



REPUBLIC OF KENYA



**Njoroge v Kinuthia & another (Environment & Land Case
101 of 2017) [2024] KEELC 1328 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 101 OF 2017**

**FM NJOROGE, J
MARCH 14, 2024**

BETWEEN

MARGARET NJOKI NJOROGE PLAINTIFF

AND

ELIZABETH WAIRIMU KINUTHIA 1ST DEFENDANT

RICHARD GICHINI WAIREGI 2ND DEFENDANT

JUDGMENT

1. By the plaint dated 8/12/2016 the plaintiff sought judgement against the defendant for the following orders: -
 1. A declaration that the transfer of title number Nakuru Municipality Block 22/718 to the 1st defendant on 12/04/2016 and to the 2nd defendant on 11/5/2016 were null and void and that the plaintiff is the lawful owner of title number Nakuru Municipality Block 22/718.
 2. An order that the District Land Registrar, Nakuru rectifies the register by cancelling the title deed issued to the 2nd defendant and registering the plaintiff as the owner of title number Nakuru Municipality Block 22/718.
 3. A permanent injunction restraining the defendant from disposing of, charging, leasing, interfering with the title number Nakuru Municipality Block 22/718.
 4. Mesne profits
 5. Costs of this suit.
2. The plaintiff avers that in July 2007 she purchased land parcel number Nakuru Municipality Block 22/718 from one Peninah Chepkoech Yatich. She was registered as the owner on 31/7/2007; since she resides Switzerland, she left the original copy of the title deed of the suit property in the custody of the



1st defendant. On 12/4/2016 the 1st defendant fraudulently transferred the suit property to her own name; and on 11/5/2016 the 1st and 2nd defendants fraudulently transferred the suit property to the name of the 2nd defendant; the transfer of the suit property to the name of the 1st defendant was null and void for lack of the consent from the land control board; the plaintiff had constructed residential units on the suit property with a monthly rental income of Kshs.37, 000/= and so she seeks for mesne profits of the said amount from June 2016 until the determination of the suit.

3. The 2nd defendant filed his statement of defence dated 29/1/2021 on 01/02/2021. According to that pleading, he was aware that the plaintiff had sanctioned, approved and facilitated the transfer of the suit property to the 1st defendant; the proceeds of the said transaction were used to settled the liabilities to K-Rep Bank, the institution to which the title had been charged. He had purchased the suit property from the 1st defendant who was the registered owner upon conducting due diligence and after following all the stipulated procedures, and without any notice of fraud and so he acquired a good title; that the plaintiff's recourse therefore lies in damages against the 1st defendant who was her agent; that the suit property was not agricultural land and did not therefore need any land control board consent; that the sale included the developments on the suit property. Since the purchase, the tenants have been paying rent to the 2nd defendant. He stated that after the transaction, the plaintiff's brother vacated the premises with the sanction of the plaintiff. The 2nd defendant then denied the other averments in the plaint and sought that the suit be dismissed with costs.

Plaintiff's Evidence

4. Margaret Njoki Njoroge testified as PW1 on 21/11/2022. She adopted her witness statement filed on 9/3/2017 as part of her evidence-in-chief and testified that the defendants had defrauded her of the suit property; that on 12/04/2016 her nephew informed her that his wife who was cultivating the suit property was stopped from doing so; that upon instructing her nephew to conduct a search on the property, she discovered that the suit property had been fraudulently transferred to the name of the 2nd defendant by the 1st defendant. She produced a copy of the title for land parcel No. Nakuru Municipality Block 22/718 registered in her name on 31/7/2007 as PExh. 1; she had originally constructed mud houses before building permanent rental houses in 2014; she produced a photograph PExh.2(a) that showed the developments on the land. She then produced a copy of the search certificate issued on 30/6/2016 (P. Exh. 4) showing that the 2nd defendant had been registered as the owner of the suit property on 11/5/2016. Making reference to the 2nd defendant's bundle of documents, she stated that the 2nd defendant had attached a charge document dated 22/10/2013 registered in favour of K-Rep Bank and the borrower was named therein Elizabeth Wairimu Kinuthia, her niece. She denied ever charging the suit property to K-Rep Bank and alleged that at the time of the said registration charge, she was abroad. She averred that her alleged signature thereon was a forgery. She denied ever appearing before Felix Ochieng Orege; neither did she appear before Sally Mbeche, advocate on 30/10/2013.
5. PW1 produced the documents in her supplementary list of documents among them being Account Opening form as P. Exh. 5(a)-(c), Bank Statement as PExh.6 (a)-(c), work schedule as P. Exh. 7(a)-(c), passport as P. Exh. 8(a)-(f), Cheques as P. Exh. 9(a)-(b). She then made reference to the passport that had been produced as P. Exh. 8(a)-(f) and testified that in 2013 she was not in the country; that she was in Kenya from 3/3/2012 to 19/3/2012; that she was also in Kenya between 22/2/2014 and 19/3/2014; further, that she was in the country between 19/11/2016 to 9/12/2016; she relied on the passport entry and exit stamps; she had a joint account with the first defendant at Barclays Bank that was opened on 12/3/2014; that they were not issued with a cheque book and either of them would sign to transact; that when she was referred to page 4 of PExh.6 which was a bank statement, she admitted that the entry for 25/4/2016 was for Kshs.1,300,072/=; that she was not aware of the said money; that there was a



