



**Kiplagat v Ratemo (Sued in her capacity as the legal representative of Thomas Ratemo Oira)
(Environment & Land Case 38 of 2012) [2024] KEELC 1628 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1628 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 38 OF 2012**

**A OMBWAYO, J
MARCH 14, 2024**

BETWEEN

LAWI KIGEN KIPLAGAT PLAINTIFF

AND

**JAPHETH AMENYA RATEMO (SUED IN HER CAPACITY AS THE LEGAL
REPRESENTATIVE OF THOMAS RATEMO OIRA) DEFENDANT**

JUDGMENT

1. The Plaintiff filed an amended Plaintiff dated 9th July, 2021 and he avers that by an agreement entered into on 24th June 2008 between the Plaintiff and Thomas Ratemo Oira- Deceased, the Plaintiff agreed to sell to the Defendant all that parcel of land known as Plot No 34 Miti Mingi Settlement Scheme No 722 Naivasha at a total consideration of Ksh 7,600,000.00 out of which Thomas Ratemo Oira- Deceased paid a sum of Ksh 760,000.00 on the said date and the balance to be paid within ninety days from the said date of the agreement.
2. He avers that it was a term of the said agreement that the completion period for the said transaction would be ninety days, changeable by consent and in writing, and that before the completion date, the Plaintiff's advocate would deliver to Thomas Ratemo Oira- Deceased advocate all the requisite registrable documents against a professional undertaking given by Thomas Ratemo Oira- Deceased advocate to the Plaintiff's advocate to pay the balance of the consideration.
3. The Plaintiff further avers that before Thomas Ratemo Oira- Deceased would give the requisite professional undertaking to the Plaintiff's advocates, Thomas Ratemo Oira- Deceased fraudulently, and without the knowledge and consent of the Plaintiff procured, and has in his possession all the registrable documents to enable him transfer the said parcel of land to his name.
4. The Plaintiff further lists the particulars of fraud , misrepresentation and illegality as against Thomas Ratemo Oira- Deceased as: procuring the registrable documents secretly and without the knowledge



and consent of the Plaintiff, Forging some documents purporting to show that either the Plaintiff's advocate released the said document to the Defendant, Procuring the said registrable documents through illegal means and not in accordance with the agreement dated 24th June, 2008, Failing to disclose to the Plaintiff that he had procured the said documents, Failing to give a professional undertaking to the Plaintiff's advocate, Actively processing the transfer of the said property without the requisite professional undertaking and illegally procuring a title deed for the suit property during subsistence of this suit and while there were court orders restraining him from procuring a title deed for the suit property.

5. The Plaintiff avers that in further breach of the said agreement, Thomas Ratemo Oira- Deceased took over possession of the said plot before the completion date and Thomas Ratemo Oira- Deceased has been cultivating the said land ever since the year 2008 to 2021 when he passed on. He avers that the taking over of possession of the said parcel of land and the subsequent cultivation by Thomas Ratemo Oira- Deceased and Thomas Ratemo Oira- Deceased processing of the transfer before or without the requisite professional undertaking is prejudicial to the Plaintiff's interest in the said land as the payment of the balance of the consideration has not been secured and has never been paid to date.
6. It is also the Plaintiff's averment that without prejudice to the foregoing, in the alternative, the transaction commenced by the agreement of sale dated 24th June, 2008 not having been completed within (90) ninety days of the said date has expired by effluxion of time and Thomas Ratemo Oira- Deceased purported move to process the transfer of the parcel to his name is null and void.
7. The Plaintiff avers that unless the Defendant herein and all other beneficiaries of Thomas Ratemo Oira- Deceased are restrained from processing the transfer of the said property to their name or to include the suit property as a property forming part of the estate of Thomas Ratemo Oira- Deceased and unless the Defendant herein and all other beneficiaries of Thomas Ratemo Oira- Deceased are evicted from the suit land, the Plaintiff is likely to suffer very substantial if not irreparable damage. The Plaintiff avers that the cause of action as against Thomas Ratemo Oira- Deceased and who passed on 24th March 2021 is a cause of action which survived him and as such the Defendant herein is sued on behalf of the estate of Thomas Ratemo Oira- Deceased.

The Plaintiff prays for judgment against the Defendant for:

- a. A perpetual injunction to restrain the Defendant herein and all other beneficiaries of Thomas Ratemo Oira- Deceased from entering, remaining in possession, processing the transfer of land parcel number plot No 34, Miti Mingi Settlement Scheme No 722 (now known as Nakuru/Miti Mingi Scheme/34) or transferring, charging, selling, cultivating, or in any manner dealing with the said land.
- b. A declaration that the Plaintiff is the rightful and legal owner of all that parcel of land known as Nakuru/Miti Mingi Scheme/34 and that the land registrar do register him as so.
- c. An order of cancellation of title deed for all that parcel of land known as Nakuru/Miti Mingi Scheme/34 registered under the name of Thomas Ratemo Oira- Deceased.
- d. An order to compel the defendant herein and all other beneficiaries of Thomas Ratemo Oira- Deceased to immediately vacate the suit land parcel No 34, Miti Mingi Settlement Scheme No 722 (now known as Nakuru/Miti Mingi Scheme/34) and in default an order of eviction to issue.



