The plaintiff further stated he conducted a search on the property which confirmed the land parcel was LR No. **Central**

**Kitutu/Daraja Mbili/2380** and that the same was registered in the 1<sup>st</sup> defendant's name. The copy of the certificate of search dated 11<sup>th</sup> January 2008 was produced as **PEx1**. After the search the plaintiff stated that he entered into an agreement of sale with the 1<sup>st</sup> defendant dated 15<sup>th</sup> January 2008 and paid kshs. 450,000/= on execution of the agreement. The agreement was produced as "**PEx2**". After the agreement for sale the 1<sup>st</sup> defendant applied for and obtained consent from the land control board to subdivide land parcel **Central Kitutu/Daraja Mbili/2380** into 2 portions being parcel Nos. **2859** and **2860** but the mutation was not registered as the 2<sup>nd</sup> defendant registered a caution against the title on 23<sup>rd</sup> January 2008 as per certificate of official search dated 23<sup>rd</sup> February 2015 produced in evidence as "**PEx6**".

9. The plaintiff stated that he assembled various building materials at the plot which included 500 bricks, 5 lorries of hardcore valued at kshs. 40,000/=, building sand valued at kshs. 100,000/= and constructed a pit latrine at kshs. 70,000/=. The plaintiff further claimed to have planted 25 trees on the plot. The plaintiff averred that the 2<sup>nd</sup> defendant on 12<sup>th</sup> September 2008 trespassed on the **Plot No. 2860** which was the plaintiff's land portion and damaged a live fence valued at kshs. 10,000/= and removed the plaintiff's building materials by throwing them onto the road. He claimed the value of the materials damaged was worth kshs. 100,000/=. The plaintiff's claim was for the value of the damaged materials and for the 2<sup>nd</sup> defendant to be restrained from interfering with his parcel of land and for the 2<sup>nd</sup> defendant to be ordered to remove the caution so that the 1<sup>st</sup> defendant who is ready and willing can transfer the land to the plaintiff.

10. In cross examination by Mr. Omwenga, advocate for the 2<sup>nd</sup> defendant, the plaintiff confirmed that he was to take possession of the land after transfer to him which was expected to be done within 2 months from the date of the agreement. The plaintiff stated when they met Lucy Mogoi on the land she did not inform them that the land was jointly owned by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiff stated he had no documents to prove purchase of the bricks or sand. The plaintiff also stated that when he purchased the plot the same was fenced with kieapple plants and that he estimated the cost of the fence at kshs. 10,000/= which he paid to the 1<sup>st</sup> defendant. The plaintiff further stated he was not there on 12<sup>th</sup> September 2008 when the 2<sup>nd</sup> defendant trespassed onto his plot and damaged his building materials and that he was informed and rushed to the scene and found the damage had been done whereafter he made a report to the police and recorded a statement.

11. The 1<sup>st</sup> defendant, George Nyangena Mogoi testified as DW1 and he stated that the plaintiff purchased a portion of his land parcel **Central Kitutu/Daraja Mbili/2380** which is registered in his name as per title deed issued in his name on 1<sup>st</sup> November 2008. Copy of title deed dated 1<sup>st</sup> November 2007 produced as "**DEx1**". The 1<sup>st</sup> defendant stated that he purchased **land parcel 2380** over a series of transactions thus:-

(i) On 4<sup>th</sup> April 1984 he bought a portion measuring 100feet by 100 feet from one Agnes Kwamboka Orege and Regina Kerubo Mosirigwa through the law firm of D.C Bwokara & Company Advocates.

(ii) On 7<sup>th</sup> February 1990 purchased a portion measuring 90feet by 91feet from Kwamboka Orege, Francis Mose Orege and Kennedy Orege.

(iii) On 19<sup>th</sup> June 1990 purchased a portion measuring 35feet by 35feet from Kennedy Orege and Kwamboka Orege.

(iv) 19<sup>th</sup> April 1990 purchased a portion measuring 35feet only from Francis Mose Orege.

(v) 12<sup>th</sup> April 1991 purchased a poriotn measuring 5 feet only from Kwamboka Orege and Kennedy Orege.

(vi) 3<sup>rd</sup> October 1995 purchased a portion measuring 20 feet from Kwamboka Orege and Kennedy

Orege whereby they extended the plot by 20 feet.