cheque withdrawal on 26/4/2016 for Kshs.1,000,000/= and another of 28/4/2016 for Kshs.280,000/=; that PExh.9(a) was a copy of a cheque dated 28/4/2016 that had been issued to Elizabeth Wairimu Kinuthia on their account for Kshs. 280,000/=; P. Exh 9 was only signed by one person, Elizabeth; she was not aware of the withdrawal as she was abroad then; that PExh.9(b) is dated 26/4/2016 which was a cheque in Elizabeth's name on their account; that she was also not aware of that withdrawal; when she was referred to the Letter dated 25/1/2016 from Mirugi Kariuki & Co. to the Manager K-Rep Bank with her parcel of land as the reference she denied being aware that the property was charged to K-Rep Bank; that she did not know Mr. Richard Gichini the 2nd defendant; she had never sold the suit property to him; she had no undertaking with Mirugi Kariuki & Co. Advocates and she did not know them and has never been their client in any sale; that she was not aware of the forwarding of two Banker's cheques as per the letter dated 22/2/2016 to K-Rep Bank from the said advocates; that she was also not aware that the bank held the title deed; she denied the allegation in the 2nd defendant's witness statement that she had not given the suit land to Elizabeth; that she was to only take care of the property; she never signed transfer forms in Elizabeth's favour; that she was not aware of any money paid to K-Rep Bank by Richard Gichini Wairegi; that she did not know how the Kshs.1,300,032/= came into the account; that she last she ever saw the 1st defendant was in September 2016 but she later disappeared and her family did not know where she had disappeared to; that she then put her nephew in charge of the suit property; she later came to know that the property had been sold. In 2016 she was informed by her nephew that a man had gone to the suit property and told them to vacate it; the suit property was developed in 2014; she had built a 3 self-contained double room and one single; in front of the houses was a garden; that the monthly rent from those houses was Kshs. 7,000/=; after her nephew was chased away, the 2nd defendant started collecting the rent.

6. She was not able to find the land control board consent, rates clearance certificate or the receipts for payment of stamp duty among the records at the lands registry.
7. Upon cross-examination, she confirmed that she lives in Switzerland; that she did not return to Kenya; that she never went to Advocate Munene's office in Gate House; that she came to the country on various dates; that in 2016 she was in Kenya in September then returned to Switzerland; after that, the next time she came to Kenya was in 2018. When she was referred to the supporting affidavit sworn before Mr. Munene Muiyuro on 8/12/2016, she admitted that she was in Kenya on 8/12/2016; that she also signed the Verifying Affidavit before Mr. Munene Muiyuro; that the verifying affidavit states that she is a Kenyan citizen; that she bought the suit land in 2007; that she made the developments thereon between 2014 – May 2015 prior to her leasing it; the rent was going into the bank account before it was stopped May 2016 and the present suit was filed in 2017; she reiterated that they had opened a joint bank account with Elizabeth; that as per PExh.5, the customer's name was Njoroge Margaret; that the account is in the name of Margaret Njoki Njoroge; that she gave Elizabeth the mandate to operate the account; they were not issued with a cheque book but it appears that PExh.9(a) & (b) were cheques for the said account; that the name that appears on the said cheques was Margaret Njoki Njoroge; that the name of Elizabeth does not appear on them; that she knew that there was an account that was operated in their name; that rent was paid therein and they were not initiated by herself; that she never filed any complaint with the bank or the police about it; she was not aware of the loan that encumbered the property between 2013 and 2016 as she had never charged the land; she however admitted that all the transactions were effected using the genuine title which she left with her niece as she could not have travelled with the said document; that she had brought up Elizabeth like her own daughter; she however did not sign any documents for those transactions and the signatures on the cheques produced as PExh.9(a) and (b) did not belong to her; that when the bank account was opened she and Elizabeth were required to and did tender their signatures as they were opening a joint account.



