



**Nyakundi & 2 others v National Social Security Fund & another (Environment & Land Case 74 of 2018) [2024] KEELC 1012 (KLR) (20 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1012 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 74 OF 2018  
MD MWANGI, J  
FEBRUARY 20, 2024**

**BETWEEN**

**FELIX MECHA NYAKUNDI ..... 1<sup>ST</sup> PLAINTIFF  
STELLA NYABOKE OTWORI ..... 2<sup>ND</sup> PLAINTIFF  
FESTEMAGRA INVESTMENT LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**NATIONAL SOCIAL SECURITY FUND ..... 1<sup>ST</sup> DEFENDANT  
MORARA NGISA & CO ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs in this matter instituted this suit vide the plaint dated 18<sup>th</sup> July, 2016. In the Plaint, the Plaintiffs pleaded that they were the absolute and registered owners of Title No. Nairobi Block 140/561/31, Nairobi Block 140/571/34, Nairobi Block 140/263/70 and Nairobi Block 140/516/76 (hereinafter referred to as ‘the suit properties’). The Plaintiffs stated that the suit properties were previously owned by the 1<sup>st</sup> Defendant, National Social Security Fund (NSSF), who sold them to tenants under the tenant-purchase scheme. The Plaintiffs alleged that they purchased the properties under a sale and paid as instructed by the 1<sup>st</sup> Defendant and that any amount in surplus of the money payable to the 1<sup>st</sup> Defendant was to be paid to the original allottees.
2. The Plaintiffs stated that they paid a total of Kshs 25.6 million under the tripartite arrangement. Out of the total amount paid, Kshs. 21.3 million was paid to the 1<sup>st</sup> Defendant, whereas the balance was paid to the original allottees. The 2<sup>nd</sup> Defendant who was the Advocate representing the Plaintiffs processed the titles for all the 4 plots in favour of the Plaintiffs.
3. It is the Plaintiffs’ case that on or about the 4<sup>th</sup> July, 2016, the 1<sup>st</sup> Defendant without any lawful justification and or notice trespassed into, cramped and locked houses No. 031 and 034, two of the



properties/houses of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs and which were occupied by tenants. The 1<sup>st</sup> Defendant further threatened to take similar action in respect to the other two houses No. 070 and 076, unless they received (purchase) money from the Plaintiffs.

4. The Plaintiffs aver that after the above illegal action by the 1<sup>st</sup> Defendant, they contacted and notified the 2<sup>nd</sup> Defendant, who was their Advocate, who allegedly confirmed having released the full purchase price to the 1<sup>st</sup> Defendant in accordance with the terms and conditions of professional undertakings given to the 1<sup>st</sup> Defendant. Arising from the foregoing, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs' tenants in houses No. 031 and 034, issued the Plaintiffs a two months' notice to vacate the houses. The Plaintiffs plead that they stand to suffer immense financial losses as a consequence of the illegal actions by the 1<sup>st</sup> Defendant.
5. The Plaintiffs seek orders of a permanent injunction against the Defendants barring them from interfering, locking, harassing and or trespassing into the suit properties. Further, the Plaintiffs seek general damages for trespass and costs of the suit against the Defendants.

### **Response by the Defendants**

6. The 1<sup>st</sup> Defendant responded to the Plaintiffs' claim by way of a statement of Defence and Counter-Claim dated 8<sup>th</sup> August, 2016, filed in court on the same date.
7. The 1<sup>st</sup> Defendant asserted that it entered into agreements (Tenant – Purchase agreements) with George Ondari Ontere, Joseph Kimari M'Mwarania, Mercy Mildred Awour and Philomena Morara Apiemi (jointly with Wilkister Kemuma Nyangito) for houses No. 76, 34, 31 and 70, respectively. The tenant-purchasers however defaulted in the payment of the purchase price by instalments in accordance with their agreements with the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Defendant exercised its right of rescission and revoked the agreements accordingly.
8. The 1<sup>st</sup> Defendant asserted that the 2<sup>nd</sup> Defendant purporting to act for Equity Bank Ltd, as a financier for the 1<sup>st</sup> Plaintiff, gave professional undertakings in respect to the suit properties upon which undertakings, the 1<sup>st</sup> Defendant signed transfer documents and released them and other completion documents to the 2<sup>nd</sup> Defendant on diverse dates.
9. In spite of the release of the transfer documents and other completion documents, the 2<sup>nd</sup> Defendant did not pay and has never paid the amounts outstanding and payable to the 1<sup>st</sup> Defendant in accordance with the said undertakings. As at the date of filing the statement of Defence and Counter-claim, the outstanding amounts were as follows:
  - a. House No. 76 – Kshs 3,317,676.61, as at 31<sup>st</sup> July, 2016;
  - b. House No. 34 – Kshs 6,090,149.31, as at 31<sup>st</sup> July, 2016;
  - c. House No. 31 – Kshs 5,523,986.68, as at 31<sup>st</sup> July, 2016; and
  - d. House No. 70 – Kshs 1,700,173.55, as at 31<sup>st</sup> July, 2016.
10. The 1<sup>st</sup> Defendant asserted that it rescinded the agreements with the tenant-purchasers and on expiry of the rescission notices moved to repossess the suit properties as stipulated in the agreements. It was then that the 1<sup>st</sup> Defendant was shown titles in the names of the Plaintiffs. The 1<sup>st</sup> Defendant avers that the purported transfer and issuance of the titles to the Plaintiffs was fraudulent and unlawful and the same should be cancelled. The particulars of fraud are tabulated at paragraph 11 of the 1<sup>st</sup> Defendant's Statement of Defence and Counter-Claim.
11. The 1<sup>st</sup> Defendant counter-claimed against the Plaintiffs jointly and severally for:



- i. Payment of Kshs 16,631,986.15 with interest at the rate of 15% P.A. from the dates when the professional undertakings were furnished to NSSF until payment in full.
- ii. In the alternative and without prejudice to (a) above, cancellation of the titles in the names of the Plaintiffs and vacant possession of the properties.
- iii. Costs with interest.

### **Response by the 2nd Defendant**

12. The 2<sup>nd</sup> Defendant too filed a statement of Defence in response to the Plaintiffs' claim. It is dated 11<sup>th</sup> October, 2016. The 2<sup>nd</sup> Defendant while denying the Plaintiffs' claim against him averred that he had paid all the funds to the 1<sup>st</sup> Defendant as agreed. He denied any collusion with the 1<sup>st</sup> Defendant as alleged by the Plaintiffs in the plaint putting the Plaintiffs to strict proof.
13. Subsequently, the 1<sup>st</sup> Defendant joined the 4 tenant-purchasers as Defendants to its Counter-Claim pursuant to leave granted by the court on 18<sup>th</sup> September, 2019. It filed an amended Statement of Defence and Counter-Claim naming Fredrick George Ondari Ontere, Joseph Kimao M'warania, Mildred Mercy Owuor and Winfrida Nyahudu Muhalia as the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants in the Counter-claim, respectively.
14. The 1<sup>st</sup> Defendant sought judgment against the 8 Defendants jointly and severally for:
  - a. Payment of Kshs 16,631,986.15 with interest at the rate of 15% per annum from 31<sup>st</sup> July, 2016 until payment in full.
  - b. Aggravated damages for trespass together with interest.
  - c. In the alternative and without prejudice to the foregoing, cancellation of Title Deeds in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the Counter-claim and vacant possession of the suit properties.
  - d. Costs with interest.
15. From the Court's record, the 6<sup>th</sup> and 8<sup>th</sup> Defendants filed a Statement of Defence to the 1<sup>st</sup> Defendant's Counter-Claim. They denied the 1<sup>st</sup> Defendant's claim against them asserting that it did not disclose any cause of action against them. They denied any collusion or fraud on their part.

### **Evidence adduced at the hearing.**

16. This matter proceeded to full hearing. The Plaintiffs in this case called 2 witnesses. The 1<sup>st</sup> Defendant on its part called one witness. The 2<sup>nd</sup> Defendant in the main suit and the 5<sup>th</sup> – 8<sup>th</sup> Defendants in the Counter-claim did not call any witnesses. The witnesses testified in support of the parties' respective positions, adopting their witness statements which form part of the record of this court.
17. The 1<sup>st</sup> Plaintiff testified in this case as the 1<sup>st</sup> witness – PW1. He adopted his witness statement of 18<sup>th</sup> July, 2016 as his evidence in chief. He further produced the documents in his bundle which were marked as exhibits accordingly.
18. PW1 stated that he bought the 4 houses from NSSF on cash basis through electronic cash transfers to his Advocates, Morara Ngisa & Co. Advocates, the 2<sup>nd</sup> Defendant in this matter. In total, he asserted that he paid Kshs. 25.6 million. He confirmed that he had no direct contact with the 1<sup>st</sup> Defendant, NSSF, at any one time.