- e. An order to compel the defendant to surrender the original title deed and all other the plaintiff's registrable documents relating to the sale agreement dated 24th, June 2008 and in respect of land reference No. 34, Miti Mingi, Settlement Scheme No 722, Naivasha (now known as Nakuru/Miti Mingi Scheme/34) and in default the deputy registrar to execute all the necessary documents to transfer the aforesaid property back to the Plaintiff.
 - f. A declaration that the agreement dated 24th, June 2008 has expired by effluence of time.
 - g. A declaration that the defendant is in breach of the contract of sale commenced by the agreement of sale dated 24th, June 2008.
 - h. General damages for breach of contract.
 - i. Costs of the suit.
 - j. Such other or further order the court may give.
8. The Defendant filed his Statement of Defence dated 22nd November, 2012 on 30th November, 2012. He denies each and every allegation of fact in the Plaint. He denies that the sale of the parcel of land known as plot No 34, Miti Mingi settlement scheme No 722 Naivasha was the only parcel of land sold to the Defendant and the dates of the sale agreement. The Defendant also denies the alleged fraud of the transfer documents without the consent of the plaintiff particularly the particulars of allegation of the Plaint. The Defendant denies having received or being served with any written demand letter or notice of intention to sue. He denies the particulars on the allegations to return the registered documents which are duly and legally registered in the name of the Defendant on payment of the consideration purchase price for the parcel of land no 34 and 181 situated at Miti Mingi settlement Scheme No 722 in Naivasha.
9. The Defendant also states that he cannot vacate or be evicted from the said suit parcel of Land No 34 and 181 Miti Mingi Settlement Scheme No 722 since he legally and lawfully purchased the two parcel of land measuring about one hundred and five acres (105 acres) at Miti Mingi Settlement Scheme No 722 Naivasha. The Defendant states that in the alternative, the Plaintiff sold and transferred absolutely the two parcel of land plot No 34 and plot No 181 Miti Mingi settlement scheme No 722 measuring one hundred and five acres respectively situated in Naivasha and the two parcel of land are duly legally registered in the name of the Defendant after paying the full purchase price in exchange of the transfers and there is nothing to be returned to the Plaintiff as alleged in the Plaint.
10. The Defendant further states that the Plaintiff handed over the two parcel of land plot No 34 and 181 Miti Mingi Settlement scheme of the 27th July, 2008 and the Defendant has been in possession of the said parcel of land until the Plaintiff hired thugs to destroy illegally and took possession of the Defendants goods in the said parcel of land. The Defendant prays that the Plaintiff's suit be dismissed with costs.

Evidence On Record

Plaintiff's Evidence

11. On 3rd March 2020, Lawi Kigen Kiplagat testified as PW1. It was his testimony that he resides in Nairobi and he is the plaintiff in this case. He testified that he has recorded two statements on 26th October 2012 and 3rd July 2012 in support of his case and he adopted the statements as part of



- his evidence. It was his testimony that the case involves plot No.34 Miti Mingi Settlement Scheme-Elmentaita and the land is about 100 acres and it has a permanent house and a swimming pool.
12. He testified that sometime in 2008 he approached Mr. Edward Ratemo, the father of the defendant and informed him that he wished to sell his land and he was informed that his son, the defendant herein may be interested.
 13. PW1 testified that he met with the defendant and they entered into the agreement dated 24th June 2008. He testified that the agreement on page 1 shows it was dated 25th June 2008 and he produced the agreement produced it as PEX1. He testified that the agreement was drawn by the Defendant who is a lawyer. He testified that the defendant suggested PW1 uses the services of a lawyer who was next door to the defendant's office. PW1 testified that he agreed although he did not know the agreement previously.
 14. PW1 further testified that the purchase price was Kshs7,600,000 and the deposit was paid in various instalments as set out in the further witness statement. He testified that his Cooperative Bank statement (PEX2) shows the instalment of Kshs300,000/= & Ksh460,000/= being the initial instalment.
 15. It was his testimony that the balance of the purchase Kshs6,840,000/= was to be paid within 90 days' completion period. He stated that they did not make any agreement to vary the terms of the agreement and the sale was subject to Law society conditions of sale. He testified that clause 13 provided for amendment of the agreement which required that all parties sign a document changing or varying the agreement. He testified that the balance was not paid to him as per agreements outside the 90 days. He testified that on 26th November 2008 – Ksh 350,000; No payment in 2009; On 17th June 2010 – Kshs. 30,000/=; On 2nd July 2010 – Kshs. 250,000/=; On 18th September 2010- Kshs. 100,000/= and the last payment represented goats he left him with. PW1 testified that the total amount paid was Kshs1,810,000/= discounting the value of the goats.
 16. PW1 testified that he never extended the period for payment of the purchase price. He testified that he sought the advice of a lawyer who advised that he files a suit. He testified that the advocate he engaged was Masore Nyangau. PW1 testified that he told the lawyer he has fully paid and the lawyer wrote a letter dated 14th March 2012 which he produced as PEX3.
 17. It was PW1's testimony that the advocate requested the defendant to vacate the land and return all the registrable documents. He testified that the defendant did not comply and hence the filing of the suit.
 18. PW1 further testified that the supplementary bundle of documents shows a payment was made on 6th December 2016 of Kshsh5,550,000/= by Ratemo & Co. Advocates and he was surprised since he had no discussion with the defendant. He testified that he has a copy of the bank statement showing the deposit and he produced it as PEX4.
 19. He testified that when he discovered the payment, he told the Bank Manager to reverse the transaction. He testified that he returned the money to the defendant and he made a swift transfer which he produced as PEX5. He testified that the amount was debited to his account and returned to Ratemo Oira & Co Advocates. He testified that the letter by Masore Nyangau indicated there were documents which were illegally obtained contrary to clause 11 of the Agreement for sale.
 20. PW1 testified that no undertaking was given by his advocate and he was totally kept in the dark. He testified that the original title was with the Settlement Fund Trustee (herein after referred to as SFT) and he was supposed to get it. He testified that the title was transferred without his involvement and



he wrote a letter to SFT dated 6th December 2011 which he produced as PEX6 to follow up on his title but he got no co-operation.