8. Upon re-examination, she stated that PExh. 5(a) and (b) indicated her name Margaret Njoki Njoroge and it had her signature; that PExh. 6(b) read Elizabeth Wairimu Kinuthia and it had her signature; that she operated the account when she was abroad; that she left Elizabeth with all her documents; that the transfer on the 2nd defendant's list of documents was signed by Elizabeth and she did not sign the said transfer.
9. Raymond Gitonga testified as PW2. He stated that he was the Land Registrar Nakuru; he had the certified copy of the register of the suit property; entry No. 4 on the proprietorship section showed that the property was registered on 31/7/2007 in favour of Margaret Njoki Njoroge and title deed issued same day; entry No. 6 was dated 1/11/2018 noting rights under Section 87 for a charge; entry No. 7 was dated 12/4/2016 in favour of Elizabeth Wairimu and title issued same day; entry No. 9 was dated 11/5/2016 in favour of Richard Gichini Wairegi and title issued on the same day; entry No. 11 was registered on 20/7/2016 and was a restriction by Ndeda & Co. Advocates; that it was unsigned; there is another restriction entered on 22/9/2018 – No dealings until ELC Case No. 100 of 2017 is finalized; there is no other entry in the proprietorship section; according to the record the current proprietor was Richard Gichini Wairegi; on the encumbrances section there was a charge for Ksh.1.5 million entered on 1/11/2013 to K-Rep Bank and its discharge was entered on 11/4/2016. PW2 then produced a certified copy of the Register as PExh.10; that he did not bring to court the parcel file for the suit land as it was searched for and not found at the Registry; the transaction should have documents in the parcel file; he did not have any explanation why it was not there; they were served and undertook a search for the parcel file; all the documents for transaction are supposed to be in the parcel file; as per DMFI-10, the stamp duty rate for a municipality property should be 4%; that the transferee was supposed to approach the Government Valuer; that stamp duty is then calculated based on the report of value; that the Land Registrar computes stamp duty and the transferee pays it; Elizabeth was named the transferor and Richard transferee; that Stamp duty was Kshs.2,000/=, bank charges Kshs.110/=; that the stamp duty would be Kshs.50,000/= if the land is in a municipality; that the value assigned the plot would not have been a fair value or true value for a plot at Muguga at the time since the property was charged for Kshs.1.5 million in 2013; that if that was the stamp duty, then there must have been some dishonesty; that DMFI-10 stated the amount that was paid; that it was assessed by a Land Registrar, C. W. Sunguti, and signed on 10/5/2016; that DMFI-7 (the transfer) did not have the stamp to show that it was received at the Land Registry; that there was no presentation book number and neither was it registered.
10. Upon cross-examination he confirmed that the transfer in the parcel file was the one that mattered; that the assessment on DMFI-10 was done by Sunguti, a Land Registrar in Nakuru then; that he did not have evidence of what was actually paid; that the balance on underpayment was still owed to Kenya Revenue Authority; that PExh.10 showed Margaret Njoki Njoroge was at some time the registered owner of the land; that in 2016 a transfer was registered in favour of the 1st defendant; that documents of completion would have to be lodged and the original title required; that on 11/5/2016 the 2nd defendant was registered as proprietor; that a restriction was later registered; that there was no other encumbrance; that there was no caution or complaint indicated by Margaret on the Land Register and that the charge was registered and subsequently discharged.
11. The plaintiff's case was then closed.
12. Richard Gichini Wairegi testified as DW1. He adopted his witness statement filed on 2/3/2021 as his evidence in chief and produced numerous documents.
13. He testified that he was looking for property to buy and saw that the suit property was for sale on the OLX website; that he called the phone number on the advert and spoke to the 1st defendant and the



1st defendant took him to the suit property and showed him the boundaries; that the 1st defendant spoke to some tenants who had not paid their rent and power bills which gave him the confidence that she was managing the houses on the property; that the 1st defendant informed him that she had been bequeathed the suit property by her aunt; that they then agreed at a purchase price of Kshs. 4,500,000/=; that she informed him that she was selling the property because she was not able to service a loan that she had taken from K-Rep Bank; that she was scared that the bank might exercise its statutory power of sale; that he sought the services of Mirugi Kariuki & Co. Advocates to help him buy the property. They conducted a search which reflected the charge to K-Rep Bank; that the search also showed that the property had initially been registered in the name of the plaintiff before it was registered in the name of the 1st defendant. The title was in the name of the plaintiff but the loan was issued to the 1st defendant. When his lawyers inquired from the 1st defendant about the charge, the 1st defendant informed them that she had obtained the consent of the plaintiff before registering the charge; that his advocates also inquired as to why, if the property was bequeathed to her, it was not transferred to her name and she stated that she needed the money urgently and that is why she registered the charge before the transfer; that his lawyers wrote to K-Rep Bank requesting details of the loan and balance and they wrote back; that they then made an agreement that he was to pay in 3 instalments; that the 1st defendant Elizabeth directed that they pay partly to her account and partly to Margaret's account; that they had to call the plaintiff before finalization of the payment; that Elizabeth called the plaintiff by phone, the latter who confirmed she had bequeathed the property to the 1st defendant but they had not finalized the transfer process; that the payment to the plaintiff was made from his account in Prime Bank to the plaintiff's in Barclays, Nakuru West Branch on 25/4/2016; that the plaintiff's account bore only her name; that he had never received any refund of that money from plaintiff; that his payment to K-Rep Bank was according to the 1st defendant to first clear the loan and secondly to pay the consideration. His lawyers guided him in the transaction; they obtained a Land Control Board Consent; the 1st defendant transferred the land to him; the transfer was witnessed by Mr. Kibet, a lawyer; he got the title deed in DW1's name; the 1st defendant then facilitated the handover of the tenants to him; he then undertook maintenance on the property after becoming owner; the tenants now pay rent to him. For 6 months after he took possession, Margaret never contacted him; however, in January 2021 he checked his name on google and it showed that he had a court case and he then called his advocates on record. The tenants had not brought to his attention any claim by Margaret; he was not aware of the whereabouts of the 1st defendant; he conducted all due diligence and surveyed the property and that at the time of the transfer, the suit property was in the name of the 1st defendant; he obtained the land Control Board consent and paid stamp duty; he was not aware of any fraud in the transfer from the plaintiff to the 1st defendant and from the 1st defendant to his name; he knew that the plaintiff was aware of the transfer since some monies were paid to her; he was not aware of any cheques or refunds; he found it puzzling that the 1st defendant disappeared. He prayed that the suit be dismissed.