19. The executed transfer documents were presented to PW1 by his Advocate. PW1 however was categorical that he was not privy to the arrangements in form of the professional undertakings allegedly issued on his behalf by the 2<sup>nd</sup> Defendant to the 2<sup>nd</sup> Defendant.
20. PW1 averred that he moved to court when the 1<sup>st</sup> Defendant through his agents locked and cramped two of his houses yet he had the original titles. This was one year after the transactions. It was then that he was informed that no monies had been paid to NSSF as stipulated in the agreements he had signed for purchase of the houses.
21. Under Cross-examination by the Advocate for the 1<sup>st</sup> Defendant, PW1 confirmed that he was a Principal Land Registrar based at Kerugoya. When the transactions were going on, he was based at Thika in the same capacity.
22. PW1 stated that although he had bought 3 of the properties in his name, he had subsequently transferred them into the name of the 3<sup>rd</sup> Plaintiff company where he was a shareholder/director with his wife the 2<sup>nd</sup> Plaintiff in this case. None of the properties was in his name at the time of filing this suit. He had no proprietary rights in any of the properties as an individual yet he had sworn the verifying affidavit in support of the Plaint with authority of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs though he had not attached or produced the same.
23. PW1 was a director of the 3<sup>rd</sup> Plaintiff company but had no evidence before the Court to prove it.
24. At the time of purchasing the suit properties, they were owned by third parties. His Advocate, the 2<sup>nd</sup> Defendant though had told him that he was buying them from NSSF. He was not sure of the contents of the agreements he had signed. Everything was done for him by his Lawyer, the 2<sup>nd</sup> Defendant.
25. The 2<sup>nd</sup> Plaintiff was the wife of PW1. She had not personally bought any of the properties. The 1<sup>st</sup> Plaintiff had nonetheless registered one of the houses in her name.
26. Shown the agreements between him and the 5<sup>th</sup> – 8<sup>th</sup> Defendants in the Counter-claim, PW1 confirmed that he indeed signed the agreements with them. NSSF, the 1<sup>st</sup> Defendant was not a party to the said agreements.
27. PW1 reiterated that he was not aware of the purported professional undertakings issued by his Advocates, the 2<sup>nd</sup> Defendants. He only came to learn about the undertakings after he collected his files and documents from the 2<sup>nd</sup> Defendant's offices. He affirmed that he was not borrowing any monies from Equity Bank Ltd or at all to purchase the suit properties. He had trusted his Advocate with the transactions.
28. PW1 confirmed that the agreements between NSSF and the tenant-purchasers, under clause 7(b) thereof, the tenant – purchaser had given an undertaking not to sell or charge the suit properties or any part thereof until full payment of the purchase price.
29. Before signing the agreement with the tenant purchasers, PW1 confirmed that he was not shown by his Advocate any consents authorizing the sales by NSSF. There was also nothing notifying NSSF about the proposed change of ownership.
30. In responding to questions by Mr. Makori, Advocate for the 2<sup>nd</sup> Defendant, PW1 confirmed that he had no retainer agreement with the 2<sup>nd</sup> Defendant. Though he alleged to have paid him legal fees of Kshs 150,000/=, he had no receipt or an acknowledgement of any kind to confirm the payment. It was his claim that he was not issued with one upon making the payments.