21. PW1 confirmed to have seen the transfer annexed in the defendants bundle of documents. He testified that he signed an undated transfer as per the agreement. It was his testimony that however, he never appeared before any advocate on 20th March 2008 and that was before they signed the sale agreement.
22. He testified that he did not sign the application for consent exhibited at pages 14- 16 of defendant's bundle and he did not sign the Land board application forms exhibited at page 50 of the defendant's bundle. He also testified that he has never appeared before the Land Control Board for consent at any time.
23. PW1 was shown an agreement dated 20th March 2008 for land parcels 34 & 181 at page 64 of defendants bundle and he stated that he never signed such an agreement. He testified that he also did not sign the agreement at page 65 indicating the purchase price of land parcel 34 of Kshs2,000,000/=.
24. It was also his testimony that he did not appear before the SFT at any time in regard to a transaction involving plot No.181 and there was no consent given for such transaction by the SFT. PW1 testified that he noticed some bank slips annexed to the defendant's bundle. PW1 acknowledged receipt of the ones he has put in his statement and not the others. PW1 testified that the sum of Kshs. 5,500,000 sent to his account could not have been an overpayment.
25. PW1 testified that there is no time the defendant ever paid him in cash. PW1 informed the court that he would like the transaction to be cancelled and the defendant ordered to retransfer the land to him and to vacate from his land. He testified that the land, the subject of the suit is in possession of the defendant. He testified that he leased the land to third parties and he prayed for the costs of the suit.
26. Upon cross examination PW1 stated that he purchased plot no 34 in 1985 and he purchased the property from the late professor Saitoti for Kshs300,000/=. He stated that the transfer was effected at Nakuru and they signed the transfer in Nairobi and presented the same at Nakuru. PW1 stated that the transfer was in October 1985.
27. PW1 referred to a letter of consent at page 54 of the defendants bundle and affirms the consideration was Kshs300,000/=. He stated that he signed the documents in Nairobi. He stated that he purchased plot 181 from a person by the name Komen from Baringo. He stated that he filed the present suit in 2012.
28. PW1 stated that in the suit, his claim is for plot no 34 which was the subject matter for a sale agreement. PW1 also referred to transfer at page 12 defendants bundle and stated that he only signed the agreement on 24th June 2008. PW1 stated that the agreement provided the terms that were agreed. He stated that the title was held by the SFT and he had not cleared the SFT loan.
29. PW1 stated that as at 2011 a sum of Ksh 2,181,479 was outstanding and the sum was still accruing interest. He stated that he never appeared before the land control Board. He stated that he signed several documents which the Defendant must have used to process the title documents.
30. PW1 agreed that there was a time he was declared bankrupt and he never received any cash payment from the Defendant. PW1 stated that the Defendant paid two instalments of Kshs300,000/= and Kshs460,000/= through the bank. He stated that he never went with the Defendant to the District Commissioner's office on 24th July 2008 for consent. PW1 referred to Land Board application form and denies he executed the document.



31. PW1 stated that he gave the Defendant a copy of his Personal Identification Number and copy of his Identity Card. PW1 referred to copies of transfer at pages 48-52 of the bundle and stated that he signed many documents. PW1 stated that he was not paid Kshsh5,650,000/= on 20th March 2008 and if he was paid, he would have acknowledged.
32. PW1 stated that the Defendant even gave me him a bank guarantee to secure payment of the balance. The balance then in 2009 was about Kshs. 6,800,000/= or thereabouts. He stated that he did not visit the SFT to inform them that he intended to sell his property. He stated that he lodged a complaint to SFT on 6th December 2011.
33. PW1 also stated that he has not made any payment to SFT since the Defendant took possession of the land. He confirmed that there is a dispute respecting the land. He stated that the agreement of 20th March 2008 is not genuine and he agreed that he signed the agreement of 24th June 2008. PW1 stated that he received a deposit of Ksh. 5,650,000/= in his bank account. PW1 stated that he made a refund on 10th January 2017 when he got notice of the deposit.
34. PW1 stated that he never used the money because he did not know it was there. He stated that he returned the money immediately he got information. PW1 stated that when he discovered the money, he had gone to the bank to seek a small overdraft of Ksh. 20,000/=.
35. He stated that the bank manager informed him his account had a lot of money. He stated that he never received any letter from the Defendant saying he did not want to buy the land. PW1 stated that the Defendant made various deposits. PW1 stated that he did not accept any variation of the agreement. PW1 stated that the agreement to a large existent was predicated on trust and that was why he left the Defendants with his documents. He stated that he gave the Defendant his bank account in good faith.
36. PW1 stated that he filed the suit when the Defendant refused to pay him the balance of the purchase. He stated that the letter by Nyang'au Masore required him to vacate and return the title documents. He stated that his lawyer wrote to the Defendant avoiding the contract. PW1 stated that the completion notice was issued in March 2011 by Mirugi Kariuki & Co advocates
37. Upon re-examination, PW1 testified that the completion notice was sent by registered post to the defendant's postal address. He stated that the defendant did not complete the transaction. PW1 also testified that the letter by Masore Nyangau which is produced as PEX3 was written on 14th March 2012. He testified that the completion notice was given on 6th March 2011. He testified that there was no variation to the sale agreement of 24th June 2008. PW1 referred to letter of consent dated 24th July 2008 and testified that there was no land board application on 20th July 2008. PW1 testified that the defendant never paid any cash of 5,000,000/= for him at any time.