14. Upon cross-examination, he was referred to his witness statement and he confirmed that he had stated that he had met the 1st defendant in early 2016; that at the time he was negotiating with the 1st defendant to buy the suit property, the land was registered in the name of the plaintiff; that the 1st defendant did not produce any written document to show that she had been gifted the suit property; that when the 1st defendant called the plaintiff, it was through a voice call; that he did not know the plaintiff's voice and solely relied on the 1st defendant to inform him that the plaintiff was on the line; that he agreed to purchase the property from the 1st defendant and they entered into a written sale agreement and then he released the cheques on 20/2/2016; that they agreed on the purchase price of Kshs.4,500,000/= and he ended up paying Kshs.4,500,028/=; that he did not have the agreement with him in court; that he paid the lawyers Kshs.45,000/=.



15. DW1 also stated that payment to K-Rep bank was done through Bankers Cheque before they entered into the sale agreement; that he took possession of the property in June 2016; that they were tenants that were on and off and in a good month, he used to collect Kshs. 32,000/= as rent and that D. Exh. 20 did not indicate the purpose of the cash payment.
16. Upon re-examination, DW1 confirmed that he was not aware of any fraud between the parties and that the other person who they spoke to over the phone sounded knowledgeable about the transaction.
17. Elijah Cheboswony Kibet testified as DW2. He stated that he practices law with Mirugi Kariuki & Co. Advocates and he has been an advocate of over fifteen years standing. He adopted his witness statement filed on 9/02/2022 as part of his evidence-in-chief. His further testimony was that his firm had done the conveyancing between the 1st defendant and the 2nd defendant regarding the suit property; that they were instructed by the 2nd defendant and they conducted a search on the suit property; that from the search they found out that the property was charged to K-Rep Bank; that the charge was three years old on the title; that they therefore wrote to the bank to confirm the charge and the arrears; that they learnt that Munene & Co. Advocates were acting for the 1st defendant; that when they reached out to the advocates for the 1st defendant, they were informed that the said advocates had dealt with both the plaintiff and the 1st defendant; that the said advocates also confirmed that they did not have anything to show that the plaintiff had gifted the 1st defendant with the suit property; that they called the plaintiff and she confirmed that she had gifted the suit property to the 1st defendant but could not transfer it to her because the title was with K-Rep Bank; that K-Rep Bank confirmed that if they paid the arrears then the title deed would be released; that they could not do the agreement till the title was released; that the 2nd defendant repaid the loan and the title was released; that Munene & Co. Advocates then had the property transferred from the plaintiff to the 1st defendant; on 1/4/2016 they did a sale agreement between the 1st defendant and the 2nd defendant; they obtained the land control board consent and transferred the title to the 2nd defendant's name and that he contacted Mr Orege who had prepared the charge and he confirmed that the plaintiff had signed it.
18. Upon cross-examination, he was referred to his statement and confirmed that it was the 2nd defendant who was their client and not the plaintiff; that the title was initially in the name of the plaintiff and that they wanted K-Rep bank to release it to them; that they did not have any written authority from the plaintiff authorizing the release of the property to them; that he did not have any documents to show the involvement of Mr. Munene; that he did not file the said correspondence that he had with Mr. Munene; he clarified that he did not see any deed of gift from the plaintiff to the 1st defendant as he only trusted the word of Mr. Munene; that the 1st defendant gave them a phone number that was said to belong to the plaintiff and they called her using their office line; that he had never met the plaintiff and could not therefore identify her voice; that he was convinced that it was the plaintiff who was on the other end of the line; that when he was referred to his letter dated 25/1/2016, he confirmed that it indicated that the chargor was the plaintiff and that the 2nd defendant would be purchasing the property from the plaintiff; that the sale agreement between the 1st defendant and the 2nd defendant was written on 1/4/2016 and at that time the 1st defendant was the registered owner of the suit property; that upon being referred to the title deed in the name of the 1st defendant, he confirmed that it was issued on 12/4/2016; that he was only learning at the hearing that at the time they entered into the sale agreement, the property was yet to be registered in the name of the 1st defendant and she therefore had no interest to sell to the 2nd defendant; that the sale agreement was made after the loan to K-Rep bank had been repaid and the title deed released; that they acted for both parties in the agreement and the payments of the purchase price of Kshs.4,500,000/= was done through bank transfers; that the property is valued by the government valuer for stamp duty; that it was described as a "Nakuru



Municipality Block...” and that duty is assessed at 4%; that Kshs.2,000/= was paid as stamp duty as per the KRA stamp duty form dated 10/5/2016; that there was no underpayment as that was the assessed value. He averred that a gift or a sale has to be in writing and signed by the parties.