31. The 2<sup>nd</sup> Plaintiff testified as PW2. She affirmed that she too was a director of the 3<sup>rd</sup> Plaintiff Company alongside the 1<sup>st</sup> Plaintiff. She adopted her witness statement dated 1<sup>st</sup> July, 2016 as her evidence in chief.
32. PW2 averred that she was not involved in the purchase transactions of the suit properties. The 1<sup>st</sup> Plaintiff had done it on her behalf and on behalf of the 3<sup>rd</sup> Plaintiff Company.
33. In response to questions by the Advocate for the 1<sup>st</sup> Defendant, PW2 stated that she did not pay any money towards the purchase of House No. 70 which was registered in her name. The title in her name was brought to her by her husband, the 1<sup>st</sup> Plaintiff. She was not even aware of the amount of rent paid by the tenants in occupation of the houses. She could not remember signing any agreement with NSSF.
34. In responding to the questions by the Advocate for the 2<sup>nd</sup> Defendant's, PW2 stated that she did not know the 2<sup>nd</sup> Defendant personally. She had not met him at any one time. She had not visited his office to sign either the agreements or the transfers.
35. On its part, the 1<sup>st</sup> Defendant called one witness by the name of Caroline Esendi Rakama (DW1), its acting Corporate Secretary. She adopted her witness statement dated 26<sup>th</sup> September, 2019 as her evidence in chief. she further produced as exhibits the 7 documents on the 1<sup>st</sup> Defendant's list of documents.
36. Responding to questions from the Advocate for the Plaintiffs, DW1 asserted that the Plaintiffs were strangers to NSSF. She however confirmed receiving the 4 professional undertakings from Morara Ngisa & Co. Advocates. They had executed transfer documents in favour of the 1<sup>st</sup> Plaintiff on the strength of the undertakings. They however had no agreements for sale with the Plaintiffs. They believed that the professional undertaking was legitimate at the time it was issued and presented to them.
37. In spite of the undertakings, DW1 insisted that the 1<sup>st</sup> Plaintiff was a stranger to her and to NSSF.
38. The 1<sup>st</sup> Defendant, according to the witness released the completion documents to the 2<sup>nd</sup> Defendant on diverse dates. The accounts for the 4 houses were however in the names of the original tenant-purchasers, all along. Even at the time of her testimony, they were still in the names of the original tenant-purchasers.
39. DW1 asserted that she was duped into releasing the completion documents on the strength of a fraudulent undertaking.
40. Responding to the Advocate for the 2<sup>nd</sup> Defendant, DW1 stated that prior to the issuance of the professional undertaking, the 1<sup>st</sup> Defendant had not issued the 2<sup>nd</sup> Defendant with 'preferred terms of a letter of undertaking' specifying the terms of the undertaking they were willing to accept from the 2<sup>nd</sup> Defendant.
41. There were variances of the prices indicated as the purchase price for the suit properties in the letters of undertaking and the transfer documents.
42. In re-examination, DW1 confirmed that none of the Plaintiffs in this case was a tenant-purchaser. NSSF had no agreement with either of the Plaintiffs. It was the original tenant-purchasers who purportedly sold the suit properties to the Plaintiffs without the knowledge and consent of NSSF.
43. DW1 in referring to the professional undertakings noted that the 2<sup>nd</sup> Defendant was to present for registration, the transfer (document) and the charge (document) simultaneously. She affirmed that they had not, to the date of her testimony, been notified of the successful registration of the transfer



and the charge. As per their records, the units were still in the names of the original tenant-purchasers. NSSF was yet to receive the full purchase price for the 4 units.

44. DW1 asserted that once they discovered that the professional undertakings were dubious, they concluded that it would have been an exercise in futility attempting to enforce them against the 2<sup>nd</sup> Defendant who was no longer in practice anyway. The 1<sup>st</sup> Defendant had not received any money either from the Plaintiffs or the 2<sup>nd</sup> Defendant.
45. The 2<sup>nd</sup> Defendant did not call any witness. The 5<sup>th</sup>-8<sup>th</sup> Defendants in the counter-claim too did not call any witnesses.

### **Directions by the court**

46. Upon close of the hearing, the court directed parties to file written submissions. The Plaintiffs and the 1<sup>st</sup> Defendant complied and filed their respective submissions. I have had the opportunity to read and consider the submissions for purposes of this judgement.

### **Issues for Determination**

47. From my reading of the submissions filed by the Plaintiffs and the 1<sup>st</sup> Defendant, both sides are in agreement that the main issue for determination in this case is whether the 1<sup>st</sup> Plaintiff lawfully purchased the 4 units from the 1<sup>st</sup> Defendant. The other issues will flow from the finding on that main issue. The issues then for determination are:-
  - a. Whether the 1<sup>st</sup> Plaintiff and 2<sup>nd</sup> Plaintiff lawfully purchased the suit properties from the 1<sup>st</sup> Defendant.
  - b. Whether the subsequent transfer to the 3<sup>rd</sup> Plaintiff or other third parties is lawful.
  - c. Whether the Plaintiffs are entitled to the orders sought.
  - d. Whether the 1<sup>st</sup> Defendant is entitled to the orders sought against the Defendants in the counter-claim and if so, against which party.
  - e. What orders should be made with regard to the costs of the suit and the counter-claim.

### **Analysis and Determination**

48. The Plaintiffs in their plaint alleged that they purchased the suit properties under a sale and paid as instructed by the 1<sup>st</sup> Defendant and that any amounts in surplus were to be paid to the original allottees. In their submissions, the Plaintiffs submitted that the purchase transactions were carried out on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs by the 2<sup>nd</sup> Defendant, as an Advocate. As it clearly emerged during the hearing, none of the Plaintiffs directly negotiated or engaged with the 1<sup>st</sup> Defendant. They did not sign any sale agreement with the 1<sup>st</sup> Defendant either. At no point in time did they agree on the purchase price or terms of the sale of the houses with the 1<sup>st</sup> Defendant.
49. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs confirmed that they executed the documents of transfer that were presented to them by the 2<sup>nd</sup> Defendant, their Advocate, in respect of all the 4 units. The consideration/purchase price was allegedly forwarded through the 2<sup>nd</sup> Defendant for onward transmission to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Plaintiff insisted that he paid the purchase price in full for each of the 4 units in one instalment and not through any other arrangements to the 2<sup>nd</sup> Defendant. He was categorical that he was not being financed by Equity Bank Ltd or any other financier for that matter.