Defendant's Evidence

38. Ratemo Amenya testified as DW1 and he stated that he is the legal representative of Ratemo Amenya advocate. He testified that he is an advocate and his relationship with the defendant is that the defendant was his father and he died on 24th March, 2021. It was his testimony that the suit before court revolves on an agreement of sale between plaintiff and defendant for purchase of two plots; plots number 34 and 181 situated within Miti mingi settlement scheme in Nakuru County. He testified that he has a statement dated 22nd November, 2012 and a further witness statement dated 25th October, 2021.
39. DW1 testified that he has 47 documents listed and dated 22nd November, 2012. He testified that he has a letter dated 6th October, 2011. He testified that the total acreage of land sold to plaintiff is 105



- acres. He stated that the sale agreement produced by plaintiff is dated 24th June, 2008 and the second page is dated 25th June, 2008. DW1 testified that as at the time of giving evidence, the contract to the plaintiff failed to disclose the total acreage of land was 105 acres. He further testified that when it was discussed that the parcel was 105 acres, the parties entered into a contract dated 20th March, 2008. He stated that the second sale agreement is dated 24th June, 2008. He stated that the sale agreement dated 24th June, 2008 and 25th June, 2008 were produced as Exhibits. DW1 also re-produced the same with the one dated 20th March, 2008 and DEX 1(a) & DEX (b).
40. DW1 testified that the agreement dated 24th June, 2008- DEX 1(a) was in respect of Kshs2,000,000. He testified that the agreement dated 20th March, 2008 was for two properties which he stated are plot number 34 and plot number 81. DW1 testified that the correct sale agreements are dated 20th March, 2008 and 24th June, 2008. DW1 stated that the total considered price was Ksh 7,600,000 for the two properties. DW1 stated that within the pleadings, the plaintiff is not disputing ownership of plot number 181 measuring 5 acres.
 41. DW1 testified that on the proffered undertaking, it was a constitutional undertaking. He testified that as at 20th March, 2008, to plaintiff has paid Kshs5,200,000 which he acknowledged by signing a transfer dated 20th March, 2008. DW1 testified that the identity was overtaken by events because the consideration of Ksh 5,600,000/= was paid to the plaintiff by defendant on 20th March, 2008 when the agreement was signed. He testified that he had to transfer from plot number 34 which is exhibit DEX2. He testified that he has a transfer for plot number 181 which is exhibit DEX 3. He confirmed that the vendor for the 2 properties is the plaintiff.
 42. DW1 testified that the two sale agreements were because of the relevant of the purchase price of Kshs2,000,000 that was captured as the sale agreement for 24th June,2008.
 43. DW1 testified that the vendor's duty was to produce the registered individuals in the name of plaintiff to enable a successful transfer. He stated that the purchaser's responsibility was to pay Kshs7,600,00. He stated that the vendor had never submitted to original title deed in his name to defendant. DW1 stated that as at the time of entering the contract, the plaintiff only had a letter of allotment and the land had an encumbrance.
 44. DW1 also stated that as at the time of sale, the land was allotted to the plaintiff. He stated that the letter of allotment and charge were in the name of the plaintiff. He confirmed that the defendant paid an amount of Ksh. 2,443,600 and a further Ksh 38,410 to the Settlement Fund Trustees. DW1 produced the payment cheques and receipts as DEX 4 (a) 4(b) 4 (c) 4(d) 4 (e). He stated that the balance of kshs43,000 was paid in cash.
 45. DW1 testified that the plaintiff partially fulfilled his responsibility and he did not produce the original title deed. DW1 stated that as at 2008 the plaintiff had been paid Kshs3, 600,000/= million. He stated that the defendant transferred the payment of the document to his name upon payment of stamp duty of Kshs50,000 for plot number 34 and 6000 for plot number 181. He stated that the defendant took the document to lands office on 8th December, 2008 and properties changed ownership from the plaintiff to defendant. He stated that the SFT still had an interest to the suit property as the letter of allotment was not a title. DW1 produced the consent dated 24th July, 2008 as an exhibit. The court directed that the documents from the Land Control Board be marked for production. The consent dated 26th January 2008 was marked DMFI 5 and the consent dated 24th July, 2008 was marked as DMFI 6.



46. DW1 testified that the other document was the valuation report for plot 34 and 181 and he produced them as exhibits DEX 7 (a) and DEX 7 (b). DW1 stated that the defendant paid stamp duty for plot 34 and he paid Kshs50,120 which was produced as DEX8.
47. DW1 testified that for plot number 181, he paid Ksh 6,100 and he produced an exhibit which was marked DEX 8 (b). DW1 informed the court that was the extent the plaintiff fulfilled the conditions. He stated that in the pleadings, the same was produced fraudulently. DW1 stated that the purchaser paid the consideration price. He stated that the purchaser paid a total of Ksh 10,293,010. He stated that the 3,600,000 million was on the signing of the transfer and it was in cash. SFT was paid Kshs15,000 for plot number 181. And 2,443,600 was for plot number 34. He stated that Ksh 38,410 was paid for plot number 34 and Ksh 2,196,000 was deposited to the account of plaintiff. DW1 testified that the money was paid by a person referred to as David and deposited on 24th July, 2008.
48. He stated that the total consideration was Kshs10,293.010. He stated that the suit property exchanged hands on 8th December, 2008. He stated that the transfer was registered on 20th March, 2008. He stated that he has a transfer dated 20th March, 2008 for plot number 31 and this is an additional transfer of SFT.
49. DW1 testified that he has the legal documents that were produced by the plaintiff. He stated that he has a letter dated 8th December, 2008 from SFT and the letter has attached legal documents and the letter is marked DMFI 11(a) He stated that the letter of offer is marked as DMFI 11(b) and the caution is marked as DMFI 11(d). He stated that the properties exchanged hands on 8th December, 2008. He stated that the court issued two orders against procuring the title and the orders were issued on 13th October, 2012 and the title possessed on 8th December, 2008.
50. DW1 testified that the orders were issued ex-parte and the defendant paid S.F.T and the custodian of the registrable document was the plaintiff. He stated that no action was being taken to infer fraud and the consequence of failing to settle the loan was that they could repossess the suit property. He stated that the letter was written by the plaintiff's advocate. He stated that the plaintiff had an issue that he was still the owner of the suit property and the plaintiff obtained vacant possession on 29th June, 2008. He stated that the defendant fulfilled the mandate while the plaintiff did not fulfil his part of the bargain.
51. He stated that at the time of entering consent the plaintiff had been declared bankrupt and he was declared bankrupt as at 20th March, 2008 and he decided to be paid the money in cash.
52. He stated that the defendant had paid Kshs5,600,000 million and the plaintiff had submitted partial documents. He stated that the payment was done in stages because the plaintiff had not complied.
53. Upon cross-examination, DW1 stated that the plot in issue is no. 34 and No 181. He stated that as per the plan in number 34 only, the owner was Thomas Ratemo Oira and they purchased on 20th March, 2008. He confirmed that the vendor was Lawi Kigen Kiplagat who is the plaintiff. DW1 confirmed that the property was at a price condition of Kshs7,600,000 and the Plaintiff was paid Ksh7, 600,000 million where 5,600,000 million was paid in cash. DW1 made reference to the sale agreement produced by the plaintiff. DW1 also confirmed that they produced an agreement dated 24th June, 2008 and the plaintiff also produced an agreement dated 24th June,2008. DW1 informed the court that there are two sale agreements over the same property.
54. DW1 stated that they produced a sale agreement dated 20th March, 2008 for 7,600,000 million and they have produced a sale agreement dated 24th June, 2008 for 2,000,000 million. He stated that the basis for the sale agreement is that the plaintiff paid in cash because he was declared bankrupt. He stated that he has a transfer instrument where they acknowledge receipt of money.