19. Upon re-examination, he stated that the only transaction he was aware of was between the two parties in the matter; that he confirmed that there was a gift deed; that they never received any notice of any non-performance of the agreement.
20. The 1st and the 2nd defendant’s case was then respectively marked as closed.

Submissions

21. The plaintiff filed her submissions on 19/5/2023 while the 2nd defendant filed his submissions on 5/06/2023 and the plaintiff filed her supplementary submissions on 6/06/2023.
22. The plaintiff in her submissions identified the following issues for determination:
 - i. Whether the transfer of the suit land into the names of the defendants was fraudulent.
 - ii. Whether the 2nd defendant is an innocent purchaser for value without notice.
 - iii. The reliefs that this honorable court should grant.
23. On the first issue, the plaintiff relied on the case of Elizabeth Kamene Ndolo vs George Matata Ndolo [1996] eKLR and Section 26 of the [Land Registration Act](#) while submitting that the transfer of the suit property from her name to the 1st defendant on 12/04/2016 was fraudulent as she was outside the country. She relied on her passport which indicated that she was not in country between 22/10/2013 and 30/10/2013 when she was alleged to have executed the charge instrument. It was also her submissions that she did not sign the application for consent of the Land Control Board or the transfer and that she was not able to obtain copies of the said documents from the land registry. It was the plaintiff’s submissions that the 2nd defendant admitted that he negotiated the purchase of the suit property with the 1st defendant while it was still registered in her name and even indicated in his advocates letter dated 25/01/2016 that was addressed to K-Rep Bank that he was purchasing the suit property from her which was not true. She urged that the 2nd defendant acted fraudulently by obtaining the plaintiff’s title deed from K-Rep bank without her consent and by entering into the sale agreement with the 1st defendant while the property was still registered in her name. The plaintiff further submitted that the 2nd defendant did not prove the alleged voice calls that allegedly took place between them and her. The plaintiff also submitted that the 2nd defendant’s witness admitted to not seeing the deed of gift between her and the 1st defendant which was further evidence of fraud.
24. With regard to the second issue, the plaintiff relied on the case of Weston Gitonga & 10 others vs Peter Rugu Gikanga & another [2017] eKLR and submitted that even though the 2nd defendant had in his possession the title deed to the suit property, he did not produce the sale agreement that he allegedly entered into with the 1st defendant as required by Section 3(3) of the [Law of Contract Act](#). She then reiterated that the 2nd defendant purchased the property when he was aware that it was not registered in the name of the 1st defendant which shows that he had knowledge of the fraud and the court should therefore declare that the said transfer was fraudulent. The plaintiff also sought that the court cancels the title in the 2nd defendant’s name and order the rectification of the register. The plaintiff further sought an award for mesne profits and a permanent injunction to be issued against the 2nd defendant together with costs of the suit.



25. In his submissions, the 2nd defendant set out the summary of each of the parties cases, the evidence that was given during trial and identified the following issues for determination:
- a. Whether the title to the suit property was fraudulently acquired by the defendants.
 - b. Whether the 2nd defendant was an innocent purchaser for value without notice.
 - c. Whether the plaintiff is entitled to the reliefs sought in her plaint.
26. On the first issue, the 2nd defendant submitted that it was the plaintiff's case that she was not present in Kenya when the alleged charge was executed but as per his then advocates during the said transactions, K-Rep bank confirmed that it was the plaintiff who had executed the charge for the loan that was issued to the 1st defendant. It was the 2nd defendant's submission that the plaintiff failed to prove her allegations of fraud because even though she claimed that she had a joint account with the 1st defendant, no such evidence was produced and that it was clear from the evidence adduced that the plaintiff received part of the purchase price. The 2nd defendant relied on the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] in support of his argument.
27. It was the 2nd defendant's further submission that the plaintiff was aware of the said transaction as she received part of the purchase price and that even though the Land Registrar indicated that some documents were missing in the lands registry, that per se would not mean that there was fraud. With regard to whether he was an innocent purchaser for value, the 2nd defendant relied on the cases of *Katende vs Haridas and Company Limited* [2008] EA 173, *Samuel Kamere v Lands Registrar, Kajiado* [2015] and urged that he acquired a valid and legal title of the suit property. It was also the 2nd defendant's submission that he conducted due diligence before purchasing the suit property; he submitted that the 1st defendant signed the transfer documents and that he had paid valuable consideration for the purchase of the suit property.
28. On whether the plaintiff is entitled to the orders sought in the plaint, the 2nd defendant submitted that since the plaintiff had failed to prove that the property was acquired fraudulently, she is not entitled to the orders sought in the plaint. On mesne profits, it was the 2nd defendant's submission that the plaintiff had not produced any evidence to demonstrate that she was entitled to damages. The 2nd defendant relied on the case of *Attorney General v Halal Meat Products Limited* [2016] in support of his arguments. The 2nd defendant concluded his submissions by stating that the plaintiff voluntarily transferred her legal interest in the property to the 1st defendant who also voluntarily transferred the property to him and since she had failed to prove her case, it should be dismissed with costs to him.
29. The plaintiff in her supplementary submissions relied on the case of *Samuel Kamere vs Lands Registrar, Kajiado* [2015] eKLR and submitted that the 2nd defendant did not prove any of the three requirements to qualify him as a bona fide purchaser for value. The plaintiff also relied on the case of *Munyu Maina vs Hiram Gathiha Maina* [2013] and submitted that since the 2nd defendant's title was under challenge, he had to prove the legality of its acquisition. The plaintiff concluded her submissions by seeking that judgement be entered in her favour.