50. The 1<sup>st</sup> Plaintiff denies giving the 2<sup>nd</sup> Defendant any instructions to issue any undertaking on his behalf since he was purchasing the units in cash. There was clearly no need for such undertakings. The 1<sup>st</sup> Plaintiff in his testimony stated that he came to learn about the purported undertakings when he obtained his files/documents from the 2<sup>nd</sup> Defendant's former offices.
51. From the evidence adduced before the court, the undertakings were purportedly issued on behalf of the Financier, Equity Bank Limited. The 1<sup>st</sup> Plaintiff was named as the borrower. In the undertakings, the 2<sup>nd</sup> Defendant, gave an unconditional, unequivocal and irrevocable professional undertaking to pay the amounts stated therein within 14 days of successful registration of the transfer and the charge (in favour of Equity Bank Ltd).
52. The Plaintiffs, despite their denial of the undertaking, submit that the 1<sup>st</sup> Defendant was agreeable to the undertakings or rather accepted the undertakings and on that basis proceeded to dispatch all the necessary documents to transfer the units to them i.e. the duly sealed and executed transfer of lease in triplicate; copy of the Managing Trustee's PIN & ID; Copy of the Fund Chairman's PIN and ID; Minister's consent to transfer; NSSF's Pin Certificate; Consent to transfer; certified copy of Land Rent Certificate, and Council's offset letter. That is how comes the titles were transferred and issued to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.
53. The Plaintiffs despite the evidence of the 1<sup>st</sup> Plaintiff under oath, denying issuing instructions for the undertaking and insisting that he paid in cash, insists that the 1<sup>st</sup> Plaintiff acquired the title to the 4 units lawfully and therefore had the right to transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff.
54. This is the true meaning of the phrase, 'approbating and reprobating' at the same time.
55. The 1<sup>st</sup> Defendant's position was that the transfer of the titles to the Plaintiffs was not lawfully obtained. The 1<sup>st</sup> Defendant submits that there was no sale agreement between the 1<sup>st</sup> Defendant and Plaintiffs in respect to the suit properties in the first place.
56. The 1<sup>st</sup> Defendant referred to Section 3(3) of the *Law of Contract Act* as read together with Section 38 of the *Land Act*. It cited 2 decided cases in support of its position. The Case of Lucy Wangui Mwaura –vs- Linet Achieng Amala [2019] eKLR, & the case of Moses Njaramba Kamau – vs – Mary Muthoni Njaramba (2017) eKLR, where it was held that a valid transfer of land must be preceded by a Sale agreement and a transfer document duly executed by the parties.
57. In the latter case, the court was emphatic that Section 3(3) of the *Law of Contract Act* sets out the requirements for a valid contract for sale of Land. Being a prerequisite anchored under the Law, nothing valid would come out of an invalid contract.
58. The 1<sup>st</sup> Defendant emphatically submitted that though the Plaintiffs pleaded in their plaint that they purchased the suit property under a sale and paid the full purchase price, no such evidence was adduced before the court. Again, the allegation of a tripartite arrangement pleaded at paragraph 9 of the plaint was not also proved.
59. The 1<sup>st</sup> Plaintiff indeed admitted during cross-examination that there were no agreements for sale between him and the 1<sup>st</sup> Defendant in respect to all the 4 units the subject matter of this suit. Neither was there any evidence of direct payment to the 1<sup>st</sup> Defendant.
60. It was the 1<sup>st</sup> Defendant who had the transferrable interest in respect to all the four units at the material time by virtue of being the registered proprietor of the suit properties.