55. DW1 stated that the two sale agreements are valid and the plaintiff has disputed the sale agreement and transfer. He stated that the plaintiff's approval before the District Land Adjudication Officer Settlement scheme and expected a transfer and applied for a consent in appendix A. He stated that he requested for a valuation requisition form and he produced a copy of Personal Identification Number and a national Identity card. DW1 confirmed that he himself requested for a valuation requisition form and he did not pay stamp duty. DW1 stated that he was already in receipt of a consideration agreed upon.
56. DW1 stated that the agreement is dated 24th June, 2008 on the first page on the second it is dated 23rd June 2008 hence it is a forgery because of the plaintiff's failure to disclose that there were 5 acres inclusive of the 100 acres. DW1 stated that the vendor was not paid 5,600,000/= million and he was in so many problems. DW1 stated that he had been declared bankrupt and he signed a transfer acknowledging the amount. DW1 confirmed that he signed a transfer and he had two sale agreements
57. DW1 stated that upon execution of sale agreement, the total consideration price was 7,600,000 million and 5,600,00 million was paid upon execution of two transfers. He stated that the money was acknowledged on the transfer. He stated that upon acknowledging the payment to the vendor, they moved to the District Land Settlement officer in Naivasha. DW1 confirmed that the sale agreement was dated 20th March, 2008 and the transfer was dated 20th March 2008. He informed the court that the sale agreement dated 24th/25th June 2008 is a forgery and there is a great difference between Thomas Ratemo and Ratemo & Company which was an error. DW1 stated that the document of payment is with the bank and his deceased father paid from the bank demands.
58. DW1 stated that as at this time of purchase, the defendant was clearing an encumbrance. He stated that he discovered that the vendor had only a letter of allotment with conditions and one of the duties of vendor was to produce a title deed. He stated that his father paid to meet the consideration and all that was not to happen after payment of the purchase price. He stated that the agreement was that upon being paid the deposit, he was to bring a title deed signed, a dated transfer consent and later a clearance certificate in the name of the vendor.
59. DW1 stated that there was no need of a professional undertaking and he had been paid 5,600,000 million. He stated that later on he was paid the rest of the money by direct deposit to his account. He stated that the transaction was not completed within 90 days and the transaction was completed in 2012. He stated that the defendant had procured a letter of allotment in his name.
60. He stated that the plaintiff obtained a temporary injunction in 2012 and it was on 30th November, 2012. He also stated that the Ex-Parte order was made on 26th October, 2012 and the title was issued but he does not know when the vendor was selling the property and he had a letter of allotment. DW1 confirmed that the letter of allotment was issued on 8th December, 2008 and it was issued to Thomas Ratemo Oira. He stated that they did not fail to comply with the sale agreement and they paid the total price.
61. Upon re-examination, DW1 testified that the sale agreements dated on 20th March 2008 and 24th June, 2008 were because the plaintiff failed to disclose that there was a five-acre plot within the 100 acres making it 105 acres. He testified that upon being paying Kshs5,600,00 million and the balance of approximately Ksh 2,000,000million was to be paid via direct bank deposit. DW1 confirmed that the plaintiff never sued for fraud. He also stated that no complaint was made to the Law Society of Kenya.
62. DW1 testified that the plaintiff appeared before the District Land Adjudication officer and he applied for a consent before the land board. He stated that the plaintiff willingly gave out his documents for transfer. He testified that the property was charged on 8th December, 2008. He confirmed that the