Analysis and determination

30. After considering the pleadings, the evidence and the submissions, the following issues arise for determination:
- a. Whether the 2nd defendant acquired land parcel No. Nakuru Municipality Block 22/718 procedurally.



- b. Whether the plaintiff should be granted the orders sought in the plaint.

Whether the 2nd defendant acquired land parcel No. Nakuru Municipality Block 22/718 procedurally.

31. It is not disputed that the plaintiff purchased land parcel No. Nakuru Municipality Block 22/718 from Peninah Chepkoech Yatich and was registered as the owner on 31/7/2007. It was also not disputed that she was based in Switzerland and that she left the original title deed with the 1st defendant who was her niece and was based in Kenya. In 2016 the 1st defendant disappeared and so she told her nephew to take care of the suit property. It was her nephew who informed her that he had been asked by the 2nd defendant to vacate the suit property as it had been sold. When she inquired from the lands registry, she was informed that the suit property was now registered in the name of the 2nd defendant and she was not able to get the documents that were used to facilitate the transfer from her name to the 1st defendant and from the 1st defendant to the 2nd defendant. The Land Registrar who gave his evidence as PW2 confirmed that he could not trace the parcel file of the suit property in the lands registry. The parcel file contained the transaction documents. It was the plaintiff's case that she did not transfer the suit property to the 1st defendant and that she did not charge the suit property to K-Rep bank as she was outside the country at the time of the transactions. It was further the plaintiff's case that she operated a joint account with the 1st defendant and that would explain why some money was paid to the said account which the 1st defendant later issued cheques to herself.
32. In support of her case, the plaintiff produced a copy of the title deed for land parcel No. Nakuru Municipality/Block 22/718 issued in her name on 31/07/2007; photographs that show the developments on the suit property; a certificate of official search dated 30/06/2016 which showed that on 11/05/2016 land parcel No. Nakuru Municipality Block 22/718 was registered in the name of Richard Gichini Wairegi, the 2nd defendant; an account opening form dated 12/03/2014 for Barclays Bank filled by the plaintiff Margaret Njoki Njoroge and is also signed by Elizabeth Wairimu Kinuthia; bank account statements issued by Absa Bank Kenya Limited; at page 4 of the bank statement is the transaction of 25/04/2016 which shows a deposit of Kshs.1,300,072/=; the statement also shows that on 26/04/2016 there was a cheque withdrawal of Kshs.1,000,000/= and on 28/04/2016 there was another cheque withdrawal of Kshs.280,000/=; a copy of work schedule that was not in English; a copy of passport No. A1620440 issued to the plaintiff Njoroge Margaret Njoki which shows that the plaintiff was in the country between 3/3/2012 to 31/2/2012, between 22/2/2014 to 19/3/2014, and also between 18/11/2015 to 4/12/2015; another cheque dated 26/04/2016 issued to Elizabeth Wairimu Njoroge for Kshs.1,000,000/= from Margaret Njoki Njoroge's Barclays account; there is also a copy of a cheque dated 28/04/2016 issued to Elizabeth Wairimu Kinuthia for Kshs. 280,000/= from Margaret Njoki Njoroge's Barclays account.
33. The 2nd defendant's case on the other hand was that he was looking for land to purchase and that he came across an advertisement for sale of the suit property on the OLX website. He contacted the phone number on the said advertisement and spoke to the 1st defendant who took him to the suit property and showed him the boundaries. They negotiated and agreed on the purchase price of Kshs. 4,500,000/=. It was the 2nd defendant's case that the 1st defendant informed him that she had been gifted the suit property by the plaintiff and had charged it to K-Rep Bank before it was transferred to her name. The 1st defendant also informed him that she was selling the property because she had defaulted in repaying the loan and that the bank would exercise its statutory power of sale at any time. They agreed that he would repay the remainder of the loan to K-Rep bank and then pay the rest of the purchase price to both the plaintiff and the 1st defendant. The 2nd defendant paid the outstanding loan balance and was



able to get the original title deed and on 1/4/2016 he entered into a land sale agreement with the 1st defendant. The 2nd defendant admitted that at the time he was negotiating for the purchase of the suit property, the property was still registered in the name of the plaintiff. On 12/04/2016 the property was registered in the name of the 1st defendant before it was registered in the name of the 2nd defendant on 11/05/2016. The 2nd defendant argued that he was a bonafide purchaser for value and that he was not aware of any fraud.