12. The agreement dated 4<sup>th</sup> April 1984 was produced as “**DEx 2 (a)**” while the agreements dated 7<sup>th</sup> February 1990, 19<sup>th</sup> April 1990, 19<sup>th</sup> June 1990, 19<sup>th</sup> April 1991 and 3<sup>rd</sup> October 1995 were produced as **DEx. 2 (b), (c), (d) and (e)** respectively. The 1<sup>st</sup> defendant stated that all these pieces of land were consolidated and he was issued with one title namely **Central Kitutu/Daraja Mbili/2380**. The 1<sup>st</sup> defendant denied that the 2<sup>nd</sup> defendant was involved in any of the transactions with the sellers of the parcels of land and maintained that the 2<sup>nd</sup> defendant has no interest in **parcel number 2380**. The 1<sup>st</sup> defendant stated that he wished to complete the sale transaction he entered with the plaintiff and that he had no objection to the plaintiff’s claim.

13. The 1<sup>st</sup> defendant on cross examination by Mr. Momanyi advocate for the plaintiff confirmed having been paid the consideration of kshs. 550,000/= by the plaintiff but he had not transferred the land to the plaintiff due to opposition by the 2<sup>nd</sup> defendant who claims to have interest in **Plot No. 2380**. The 1<sup>st</sup> defendant on further being cross examined by Mr. Omwega advocate for the 2<sup>nd</sup> defendant stated that the land sold to him vide “**DEx 2(a)**” was **Central Kitutu/Daraja Mbili/1151** which was in the names of Agnes Kwamboka Orege and Regina Kerubo Mosirigwa. The 1<sup>st</sup> defendant maintained he bought the suit **land parcel No. 2380** from diverse people over a period of time and insisted that he did not buy the land jointly with the 2<sup>nd</sup> defendant.

14. The 2<sup>nd</sup> defendant, Tom Ogencha Mogoi testified and called 3 other witnesses in support of his defence case. In his defence the 2<sup>nd</sup> defendant stated that the 1<sup>st</sup> defendant was his elder brother and that Lucy Bosibori Mauti was his step sister while Francis Mose Orege was a son to Orege whose wives sold land to them (1<sup>st</sup> and 2<sup>nd</sup> defendants) in 1985 at Daraja Mbili which they purchased jointly. He stated that they purchased the land from two widows, Agnes Kwamboka Orege and Regina Mosirigwa Orege who were co-wives. The 2<sup>nd</sup> defendant stated that they purchased the land for the total consideration of kshs. 30,000/= out of which he contributed kshs. 20,000/= while the 1<sup>st</sup> defendant paid kshs. 10,000/=. The agreement was that the 1<sup>st</sup> defendant was to process the title to the land in their joint names. The 2<sup>nd</sup> defendant further stated when they were purchasing the land Francis Orege and their cousin one Orutwa were present.

15. The 2<sup>nd</sup> defendant further stated that after his brother, the 1<sup>st</sup> defendant, retired he relocated to their rural home in Magenche and left their step sister Lucy Bosibori residing on the suit land. In the year 2007 the 2<sup>nd</sup> defendant stated he got information that the 1<sup>st</sup> defendant had processed the title deed to the parcel land in his sole name and when he asked him why he did that the 1<sup>st</sup> defendant claimed that he had been left to process the title alone. This prompted the 2<sup>nd</sup> defendant to register a caution over the suit land and further instructed the firm of Sonye Ondari & Company Advocates to file suit against the 1<sup>st</sup> defendant vide Kisii CMCC No. 54 of 2008 where the 2<sup>nd</sup> defendant obtained an injunction restraining any further dealings with the suit property pending the hearing of the suit.

16. The 2<sup>nd</sup> defendant testified that the land was clearly delineated between him and his brother and that each had his portion. The 1<sup>st</sup> defendant’s land was the upper portion while his portion is on the lower side. The 2<sup>nd</sup> defendant stated that after he had registered the caution against the land he decided to fence his portion and in that regard he purchased materials as set out in **DEx.3** but before the fencing was completed the plaintiff came to the site with a group of people and took away the materials. The 2<sup>nd</sup> defendant states that he did not sell any land to the plaintiff and that the 1<sup>st</sup> defendant had no right to sell the land without involving the him (2<sup>nd</sup> defendant). The 2<sup>nd</sup> defendant stated he had no objection to the 1<sup>st</sup> defendant selling the portion that belongs to him after he transfers the portion that belongs to the 2<sup>nd</sup> defendant to him.