- transfer is dated 20th March, 2008. He stated that the order was issued on 19th December, 2012. He testified that the order had been overtaken by events and the transaction was not completed in 90 days because the vendor failed to clear loans over the S.F.T He stated that the purchaser paid the outstanding loans and this was a clear transaction of willing buyer willing seller.
63. Purity Wanjiru Mungai testified as DW2. It was her testimony that she is a Deputy Director Land Adjudication and settlement at Ardhi House Nairobi. She testified that she is in charge of estimates management and documentation and she liaises with state with other counsels.
 64. DW2 stated that she has come with the original file of parcel 34/Miti mingi and parcel number 181 Miti Mingi. She stated that parcel number 34 was offered to Professor George Saitoti in 1982. She testified that he was issued with allotment letter and charge on 19th February, 1983. She testified that he was later issued with a development loan on 19th May, 1983. It was her testimony that he sold it to Lawi Kigen Kiplagat after a Land Control Board consent on 1st August, 1985 and he transferred it to him on 8th August, 1989.
 65. DW2 testified that Mr. Lawi Kigen inherited all the settlement payments from Professor George Saitoti and Mr. Lawi Kigen sold the plot to Thomas Oira and was issued with a Land Control Board consent on 24th July, 2008. She testified that he signed the transfer documents on 20th March, 2008. DW2 confirmed that Mr. Thomas Ratemo inherited all settlement fees and charges. She testified that he paid a 10 % land deposit on 8th December, 2008 and he was issued with the legal documents. She testified that when he signed at the office of the District Land Adjudication Officer on 8th December 2008, he was issued with a full balance statement and paid the full balance 2,443,600. She testified that he paid on 14th December, 2012 paving way for clearance of the plot and a discharge and transfer documents released to him on 20/2/2013.
 66. She testified that for Plot No 181, it was initially allocated to Solomon K Kones and he paid a land deposit on 29th November, 1989. He testified that the land is five acres or two hectares and plot number 34 is 100 acres. She testified that plot number 181 was sold to Lawi Kigen Kiplagat and the transfer was signed on 25th August, 1985. She stated that the Plaintiff sold the plot to Thomas Ratemo Oira though a Land Control Board consent of 26th June, 2008. She testified that they appeared before DLASO and Mr. Oira paid for the plot and his name was cleared.
 67. DW2 stated that discharge and transfer documents were released to him on 16th March, 2009. She stated that the documents are in the consent form as satisfied from the District office. She produced the file as exhibit DEX 13 and DEX 14. She stated that there is a transfer between professor George Saitoti and Lawi Kiplagat.
 68. Upon cross-examination, DW2 stated that she is aware of a complaint dated 24th March 2011 and it was from the Director SFT. She stated that he had been issued with the legal documents and he was issued with plot allotment charge and an agreement of acceptance. She stated that the discharge was released on 20th February, 2013. DW2 disowned the letter because it is a photograph. She confirmed that the letter is in her file but is not received and it is not forwarded and stamped. She stated that Thomas Ratemo obtained a title after 20th February, 2013 and the title deed was issued at the Land Registry. She stated that the consent was signed by the chair of the Land Control Board.
 69. DW2 also informed the court that they are not the authors of consent and they rely on the copy of consent sent to them. She stated that plot number 181 was transferred by Lawi Kigen Kiplagat to Thomas Ratemo and the discharge was done on 16th March, 2009. She stated that the two were different files and there was no dispute in the parcel of land. She stated that each file takes its own process and if one has an issue, they call the other party. She stated that issues can arise sometime.



70. Upon re-examination DW2 testified that the transfer took place on 8th December, 2008. She testified that the transfer of discharge is issued and the clearance from is issued. DW2 testified that the loan has to be paid and when the letter dated 24th March, 2011 was received and owner was Thomas Ratemo Oira. She stated that the title was issued on 20th February, 2013 and appendix A is application for Land Control Board (LCB) consent and it is issued by the DLASO. She testified that the owner applies for consent and this is to allow transfer of land. DW2 confirmed that LCB issues on consent.
71. Upon reexamination, DW2 testified that in respect of the letter dated 24th March, 2011, Mr. Ratemo did not have a title and he was in possession of the documents. It was her testimony that because there was a loan, nobody could have produced title. She testified that Land No .181 was discharged because the loan had been repaid.
72. John Ouma Mbuda testified as DW3. It was his testimony that he works at Corporation Bank, Nakuru Branch. He testified that he is in court to produce some documents and the issue is that the cash deposits were done through an account in co-operative bank. He testified that it is account number 01100098993400. He testified that the account is a joint account of L.K Kiplagat and he does not know the relationship.
73. DW3 testified that he was issued with summons and he is the representative of the bank. He testified that he has the bank statement between the period of January 2008 to December 2011. He testified that the bank statement shows the transaction. He testified that the deposit slip appears in the statement of account and the total is Ksh 2,196,000. He testified that the depositor Thomas Ratemo Oira and he has the bank statement. He testified that the defendant slip at page 72 is reflected at page 2 of the bank statement and the deposit slip is produced as DEX 9 (a).
74. DW3 testified that there is a bank statement at page 1 produced as DEX 9M and there is a deposit of Ksh 460,000 at page 2. He testified that there is Ksh 100,000 at page 10 and 11 and at page 11 there is a deposit of Ksh 150,000 Ref 4946306501. He testified that at page 15 for Ksh 350,000 Ref 494,8218001 dated 26th November, 2008, Page 19 Ksh 560,000 Ref 4966957801 dated 31st December, 2009, Page 1- Ksh 350,000. Ref 49m4439001 dated 17th June, 2010, page 1- Ksh 250,000 Ref 49Q7178801 date 7th July, 2010, page 47 Ksh 100,000 Ref 06R6972701 dated 18th September, 2010 and the total amount is Ksh 2,196,000/=.
75. Upon cross-examination, DW3 stated that he is not able to verify why the payment made is from the statement and it can be verified from the deposit slip. He further stated that the bank cannot know why the money was being paid and the total amount is Ksh 2, 196,000/= and it was paid between 2008 to 2010.

Upon reexamination, DW3 testified that the money was deposited.

Submissions

The Plaintiff did not file any submissions.