34. In support of his case, the 2nd defendant produced a copy of the title deed dated 11/05/2016 for land parcel No. Nakuru Municipality Block 22/718 (Muguga) issued to Richard Gichini Wairegi; a copy of the title deed dated 12/04/2016 issued to Elizabeth Wairimu Kinuthia of land parcel No. Nakuru Municipality/Block 22/718 (Muguga); copies of the plaintiff's Identity card and KRA pin; a copy of the application for consent of the land control board in respect of the suit land which indicated that the registered holder of interest was Elizabeth Wairimu Kinuthia and the purchaser Richard Gichini Wairegi; a copy of the letter of consent dated 28/04/2016 issued by the Nakuru Land Control Board to Elizabeth Wairimu Kinuthia; a copy of transfer of land from Elizabeth Wairimu Kinuthia to Richard Gichini Wairegi that is neither dated nor registered; a copy of Elizabeth Wairimu Kinuthia's identity card; a receipt for payment of stamp duty of Kshs.2,110/=; a copy of the rates clearance certificate dated 31/03/2016 for the suit land, that was registered in the name of Margaret Njoki Njoroge; a copy of the charge dated 22/10/2013 between Margaret Njoki Njoroge and K-Rep bank Limited over land parcel No. Nakuru Municipality Block 22/718 that was used to secure a loan of Kshs.1,500,000/= that was advanced to Elizabeth Wairimu Kinuthia; the charge was registered on 1/11/2013; a statutory declaration said to have been signed by the plaintiff on 30/10/2013; copies of cheques issued to Elizabeth Wairimu Kinuthia dated 20/02/2016 for Kshs.700,000/= and Kshs.500,000/=; a letter dated 22/2/2016 written by Mirugi Kariuki & Co advocates to the Legal Officer K-rep bank forwarding the aforementioned bankers cheques to clear the loan taken by Elizabeth Wairimu Kinuthia; the said letter also sought for the release of the original title deed for land parcel No. Nakuru Municipality Block 22/718 and the discharge of charge; a letter dated 25/1/2016 written by Mirugi Kariuki & Co. Advocates to the manager K-Rep bank indicating that the 2nd defendant was intending to purchase the suit property from the chargor and seeking to find out the outstanding arrears; receipt dated 8/04/2016 for payment for the discharge of charge; a letter dated 11/3/2016 written by Mirugi Kariuki & Co. Advocates to the manager K-Rep Bank forwarding the discharge of charge; a copy of the title deed for the suit property issued to the plaintiff Margaret Njoki Njoroge dated 31/07/2007 and copies of transmission notifications dated 21/04/2016 and 25/04/2016 for Kshs.505,000/=, Kshs.1,300,072/= and Kshs.1,449,956/= respectively.
35. The plaintiff gave the title deed in respect of the suit property to the 1st defendant for safe keeping as the plaintiff is based in Switzerland. That is an undisputed fact. It is further not disputed that the 1st defendant sold the suit property to the 2nd defendant while it was registered in the name of the plaintiff. What is disputed is whether the serial transfers to the defendants were valid.
36. The 2nd defendant alleged that the plaintiff had gifted the suit property to the 1st defendant who took a loan from K-Rep bank before the suit property could be transferred to her name. The plaintiff denied gifting the suit property to the 1st defendant and stated that she had only given the original title deed to the 1st defendant for safekeeping. The 2nd defendant admitted that he did not see any deed bequeathing the suit property to the 1st defendant and that at the time he was negotiating with the 1st defendant over the sale of the suit property, it was registered in the name of the plaintiff. It is therefore my finding that no evidence was adduced in support of the allegations that the plaintiff had gifted the 1st defendant with the suit property.



37. The 2nd defendant also alleged that at the time he was negotiating with the 1st defendant over the purchase of the suit property, there was a charge registered on the property by the plaintiff to secure a loan of Kshs. 1,500,000/= that had been issued to the 1st defendant. The plaintiff denied registering any charge over the suit property as she was outside the country when the said charge was being registered which charge she also denied signing.
38. From the entries contained in the plaintiff's passport that have been set out earlier in this judgement, it is clear that the plaintiff was not in the country in the year 2013 when she is alleged to have executed the charge over the suit property. The 2nd defendant also alleged that part of the purchase price was deposited in the plaintiff's bank account. It is evident from the bank statements that were produced by the plaintiff that indeed a sum of Kshs. 1,300,072 was deposited in her account on 25/04/2016. It is also evident that there was a cheque withdrawal of Kshs. 1,000,000/= on 26/04/2016 and another cheque withdrawal of Kshs. 280,000/= on 28/04/2016. The plaintiff produced copies of the said cheques that had been issued to the 1st defendant Elizabeth Wairimu Kinuthia. The plaintiff alleged that she had given the 1st defendant access to her bank account which the 2nd defendant disputed but did not adduce any evidence to the contrary. However, I find that the 1st defendant had been empowered to operate the account even if it was only in the plaintiff's name. No evidence was adduced to demonstrate that the plaintiff ever withdrew money that the 2nd defendant had deposited in that account. It is therefore clear that the 1st defendant withdrew the said monies that had been deposited in the plaintiff's bank account by the 2nd defendant.
39. The plaintiff in her plaint had set out the particulars of fraud against the defendants. The burden of proof is on the plaintiff to show that the transfer of the suit property from her name to that of the 1st defendant was fraudulent. The Court of Appeal in the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR held as follows:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 wherein the Court stated that:
- “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
40. The particulars of fraud against the 1st defendant were that she transferred the suit property to her name while knowing that she had no good title to it, failure to obtain the consent of the land control board and the requisite clearance certificates. The 1st defendant did not enter appearance and neither did she participate in the hearing of the present matter. As indicated before, the 2nd defendant alleged that the suit property had been gifted to the 1st defendant but no deed of bequeathing the suit property was produced.
41. The particulars of fraud against the 2nd defendant were that he failed to undertake due diligence, failed to obtain the land control board consent and pay stamp duty. The 2nd defendant denied having knowledge of any fraudulent activities but also admitted that at the time he was negotiating for the purchase of the suit property, he was aware that the land was still registered in the name of the plaintiff. When the 2nd defendant entered into the sale agreement with the 1st defendant on 1/04/2016, the