61. The 1<sup>st</sup> Defendant pointed out that the sale agreements produced by the Plaintiffs in relation to the suit properties and to which the Plaintiffs were parties are the sale agreements between the 1<sup>st</sup> Defendant's tenant purchasers and the. These agreements are invalid since the 1<sup>st</sup> Defendant was not a party to them neither had the 1<sup>st</sup> Defendant consented to them. The tenant purchasers could only sell the suit properties upon the prior written consent of the 1<sup>st</sup> Defendant. According to the 1<sup>st</sup> Defendant, no such prior consent was sought and none was given prior to the purported agreements. Again, it is pointed out that the tenant purchasers did not have transferrable titles to the suit properties which they could pass to the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs.
62. The 1<sup>st</sup> Defendant referring to the decision by the Supreme Court of Kenya in the case of Torino Enterprises ltd v A.G (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September, 2023) (Judgment), submitted that one cannot pass a good title to a third party unless and until he acquires a valid title to the land through registration under the applicable Law.
63. For starters, I entirely agree with the submissions by the 1<sup>st</sup> Defendant that there were no sale agreements between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Plaintiff purportedly entered into agreements with the tenant purchasers which he is attempting to enforce against the 1<sup>st</sup> Defendant in this case.
64. The tenant purchasers had not acquired proprietary rights on the suit properties at the time of the purported agreements with the 1<sup>st</sup> Plaintiff. The tenant purchasers as expressly stated in their agreements with the 1<sup>st</sup> Defendant could not lawfully sell or charge the suit properties or any part thereof until they had made full payment of the purchase price. They could not assign their rights to a third party without the express authority/consent of the 1<sup>st</sup> Defendant. They could therefore not pass a good title to the 1<sup>st</sup> Plaintiff. Consequently, the 1<sup>st</sup> Plaintiff could not pass a good title to third parties.
65. At this juncture I need to address the purported undertakings issued by the 2nd Defendant on behalf of a supposed financier, Equity Bank Ltd. The 1st Plaintiff in his testimony and submissions is categorical that he had not approached Equity Bank Ltd or any other financier for that matter, to finance him to purchase the 4 units, the subject matter of this suit. He was buying in cash and did not therefore need any financing. He did not instruct the 2nd Defendant to issue any undertaking as he purported to.
66. I must call the purported undertakings for what they are. They were fictitious creations of the 2nd Defendant to perpetrate fraud; they were instruments of fraud. They were meant to dupe NSSF that Equity Bank Ltd was financing the purchase of the four units on behalf of "the borrower". That way, NSSF would release the completion documents to the 2<sup>nd</sup> Defendant confident that their monies would be paid by the bank. That was indeed how the 2<sup>nd</sup> Defendant was able to secure the completion documents from the 1st Defendant and transfer them into the name of the 1<sup>st</sup> Plaintiff (and the 3rd Plaintiff) without paying a dime to the 1<sup>st</sup> Defendant.
67. Certainly, the 2nd Defendant must have been working in cahoots with some officers of the 1st Defendant who 'accepted' the fraudulent undertakings in spite of the fact that the 1st Defendant had not signed any agreements with the purported purchasers.
68. Under 'the undertakings', the 2<sup>nd</sup> Defendant was expected to have simultaneously transferred the titles into the name of the 1st Plaintiff and charged them in favour of Equity Bank Ltd. However, as is now apparent from the evidence before the court, Equity Bank Ltd was just a decoy. Equity Bank Ltd was not involved in any way whatsoever in the transactions herein. The 1<sup>st</sup> Defendant had not borrowed any money from Equity Bank Ltd.



69. In spite of transferring the suit properties into the name of the 1st Plaintiff, the 2nd Defendant did not pay the monies under 'the undertakings' to the 1st Defendant. In his statement of Defence, he has alleged that he paid the monies received from the 1<sup>st</sup> Plaintiff to the 1st Defendant. This is categorically denied by the 1<sup>st</sup> Defendant.
70. The burden of proof then was upon the 2<sup>nd</sup> Defendant to prove payment of the monies to the 1<sup>st</sup> Defendant as alleged in his statement of Defence.
71. In an adversarial system like ours, the burden of proof is always on he who alleges to prove. This position is well captured under Section 107 of the Evidence Act which provides that: -  
“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
72. Halsbury’s Law of England 4<sup>th</sup> Edition, Volume 17 puts it so well that:-  
“The legal burden of proof is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect to a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case.”
73. The legal burden is discharged by way of evidence. No such evidence was adduced by the 2<sup>nd</sup> Defendant before the court. The 2nd Defendant did not testify in this case. The allegations in his statement of Defence therefore remain just that, allegations.
74. The import of the failure by the 2<sup>nd</sup> Defendant to call evidence is best summarized by the holding in the case of Janet Kaphiphe Ouma & v. Marie Stopes International(Kenya) Limited (Kisumu HCCC No. 68 of 2009) where Lady Justice Ali Aroni J. (as she then was), cited with approval the holding in the case of Edward Muriga v Nathaniel D. Schulter (Civil Appeal No. 23 of 1997) where the court stated that:-  
“ Apart from filing its statement of defence, the Defendant did not adduce any evidence in support of the assertion made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remain a mere assertion.”
75. Undoubtedly therefore, the transfer of the suit properties to the first Plaintiff was obtained by deception and fraud.
76. Secondly, and without prejudice to the above finding, the tenant purchasers had not acquired good titles to the suit properties for the reason that they had defaulted and the 1st Defendant had rescinded their agreements. In any event they were under the agreements with the 1<sup>st</sup> Defendant barred from selling or parting with the titles to the suit properties until and unless they had paid the full purchase price; otherwise any such assignment was to be with the consent of the 1<sup>st</sup> Defendant. No such consent was obtained to sell to the 1<sup>st</sup> Plaintiff or to any other person. The subsequent agreements between the tenant purchasers and the 1<sup>st</sup> Plaintiff were for all intents and purposes void, ab initio.