Defendant's Submissions

76. The Defendant filed his submissions on 15th February, 2024. He identified the following twenty-five issues for determination which are listed as follows: Whether the Plaintiff entered into a valid, legally binding and enforceable sale agreement with the Defendant dated 20th March, 2018 for the sale of land referred to as parcel No 34 Miti mingi Settlement scheme and parcel No 181 Mitimingi Settlement Scheme and whether there is a valid, legally binding and enforceable sale agreement dated



24th June, 2008 for Ksh 2,000,000/= for sale of land referred to as parcel No 34 Mitimangi since there is the existence of a consent; For what reasons is there existence of three sale agreements in this suit; Whether there was varying of the sale agreement by the Plaintiff and the Defendant; Whether the Plaintiff breached the contract dated 20th March, 2008 for Ksh 7,600,000/= and 24th June, 2008 for Ksh 2,000,000/= and the legality of the orders that were issued against the Defendant; What was the total acreage of land the Plaintiff sold to the Defendant and whether the Plaintiff has produced a separate sale agreement to demonstrate if the sale of plot No 181 was separate from sale of Plot No 34 Mitimangi settlement scheme and what is the object and construction of the sale agreement and whether the vendor has come to court with clean hands or has had an afterthought after selling his parcels of land to the Defendant.

77. The other issues identified for determination by the Defendant are: Whether the Defendant is an innocent purchaser for value and if he indeed exercised due diligence before purchasing the suit property to ascertain its status before purchasing it; Whether the Plaintiff actions of making an interim application seeking an injunction challenges the legality of a charge instrument created between the settlement fund trustees and the Defendant further for what reasons did counsel for the Plaintiff extract a different order from the one issued by the Court; Whether a letter of allotment is a title or what is the significance and effects of a letter of allotment; what were the terms of the sale agreement entered between the Plaintiff and the Defendant and whether the duties and responsibilities of the Plaintiff and Defendant were met pursuant to the sale agreement dated 20th March, 2008 and 24th June, 2008; Whether the suit property has ever exchanged hands prior to the transaction between the Plaintiff and the Defendant or what is the history of the suit property in terms of ownership and whether it was possible for the Plaintiff and the Defendant to obtain land board consent without the involvement of the settlement fund trustees.
78. Additionally, the Defendant identified the following issues for determination: Whether the Defendant breached the sale agreement dated 20th March 2008 for Ksh 7,600,000 and 24th June, 2008 for Ksh 2,000,000/= and whether the Plaintiff acknowledged receiving the consideration; Whether the orders sought by the Plaintiff against the defendant contravene Article 47 of *the Constitution* since the settlement fund trustees who are an interested party will be condemned unheard since they are not parties to these suit yet and the Plaintiff had not met the conditions in the Letter of allotment; What is the threshold for forgery/fraud in civil case and whether the Plaintiff has fulfilled the threshold, who has the onus and evidential burden of proofing facts alleged before the honourable court; Whether the Plaintiff will suffer any prejudice if the orders sought are not granted; Whether the Plaintiff is guilty of material disclosure; Whether the Plaintiff delivered the completion documents to the Defendant upon being paid the consideration price of Ksh 5,600,000/= or whether they were obtained through fraud; Was the Plaintiff at one point declared bankrupt; Whether the Plaintiff took any legal action against his advocate on record for professional misconduct if indeed he was engaged in a conspiracy with the Defendants to defraud him and at what stage and time did the suit property exchange hands between the Plaintiff and the Defendant.
79. Further the Defendant identified the following issues for determination: whether the Plaintiff has produced any document to demonstrate that on 20th March, 2008 he was not near the vicinity of the Defendant; Whether there is inconsistency in the Plaintiff evidence and the effect of the inconsistency of the evidence; The effect of the director of land adjudication and settlement office producing the original file for the suit property; what remedies are there if any in these suit and lastly if the termination of the contract by the Firm of Masore Nyangau Advocates was procedural and in compliance with the Law Society conditions of sale.



80. The Defendant submits that together with the Plaintiff, they entered into a valid, legally binding and enforceable sale agreement. He also submits that they applied for a land board consent which was issued. The Defendant submits that on 1st April, 2009, he obtained a Title deed for Plot No 181 Mitimangi settlement scheme No 722 being Title Number Nakuru/Mitimangi/181 in the names of the Defendant Thomas Ratemo Oira after clearing the outstanding loan and development loans owed to the settlement fund trustees which the Plaintiff again failed to honor.
81. The Defendant submits that that the Plaintiff did not fulfil his burden of proof against the Defendant. He places reliance on Section 107, 109 and 112 of the *Evidence Act* and the cases of Christopher Ndaru Kagina vs Esther Mbandi Kagina & another (2016) eKLR, Central Bank of Kenya Ltd vs Trust Bank Ltd & 4 others, Belmont Finance Corporation Ltd vs Williams Furniture Ltd, Paragon Finance Plc v D.B Thakerar & Co and RG Patel v Lalji Makani (1957) E.A 314 and Mutsonga v Nyati (1984) KLR 425.
82. The Defendant submits that the sale agreement dated 20th March, 2008 for the sale of two parcels of land Plot No 34 and 181 Mitimangi Settlement scheme No 722 situated in Naivasha between the Defendant and the Plaintiff had contractual obligations for both the vendor and the purchaser. The Defendant goes on to elaborate how he fulfilled his obligations according to the contract. He submits that the Plaintiff's assertion that he sold goats to the Defendant is unfounded and not supported by any evidence.
83. The Defendant submits that he is legally entitled to possession and occupation of the suit property. The Defendant urges the honourable court to find that the Plaintiff has not established any ground to warrant the orders sought and therefore asks the court to dismiss the Plaintiff's suit with costs.