suit property was still registered in the name of the plaintiff. The 2nd defendant produced various documents in support of his case. They included a land control board consent, clearance certificate for rates and an undated and unregistered transfer form. The Land Registrar in his evidence admitted that he could not trace the parcel file at the lands registry and therefore did not have the transaction documents with respect to the transfer between the plaintiff and the 1st defendant and between the 1st defendant and the 2nd defendant.

42. The 2nd defendant also claimed that he was an innocent purchaser for value as he had conducted due diligence before he purchased the suit property. The court of appeal in the Ugandan case of *Katende v Haridar & Company Limited* [2008] 2 E.A 173 held as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.”

43. The Supreme Court in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) while considering the issue of bona fide purchaser for value stated as follows:

- “92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No. 28 of 2005* [2015] eKLR stated as follows:

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

93. As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina Civil Appeal No. 239 of 2009* [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.



94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.”

44. Section 26 of the *Land Registration Act* provides as follows:

- “26. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

45. This court has to therefore determine whether the 2nd defendant acquired a valid and legal title, whether he conducted the necessary due diligence and whether the root of his title was legal or valid. As was held in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (supra), a title cannot be said to be valid if it was acquired from a person who had no valid title. If the 2nd defendant knew at the time of the execution of the sale agreement that the land was registered in the plaintiff’s name, it was incumbent upon him to seek clarity as to how the same would be transferred to the 1st defendant before it was transferred to him. his only other alternative was to request to be allowed to deal directly with the plaintiff and have her execute the transfer in his or his advocate’s presence. None of this happened. There is no evidence that the 1st defendant got the plaintiff to transfer the land to her before she could purport to sell it to the 2nd defendant. Her acquisition thereof was therefore irregular, fraudulent and incapable of transferring any clean title to her. Consequently, she could also not therefore by way of a transfer confer to the 2nd defendant any good title than that faulty title she had acquired. The rule *nemo dat quod non habet* applies in the transactions subject matter of this case. From the evidence adduced in the present matter, it is thus clear that the 1st defendant acquired the suit property unprocedurally. The 2nd defendant now holds the title to the suit property which has been impeached on the ground that it was acquired from the 1st defendant who had acquired it unprocedurally. The 2nd defendant, by virtue of his prior knowledge that the land belonged to the plaintiff, and also by virtue of not having insisted on either dealing with the plaintiff or otherwise ensuring that the plaintiff was personally involved in the matter, does not qualify as a bona fide purchaser for value without notice as defined in *Katende v Haridar & Company Limited* [2008] 2 E.A 173. It is therefore my view that the 2nd defendant’s title is invalid and fit for cancellation.

46. In conclusion, it is my view that the plaintiff has proved her case on a balance of probability and is therefore entitled to the prayers sought in the plaint. I therefore enter judgment in favour of the plaintiff against the defendants jointly and severally and I issue the following orders:



- i. A declaration is hereby issued declaring that the transfer of title number Nakuru Municipality Block 22/718 to the 1st defendant on 12/04/2016 and the transfer to the 2nd defendant on 11/5/2016 are null and void;
- ii. A declaration is hereby issued declaring that the plaintiff is the lawful owner of title number Nakuru Municipality Block 22/718;
- iii. The District Land Registrar, Nakuru shall rectify the land register by cancelling the entries regarding the two transfers identified in order no (i) herein above and the title deed issued to the 2nd defendant and reinstating the plaintiff as the registered proprietor of title number Nakuru Municipality Block 22/718;
- iv. A permanent injunction is hereby issued restraining the defendants from disposing of, charging, leasing, or in any other manner interfering with the title number Nakuru Municipality Block 22/718;
- v. For lack of sufficient evidence, the claim for mesne profits fails;
- vi. The defendants shall meet the costs of this suit.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT ON THIS 14TH DAY OF MARCH, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