77. In the old English case of *Macfoy v United Africa Co. Ltd.* [1961] 3 All ER, 1169, it was well stated that:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

78. Finally, under section 3(3) of the *Law of Contract Act* it is mandatory that a valid transfer of land must be preceded by a written Sale agreement in writing signed by all the parties and attested.

79. Being a prerequisite anchored under the law, no suit then would be sustainable based upon a contract for disposition of land unless the prerequisites had been met.

80. Section 3(3) of the *Law of Contract Act* Chapter 23 which came into force on 1st June, 2003 states in part, as follows:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless:

- a) the contract upon which the suit is founded:
  - i. is in writing
  - ii. is signed by all the parties thereto; and
- b). the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

81. The 1<sup>st</sup> Plaintiff who is a Principal Land Registrar feigns ignorance of all the foregoing. I am not persuaded that the 1<sup>st</sup> Plaintiff was an innocent bystander who was unaware of what his Advocate, the 2<sup>nd</sup> Defendant was up to. The 2<sup>nd</sup> Defendant was his duly authorized agent for purposes of the transactions involving the suit properties.

82. Whereas the 1<sup>st</sup> Plaintiff signed the sale agreements with the tenant-purchasers, the transfer documents that followed and which he also personally signed were executed on behalf of NSSF, as the transferee. He nevertheless signed the same without raising any queries.

83. Secondly, the action of the 1<sup>st</sup> Plaintiff of transferring all the titles to the suit properties to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs immediately after acquiring them and for no apparent reason raises a lot of suspicions. He was cagey when asked about the reasons for the transfers to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs by the Advocate for the 1<sup>st</sup> Defendant.

84. From whatever angle one looks at it, the 1st Plaintiff couldn't have lawfully acquired titles to the suit properties. The subsequent transfers to the 2nd and 3rd Plaintiffs were consequently unlawful. That means that the Plaintiffs' case cannot succeed. It is premised on fraud and illegalities.

85. The law has long been established that the courts will not enforce illegalities.



86. In the case of *Royal Media Services v Independent Electoral and Boundaries Commission and 3 others* [2019] eKLR, the court pronounced itself in the following words:-

“Judicial tradition in this Country is to frown upon illegal contracts. Regard must be given to the doctrine of *Ex turpi causa non oritur action*, that is from a dishonorable cause an action does not arise.”

87. In the case of *Kenya Airways Ltd v Satwant Singh Flora* [2013] eKLR, the court stated that,

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him.”

88. In the case of *Kenya Pipeline Company Ltd v Glencore Energy (UK) Ltd* (supra) the court the upheld and endorsed the case of *Holman v Johnson* [1775-1803] ALLER 98, where Chief Justice Mansfield stated: -

“The principle of public policy is this;

*Ex dolo malo non ovitur citior*. No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause appears to arise *ex turpi causa*, or the transgression of a positive law of the country, then the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”

89. This court being a court of law will not lender its aid to the Plaintiffs whose claim is founded on illegalities and fraud. The Plaintiffs' claim must fail in its entirety.

90. Turning to the 1st Defendant's counter-claim, I note that the counter-claim is against the Plaintiffs, the 2nd Defendant in the main suit and the tenant purchasers who were joined as the 5<sup>th</sup> – 8<sup>th</sup> Defendants in the counter-claim.

91. One question that comes to mind is whether a Defendant can file a counter-claim against a co-defendant?

92. The Black's Law Dictionary, 11<sup>th</sup> Edition defines a counter-claim as,

“a claim for relief asserted against an opposing party after an original claim has been made; especially a Defendant's claim in opposition to or as a set off against the Plaintiff's claim.”

93. Halsbury's Laws of England, 4th Edition, vol. 42 on its part explains a Counter-claim by giving a case scenario as follows: -

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.”