Analysis And Determination

84. After considering the pleadings, submissions and the testimony of the Plaintiff, the Defendant and their witnesses, the following issues arise for determination: Whether the plaintiff has proved his case against the defendant on fraud, misrepresentation and illegality to warrant issuance of the orders sought and who should pay the costs of the suit.
85. It is the Plaintiff's case that the Defendant fraudulently and without the knowledge and consent of the Plaintiff procured, and has in his possession all the registrable documents to enable him transfer the said parcel of land to his name. The Plaintiff lists the particulars of fraud on the Defendant. According to the Plaintiff, the Defendant breached the agreement entered into on 24th June, 2008 and the Defendant took over possession of the said plot before the completion period.
86. The Plaintiff in the alternative states that the transaction commenced by the agreement of sale dated 24th June, 2008 not having been completed within ninety days thus the agreement has expired by effluxion of time and the defendant's purported move to process the transfer of the parcel to his name is null and void.
87. It is the Defendant's case on the other hand that the Plaintiff sold and transferred absolutely the two parcel of land plot No 34 and plot No 181 Miti Mingi settlement scheme No 722 measuring one hundred and five acres respectively situated in Naivasha and the two parcel of land are duly legally registered in the name of the Defendant after paying the full purchase price in exchange of the transfers and there is nothing to be returned to the Plaintiff as alleged in the Plaintiff.
88. The Plaintiff has listed the particulars of fraud, misrepresentation and illegality on the part of the Defendant as follows: a) Procuring the registrable documents secretly and without the knowledge and consent of the Plaintiff, b) Forging some documents purporting to show that either the plaintiff's



advocate released the said document to the Defendant, c) Procuring the said registrable documents through illegal means and not in accordance with the agreement dated 24th June, 2008, d) Failing to disclose to the Plaintiff that the Defendant had procured the said documents, e) Failing to give a professional undertaking to the Plaintiff's advocate, f) actively processing the transfer of the said property without the requisite professional undertaking and f) illegally procuring a title deed for the suit property during subsistence of this suit and while there were court orders injuncting/restraining him from procuring a title deed for the suit property.

89. It is trite law that he who alleges must prove. This is set out in section 107 of the *evidence Act*. It is as follows:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Fraud has been defined in Black's Law Dictionary 11th Edition as;

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

90. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in the decision of *Vijay Morjaria v Nansingh, Madhusingh Darbar & another* [2000] eKLR held thus;

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

91. Bearing the particulars of fraud in mind, it is incumbent upon the Plaintiff to prove that indeed fraudulent transfer on the part of the Defendant. The Plaintiff in his list of documents accompanying the Plaint dated 26th October, 2012 has adduced an agreement of sale dated 24th June, 2008. The Plaintiff upon being cross examined informed the court that as at 2011 a sum of Ksh 2,181,479 was outstanding and the sum was still accruing interest.

92. The Defendant on the other hand in his statement of defence dated 22nd November, 2012 has adduced; a National Bank of Kenya Payment receipt for transfer of Plot No 34 Miti Mingi Settlement Scheme No 722 Naivasha, Payment receipt No 2659160 for Plot No 34 Miti Mingi Settlement Scheme No 722, Transfer of Plot No 181 Miti Mingi Settlement Scheme No 722 situated in Naivasha District, National Bank of Kenya Limited Payment Receipt for Transfer of Plot No 181 Miti Mingi Settlement Scheme, Deposit slip of cash deposit of Ksh 300,000 in the Plaintiff's account No 0110098993400 Co-operative Bank of Kenya limited NBC branch Nairobi dated 24th July, 2008, Deposit slip of cash of Ksh 460,000/ = in the Plaintiff's Account of 0110098993400 Co-operative Bank of Kenya Limited NBC branch Nairobi dated 31st July, 2008, Deposit slip of cash deposit of Ksh 100,000 in the Plaintiff's account No 0110098993400 Co-operative Bank of Kenya Limited NBC branch Nairobi dated 2nd October, 2008; Deposit slip of cash deposit of Ksh 150,000 in the Plaintiff's account No 0110098993400 Co-operative Bank of Kenya Limited NBC branch Nairobi dated 8th October, 2008, Deposit slip of cash deposit of Ksh 350,000 in the Plaintiff's account No 0110098993400 Co-operative Bank of Kenya Limited



NBC branch Nairobi dated 26th November, 2008; Deposit slip of cash deposit of Ksh 56,000 in the Plaintiff's account No 0110098993400 Co-operative Bank of Kenya Limited NBC branch Nairobi dated 23rd December, 2008, Deposit slip of cash deposit of Ksh 50,000 in the Plaintiff's account No 0110098993400 Co-operative Bank of Kenya Limited NBC branch Nairobi dated 5th March, 2009, Deposit slip of cash deposit of Ksh 10,000 in the Plaintiff's account No 0110098993400 Co-operative Bank of Kenya Limited NBC branch Nairobi dated 31st December, 2009; Deposit slip of cash deposit of Ksh 350,000 in the Plaintiff's account No 0110098993400 Co-operative Bank of Kenya Limited NBC branch Nairobi dated 17th June, 2010; Deposit slip of cash deposit of Ksh 250,000 in the Plaintiff's account No 0110098993400 Co-operative Bank of Kenya Limited NBC branch Nairobi dated 2nd July, 2010; Deposit slip of cash deposit of Ksh 100,000 in the Plaintiff's account No 0110098993400 Co-operative Bank of Kenya Limited NBC branch Nairobi dated 18th September, 2010 and a payment receipt No G. 193195 for consent to transfer by the Plaintiff for Plot No 34 Miti Mingi Settlement Scheme No 722 Naivasha dated 20th March, 2008.

93. This court has also taken into account the evidence of DW3 (one John Ouma Mbuda) who works at Corporation Bank at Nakuru Branch. He informed the court that the above amounts were deposited into the account of the Plaintiff and the total amount is Ksh 2,196,000 which was paid between 2008 to 2010.
94. I do find that the Plaintiff has failed to prove his claim and is thus not entitled to the orders sought in his Amended Plaint dated 9th July, 2021. The Amended Plaint dated 9th July, 2021 is hereby dismissed with costs.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF MARCH, 2024

A.O.OMBWAYO

JUDGE