17. The 2<sup>nd</sup> defendant in cross examination by Momanyi advocate for the plaintiff stated that he learnt

late in 2007 that the 1<sup>st</sup> defendant was selling the land to the plaintiff and immediately visited the land and by that time the plaintiff had not done anything on the land. He stated that he spoke to the plaintiff and told him not to proceed with the transaction and to protect his interest he caused a caution to be registered in January 2008. The 2<sup>nd</sup> defendant stated that it was in September 2008 that he bought materials to fence his portion of the land and at that time the plaintiff was not on the ground when fencing commenced. The 2<sup>nd</sup> defendant further stated he had over time asked his brother to give him his share of the land but that never happened as the 1<sup>st</sup> defendant always had an excuse for not doing so. The 2<sup>nd</sup> defendant stated that his step sister, Lucy Bosibori was present when he advised the plaintiff not to buy his portion of the property.

18. DW3 Isaac Onyango Orutwa, DW4 Francis Mose Orenge and DW5 Lucy Bosibori Mauti testified before me on 18<sup>th</sup> April 2016. DW3 testified that he was a cousin of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, both of whom are brothers. He testified that in 1985 both came to where he was staying at Daraja Mbili and requested him to assist them to identify a parcel of land to buy in Kisii. The witness testified that he got a parcel of land at Daraja Mbili which belonged to one Agnes Kwamboka Orenge and her co-wife Regina Kerubo Mosirigwa and he invited the 1<sup>st</sup> and 2<sup>nd</sup> defendants to come and view the same. The witness stated that both defendants came and they viewed the plot and thereafter proceeded to one of the ladies houses where they discussed and agreed to buy the plot at the price of kshs. 30,000/=. DW3 stated that the defendants were purchasing the property jointly and that the 1<sup>st</sup> defendant paid kshs. 10,000/= while the 2<sup>nd</sup> defendant paid kshs. 20,000/= of the purchase price. He stated the defendants paid the money to the vendors in his presence at the bookshop of one Jackson Okech in Kisii town. According to the witness the defendants were only purchasing a portion of land from the vendors.

19. Under cross examination DW3 denied any knowledge of the several agreements the 1<sup>st</sup> defendant had tendered in evidence **DEx.2 (a) – (e)** and he averred that the agreements could not have been genuine. The witness maintained that he was present when the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly concluded the sale of the land from Agnes and Regina. He however stated he was not involved in the processing of the title and that he only came to learn that the 1<sup>st</sup> defendant had processed title and was solely registered as owner of the land they had purchased jointly in these proceedings.

20. DW4 Francis Mose Orenge a son of Agnes Kwamboka Orenge one of the vendors of the suit property testified that he knew both defendants and that his late mother and his aunt (step mother), Regina Kerubo Mosirigwa in 1985 sold a parcel of land to both defendants at the price of kshs. 30,000/=. The witness denied that his mother had sold any other land to the 1<sup>st</sup> defendant and further denied that he himself sold any land to the 1<sup>st</sup> defendant. The witness in particular denied any knowledge of the purported agreements of sale produced in evidence as **DEx2 (a) – (e)** by the 1<sup>st</sup> defendant. He denied executing any of the said agreements averring that the same are not genuine and that they are work of forgery as he never signed any of them.

21. The witness reiterated that his mother and stepmother sold the land to the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and that the defendants clearly demarcated the land into 2 portions where the 1<sup>st</sup> defendant occupied the upper portion and the 2<sup>nd</sup> defendant the lower portion. Under cross examination the witness stated he was present when the defendants paid the purchase price of kshs. 30,000/= to his mother and that his mother handed the title to the land to the 1<sup>st</sup> defendant before she died.

22. DW5, Lucy Bosibori Mauti is the step sister of both defendants and she testified that she has since 1996 resided on the parcel of land purchased by her two brothers. She stated she occupies the portion of the 1<sup>st</sup> defendant's land where she has built two houses. It was her further evidence that the parcel of land was clearly delineated into two portions and the 1<sup>st</sup> defendant owns the upper portion while the lower portion belonged to the 2<sup>nd</sup> defendant. She reiterated in her evidence that the land belonged to her two brothers, George and Tom. She stated that in 2008 some people came to the land and took measurements of the lower portion belonging to Tom, the 2<sup>nd</sup> defendant and further that when the 1<sup>st</sup> defendant attempted to fence his portion he was prevented by the plaintiff.