94. It goes further to elaborate that,
- “any claim in respect of which the Defendant could bring an independent action against the Plaintiff may be enforced by a Counter-claim subject only to the limitation that it must be such as can conveniently be tried with the Plaintiff’s claim. Thus not only claims for money but also other claims such as a claim for injunction or for specific performance or for declaration may be the subject of a counter-claim.”
95. A counter-claim can only be filed by a Defendant(s) as against a Plaintiff(s). It is a ‘cross-suit’ by the Defendant against the Plaintiff. It is a ‘Counter-action’ or a ‘Counter-suit’. The 1<sup>st</sup> Defendant cannot therefore purport to counter-claim against the 2<sup>nd</sup> Defendant (a co-defendant). It ought to have instead, filed ‘a claim against a co-defendant’ to enable the co - Defendant respond appropriately.
96. The 1<sup>st</sup> Defendant ought to have lodged a claim against a co-defendant under Order 1 rule 24 of the Civil Procedure Rules not a counter - claim. The counter-claim against the co-Defendants is therefore improper and is hereby struck out.
97. In respect to the 5<sup>th</sup> – 8<sup>th</sup> Defendants in the Counter-claim, the 1<sup>st</sup> Defendant has not established any claim against them. The 1<sup>st</sup> Defendant had already rescinded the agreements with them. There was no reason to join them as parties in this case. The counter-claim against them too is struck out.
98. Having found that the transfer to the 1st Plaintiff was obtained by fraud and or illegalities, this court would be sanitizing fraud/illegalities if it allowed prayer 1 of the counter-claim as framed by allowing the Plaintiffs to benefit from the fraud/illegality. The alternative prayer in the counter-claim is the appropriate remedy in this case in view of the findings of the court.
99. Section 26 of the *Land Registration Act* is explicit that a title of a proprietor may be challenged where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
100. In the case of *Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR*, the court elaborating on the provisions of section 26 held that:-
- “.....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”
101. The court’s finding in this case is that the Plaintiffs’ titles to the suit properties were obtained illegally and by fraud. The court will exercise its authority under section 80 of the *Land Registration Act* and order that the register be rectified and the entries in favour of the Plaintiffs or any other third party be cancelled and the titles be reinstated to the 1<sup>st</sup> Defendant.
102. Further the Plaintiffs and or their agents and anyone claiming under them must handover vacant possession of the suit properties to the 1<sup>st</sup> Defendant in the next 90 days from the date thereof failing which the 1<sup>st</sup> Defendant will be at liberty to evict the Plaintiffs from the suit properties without any further reference to this court.
103. In regard to the 1<sup>st</sup> Defendant’s claim for aggravated Damages for trespass, the court’s finding is that the 1<sup>st</sup> Defendant is not entitled to the same. As the court has observed, the 1<sup>st</sup> defendant’s officers must have worked in cahoots with the 2<sup>nd</sup> Defendant to “sell’ and “grant the 1<sup>st</sup> Plaintiff possession” of the suit properties to the 1<sup>st</sup> Plaintiff.



104. The 1<sup>st</sup> Defendant should carry out internal investigations and surcharge its officers who are found culpable.
105. The 1<sup>st</sup> Plaintiff is at liberty to sue for his monies paid to the 2<sup>nd</sup> Defendant.
106. In respect to costs, the court's direction is that, considering the overall conduct of the parties in this matter, it is appropriate that each party bears its own costs.

### **Conclusion**

107. The conclusion is that: -

- A. The Plaintiffs' case against the Defendants is dismissed in its entirety.
- B. The 1<sup>st</sup> Defendant's Counter-claim is allowed in the following terms;
- i. The court orders the cancellation of the title No. Nairobi Block 140/561/31, Nairobi Block 140/571/34, Nairobi Block 140/263/70 and Nairobi Block 140/516/76 in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and or 3<sup>rd</sup> Plaintiffs and directs that the same be reinstated to the 1<sup>st</sup> Defendant.
  - ii. The Plaintiffs and or their agents and anyone claiming under them are ordered to handover vacant possession of the suit properties, title No. Nairobi Block 140/561/31, Nairobi Block 140/571/34, Nairobi Block 140/263/70 and Nairobi Block 140/516/76 to the 1<sup>st</sup> Defendant in the next 90 days from the date thereof failing which the 1<sup>st</sup> Defendant will be at liberty to evict the Plaintiffs from the suit properties without any further reference to this court.
- C. Each party shall bear its own costs.

It is so ordered.

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**M.D. MWANGI**

**JUDGE.**

**In the virtual presence of:**

**Mr. Ayora for the Plaintiffs**

**Mr. Muuo h/b for Mrs. Mbabu for the 1<sup>st</sup> Defendant**

**N/A for the 2<sup>nd</sup> Defendant**

**N/A for the 4<sup>th</sup>-8<sup>th</sup> Defendants in the counter-claim**

**Court Assistant: Yvette**

**M.D. MWANGI**

**JUDGE.**