23. DW5 stated she became aware that the 1<sup>st</sup> defendant had sold the 2<sup>nd</sup> defendant's portion in 2008. She stated the 2<sup>nd</sup> defendant's portion was fenced even before the plaintiff purchased and that the plaintiff never put up any new fence even though he brought some building materials to the site.

#### 24. Analysis and determination

The parties following the close of the hearing exchanged written submissions. After reviewing the pleadings, the evidence and the submissions of the parties the issues that arise for determination can be summarized as follows:-

**(i) Whether the 1<sup>st</sup> defendant was validly registered as the sole proprietor of land parcel Central Kitutu/Daraja Mbili/2380.**

**(ii) Whether the 2<sup>nd</sup> defendant jointly purchased land parcel Central Kitutu/Daraja Mbili/2380 with the 1<sup>st</sup> defendant.**

**(iii) Whether the agreement of sale entered into between the plaintiff and the 1<sup>st</sup> defendant for the purchase of a portion of land parcel Central Kitutu/Daraja Mbili/2380 is enforceable as sought by the plaintiff.**

**(iv) What reliefs should the court grant?**

25. Though evidence has been adduced that shows the 1<sup>st</sup> defendant is the registered proprietor of land parcel **Central Kitutu/Daraja Mbili/2380** as per the certificate of official search and the copy of the title deed which both show the 1<sup>st</sup> defendant as the registered owner, the 2<sup>nd</sup> defendant has challenged that registration asserting that he and the 1<sup>st</sup> defendant purchased the suit property jointly. The 2<sup>nd</sup> defendant contends that the 1<sup>st</sup> defendant got himself registered as the sole proprietor fraudulently. The 2<sup>nd</sup> defendant led evidence to prove that he was a joint purchaser of suit property with his brother, the 1<sup>st</sup> defendant herein. The 2<sup>nd</sup> defendant called DW3 Isaac Onyango Orutwa who is their cousin who testified he was the one who identified the parcel of land which the 1<sup>st</sup> and 2<sup>nd</sup> defendants eventually purchased and that he was present when both defendants paid the purchase price with the 1<sup>st</sup> defendant contributing kshs. 10,000/= and the 2<sup>nd</sup> defendant contributing kshs. 20,000/= of the purchase price. DW3 was emphatic that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were purchasing the property jointly. DW4, Francis Mose Orange, a son of one of the two ladies who sold the parcel of land to the defendants, affirmed that his mother, Agnes Kwamboka and his step mother, Regina Kerubo Mosirigwa sold the land to both defendants in 1985 at the price of kshs. 30,000/=. The witness (DW4) denied that his mother or himself sold any other land to the 1<sup>st</sup> defendant separately. He specifically denied executing any agreement in favour of the 1<sup>st</sup> defendant and stated the agreements produced in evidence by the 1<sup>st</sup> defendant (**DEx. 2 'a' – 2'e'**) were not genuine and said they were forgeries. The witness stated the portions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants of the land they purchased were clearly demarcated on the ground. The 1<sup>st</sup> defendant's portion was the upper one while the 2<sup>nd</sup> defendant's was on the lower side.

26. DW5, Lucy Bosibori Mauti, who resided on the suit property but on the portion of the 1<sup>st</sup> defendant confirmed that the land was owned jointly by her two brothers. She stated the portions for each of her brothers were clearly delineated and that the 2<sup>nd</sup> defendant's portion was the lower one which the 1<sup>st</sup> defendant had unilaterally attempted to sell to the plaintiff but the 2<sup>nd</sup> defendant opposed the sale when he came to learn about it. The 1<sup>st</sup> defendant has in his submissions submitted that the 2<sup>nd</sup> defendant's claim of joint ownership of the suit property is not supported by any documentary evidence and the oral evidence adduced in support of his claim cannot override the written agreements produced by the 1<sup>st</sup> defendant as **"DEx.2(a) – (e)"**. The said agreements all of which are shown to have been signed by DW4, Francis Orange Mose either as a witness or as a party were disowned by the said Francis Orange Mose who denied signing them or being aware of them. On the face of this denial it is my view that the

agreements needed to be specifically proved by the 1<sup>st</sup> defendant which he did not do. I will therefore disregard them as evidence to this judgment.

27. The 1<sup>st</sup> defendant further submits that since the alleged agreement that the 2<sup>nd</sup> defendant relies on to back his claim for joint purchase has not been shown to have been in writing as required by the Law of Contract Act, Cap 23 Laws of Kenya, Section 3 (2) the transaction was null and void. According to the 2<sup>nd</sup> defendant, following the purchase he was granted possession of the lower portion of the parcel of land in part performance of the contract. The transaction was entered into before the repeal of section 3 (3) of the Law of Contract Act by Act No. 21 of 1991 which had validated transactions where a purchaser had in part performance of the contract taken possession of the property or part thereof. In the case of the 2<sup>nd</sup> defendant the lack of evidence in writing of the contract of sale would therefore not vitiate the contract of sale as there is evidence he had taken possession of his portion of the land.

28. The plaintiff has submitted that the 1<sup>st</sup> defendant is the sole registered owner of the suit property and as such registered owner his title is absolute and indefeasible in terms of Section 26 (1) of the Land Registration Act, 2012. The plaintiff asserts that he was entitled to deal with the 1<sup>st</sup> defendant as such on the basis of the certificate of official search which he obtained and which showed he was the registered owner (PEX1). The 2<sup>nd</sup> defendant, however challenges the title held by the 1<sup>st</sup> defendant on the basis that he is a joint owner of the subject land and asserts that the 1<sup>st</sup> defendant could only have been fraudulently registered as a sole owner and on that account the title he holds is liable to challenge under Section 26 (1) (a) of the Land Registration Act, 2012 which provides:-

**26 (1) 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, measurements, restrictions and conditions contained or endorsed in the certificate and title of that proprietor shall not be subject to challenge, except**

—

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

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

29. Having considered the evidence of the 2<sup>nd</sup> defendant and that of DW3, DW4 and DW5, I am persuaded that the 1<sup>st</sup> defendant bought the suit property jointly with the 2<sup>nd</sup> defendant. I find particularly the evidence of DW3 who is a cousin of the 1<sup>st</sup> and 2<sup>nd</sup> defendants credible as relates to the sale transaction involving the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the one hand and the mother and step mother of DW4 on the other hand. DW3 connected the defendants to the vendors and was present when the negotiations were carried out and when the payment was made. DW4 and DW5 confirmed that both defendants occupied the suit property and each of them had a distinct portion of the same which was well delineated. This is consistent with the defendants having jointly purchased the land. The 1<sup>st</sup> defendant took advantage of the absence of the 2<sup>nd</sup> defendant who was working away to have himself registered as the sole owner of the land. In doing that the 1<sup>st</sup> defendant acted fraudulently and he knew what he was doing was not right and it is no wonder when he got the title in November 2007 he swiftly wanted to dispose of the portion which he knew belonged to the 2<sup>nd</sup> defendant. Thank God the 2<sup>nd</sup> defendant got wind of it and he equally swiftly moved to register a caution to safeguard his interest.

30. Having held that both the 1<sup>st</sup> and 2<sup>nd</sup> defendants were joint purchasers of the suit property it follows that when the 1<sup>st</sup> defendant was registered as owner of the suit property on 4<sup>th</sup> June 2002 he was so registered to hold the land in trust for himself and the 2<sup>nd</sup> defendant. Thus the 2<sup>nd</sup> defendant had overriding interest of a trust in the suit property which in terms of Section 28 (b) of the Land Registration Act, 2012 does not require registration and in the premises the 1<sup>st</sup> defendant could not lawfully and

validly deal with the suit property without the involvement of the 2<sup>nd</sup> defendant. I have said enough to dispose of issues Nos (i) and (ii) which I answer affirmatively that the 1<sup>st</sup> defendant was not validly registered as the sole owner of land parcel **Central Kitutu/Daraja Mbili/2380** and that the 1<sup>st</sup> defendant had in fact purchased the said property jointly with the 2<sup>nd</sup> defendant.

31. As regards the third issue whether or not the agreement of sale entered into between the plaintiff and the 1<sup>st</sup> defendant is enforceable it follows that the court having held the 1<sup>st</sup> and 2<sup>nd</sup> defendants to be joint owners of the suit property, that the agreement between the 1<sup>st</sup> defendant and the plaintiff affecting the suit property cannot be enforceable. The 1<sup>st</sup> defendant could not deal with the suit property without the involvement of the 2<sup>nd</sup> defendant. The registration of the 1<sup>st</sup> defendant as sole owner was as a trustee on behalf of himself and on behalf of the 2<sup>nd</sup> defendant. It is only after the trust is discharged and the 1<sup>st</sup> defendant gets his portion of the suit land, would the 1<sup>st</sup> defendant be able to deal with the portion that is registered in his name exclusively. Until that is done the 1<sup>st</sup> defendant will continue to hold the suit land subject to the 2<sup>nd</sup> defendant's overriding interest of a beneficial owner.

32. There is another reason why the agreement between the plaintiff and the 1<sup>st</sup> defendant would be unenforceable. The transaction relates to sale of land that is subject to the provisions of the Land Control Act, Cap 302 of the Laws of Kenya. There is no evidence that the consent of the Land Control Board was sought and obtained as required under Section 6 (1) (a) of the Land Control Act which provides as follows:-

**6.(1) Each of the following transactions –**

**(a) The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within the land control area;**

**(b) .....**

**(c) .....**

**is void for all purposes unless the Land Control Board for the Land Control Area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**

The application for land board consent is under section 8 of the Act required to be made and obtained within six (6) months of the agreement for the controlled transaction. There is provision under the said Section 8 of the Act for the High Court to extend the period for obtaining the consent beyond the six (6) months if sufficient reason is shown.

33. The agreement between the plaintiff and the 1<sup>st</sup> defendant was entered into on 15<sup>th</sup> January 2008 meaning that the consent of the Land Control Board for the transaction should have been obtained by 15<sup>th</sup> July 2008. None appears to have been obtained and consequently after 15<sup>th</sup> July 2008 the agreement became null and void for all purposes. The court cannot enforce a void contract. Prayer (a) in the plaintiff's plaint virtually seeks the enforcement of the contract which has become void by operation of the law. The remedy for a party where the contract has become void is as provided under Section 7 of the Land Control Act to recover the money paid under the void contract from the person who was paid the money.

**34. Claim for damages by the plaintiff and 2<sup>nd</sup> defendant**

Both the plaintiff and the 2<sup>nd</sup> defendant claimed special damages for building materials allegedly damaged and/or converted by the other. The plaintiff claimed building materials valued at kshs. 100,000/=, fence worth 10,000/=, toilet kshs. 70,000/=, hardcore kshs. 40,000/= and value of 25 trees.

These are special damages claims which needed to be specifically proved. On the evidence taken before Okong'o, J. the plaintiff merely made generalized claims and did not tender evidence in proof. I decline to make any award for damages. The 2<sup>nd</sup> defendant for his part stated that he bought materials worth kshs. 17,250/= which he ferried to the site for purposes of fencing. He stated he was informed by the contractor that the plaintiff with a group of people picked the materials and took them away. No contractor testified and hence there is no proof that the plaintiff took away any materials belonging to the 2<sup>nd</sup> defendant. I find the claim for special damages not proved and I dismiss the same.

**35. Conclusion**

In the result, I find the plaintiff has not proved his claim on a balance of probabilities and I hereby order the same dismissed. The 2<sup>nd</sup> defendant's claim pleaded by way of an unconventional counterclaim has not been proved and equally I dismiss the same.

36. On the issue of costs I have considered that the plaintiff has been successful in resisting the claim by the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> defendant has successfully resisted the claim by the plaintiff. The 1<sup>st</sup> defendant was the trigger of the actions that led to the institution of these proceedings and for that matter cannot properly be a beneficiary of costs. In the circumstances of this matter the appropriate order in regard to costs is that each party should bear their own costs of the suit.

37. It so ordered.

**Judgment dated, signed and delivered at Kisii this 7<sup>th</sup> day of October, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the 1<sup>st</sup> defendant

..... for the 2<sup>nd</sup> defendant

..... Court Assistant

**J. M. MUTUNGI**

**JUDGE**