



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyandiko & 9 others v Nzioka & 3 others (Environment & Land Case 285 of 2017) [2024] KEELC 1411 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1411 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 285 OF 2017**

**OA ANGOTE, J**

**MARCH 14, 2024**

**BETWEEN**

**PAMELA NYANDIKO ..... 1<sup>ST</sup> PLAINTIFF**  
**EMMA MUTHONI IRUNGU ..... 2<sup>ND</sup> PLAINTIFF**  
**ALICE AYUMA MUCHILWA ..... 3<sup>RD</sup> PLAINTIFF**  
**CHARLES KAGIRI ..... 4<sup>TH</sup> PLAINTIFF**  
**LUCY MURUNGI MAINA ..... 5<sup>TH</sup> PLAINTIFF**  
**JOSEPH THAIRU KAGURE ..... 6<sup>TH</sup> PLAINTIFF**  
**HANNAH WANJIRU KAHIU ..... 7<sup>TH</sup> PLAINTIFF**  
**JOHN KIMARU MUMBI ..... 8<sup>TH</sup> PLAINTIFF**  
**DANIEL GICHERU ..... 9<sup>TH</sup> PLAINTIFF**  
**ELIUD GATHERU THAIRU ..... 10<sup>TH</sup> PLAINTIFF**

**AND**

**JONATHAN KITUNA NZIOKA ..... 1<sup>ST</sup> DEFENDANT**  
**CHARLES MUGO KIRATU T/A CHAMUKI PROPERTY**  
**AGENTS ..... 2<sup>ND</sup> DEFENDANT**  
**JULIUS KALANGA MAKORI ..... 3<sup>RD</sup> DEFENDANT**  
**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs have filed an Amended Plaint dated 28<sup>th</sup> September 2018, seeking the following remedies:



- a. A declaration that the Plaintiffs are the rightful owners of the respective plots of land in Nairobi/block/118/126.
  - b. A declaration that the 1<sup>st</sup> Defendant transfer of property Nairobi/block/118/126 to the 3<sup>rd</sup> Defendant is null and void.
  - c. The Certificate of Lease held by the 3<sup>rd</sup> Defendant over the suit property be and is hereby declared null and void and be revoked.
  - d. That the Certificate of Lease in respect of Nairobi/ Block 118/126 issued by the 4<sup>th</sup> Defendant to the 1<sup>st</sup> and 3<sup>rd</sup> Defendant is hereby revoked.
  - e. That a Vesting Order be issued directing the 4<sup>th</sup> Defendant to transfer Nairobi/block 118/ 126 in the various names of the Plaintiffs as the rightful proprietors of the said suit property.
  - f. A permanent injunction against the Defendants either severally and jointly restraining the Defendants, their employees, agents, charges, assigns, servants and any other persons howsoever acting under their directions from entry into, taking possession, seizure, confiscation, occupation, selling, advertising for sale, transferring, charging, further charging, leasing, subdividing, wasting, alienation, demolition of premises or in any manner howsoever from dealing with land known as Nairobi/ Block 118/126.
  - g. That the costs of this application be provided for.
2. The Plaintiffs' case is that at all material times, they have been in constructive possession of the whole of the suit property, NAairobi/block 118/ 126, within Nairobi City County.
  3. They claim that on diverse dates between 2014 and 2016, they individually executed sale agreements with the 2<sup>nd</sup> Defendant for the sale and purchase of portions of the suit property and that they paid monies to the 2<sup>nd</sup> Defendant in full upon execution of the Agreement for sale and were issued with receipts for the paid sums.
  4. It was averred by the Plaintiffs that the 2<sup>nd</sup> Defendant further issued them with plot ownership certificates to confer ownership of the respective plots to them; that they took possession of the suit property and constructed residential houses thereon and that they have been in possession of the suit property for the past 3 to 4 years and have been paying the required annual ground rent, rates and other charges collectively.
  5. According to the Plaintiffs, the relationship between them and the 2<sup>nd</sup> Defendant, as purchasers who had paid the purchase price for individual plots, is that of an implied or constructive trust in their favour and that their interest over the suit land emanates from the possession or occupation of the same after legally purchasing the land from the 2<sup>nd</sup> Defendant.
  6. The Plaintiffs claim that after the purchase of the suit property, the 2<sup>nd</sup> Defendant demanded that they pay him a sum of Kshs. 30,000 to facilitate and effect the transfer of the property and for each Plaintiff to obtain a Certificate of Lease and that some of them have paid the 2<sup>nd</sup> Defendant the said sum while others are in the process of paying the same.
  7. Upon seeing strangers on the suit property on 10<sup>th</sup> April 2017 and upon advice of counsel, the Plaintiffs averred that they conducted a search and found that the 1<sup>st</sup> Defendant had transferred the suit property to the 3<sup>rd</sup> Defendant on 1<sup>st</sup> February 2017, who is now the registered owner of the suit property. The Plaintiffs aver that the 1<sup>st</sup> Defendant's purported transfer and registration of the suit property to the 3<sup>rd</sup> Defendant was fraudulent.



8. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed a Defence in which they denied that the Plaintiffs have been in constructive possession of the suit property and claimed that the Plaintiffs' occupation has been without the 1<sup>st</sup> and 3<sup>rd</sup> Defendant's permission or consent and that the Plaintiffs are trespassers as the 2<sup>nd</sup> Defendant had no authority from the 1<sup>st</sup> and 3<sup>rd</sup> Defendants to sale the suit property on their behalf.
9. They claim that the Plaintiffs had no basis in making any payments for any part of the suit property to the 2<sup>nd</sup> Defendant, and they ought to pursue him for their refunds; that they lodged a complaint with the Nairobi City County regarding some people who had trespassed on the suit property and that the transfer of the suit property from the 1<sup>st</sup> Defendant to the 3<sup>rd</sup> Defendant was legal, procedural, regular and not fraudulent as alleged.
10. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants further claim that the Plaintiffs and the 2<sup>nd</sup> Defendant, through conspiracy and fraudulent means, have attempted to transfer, alienate, and deprive them of the suit property by entering into secret transactions relating to the suit land.
11. The Defendants averred that there is another suit being ELC No. 293 of 2017 between the Plaintiffs, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and others, pending before this court.
12. In their counterclaim, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants assert that on 22<sup>nd</sup> June 2015, they went to inspect the suit property and found some temporary structures which they discovered belonged to the Plaintiffs; that they learnt that the Plaintiffs claim to have bought the suit property from the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant and the Plaintiffs have conspired to fraudulently transfer the suit property to them.
13. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants averred that they have never sold or transferred any part of the suit property to any of the Defendants in the Counterclaim, and that as a result of the fraud and trespass, they have continued to be denied the ownership, occupation and use of the suit property.
14. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants claim the following reliefs in their Counterclaim:
  - a. That the Plaintiff's suit filed and dated the 26<sup>th</sup> April 2017 be dismissed with costs.
  - b. That an order of eviction do issue against all the nine (9) Defendants in the Counterclaim so that they may be forcefully evicted from the suit property known as Nairobi/ Block 118/126.
  - c. A permanent injunction do issue against the nine (9) Defendants in the counterclaim severally and jointly restraining them, their employees, servants, children, agents, charges, assigns and all those claiming through them from ever entering onto, taking possession, occupying, subdividing, selling, further charging, leasing, wasting, alienating, erecting further structures or in any manner whatsoever from interfering with that suit property known as Nairobi/ Block 118/268.
15. The 2<sup>nd</sup> Defendant filed a Defence and Counterclaim against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants in which he averred that there was no fraud in its actions and that he was not involved in transferring the suit property to the 3<sup>rd</sup> Defendant and that the Plaintiffs' claim should be allowed.
16. The 2<sup>nd</sup> Defendant asserted that he lawfully purchased the suit property from the 1<sup>st</sup> Defendant vide a sale agreement dated 16<sup>th</sup> August 2013 for a consideration of Kshs. 3,000,000; that he carried out due diligence by conducting an enquiry from Drumvale Farmers Co-operative Society who were the original owners of the parcel of land; and that the 1<sup>st</sup> Defendant executed a transfer instrument in its favour.



17. The 2<sup>nd</sup> Defendant claims that it later found out that the 4<sup>th</sup> Defendant had registered the parcel of land in favor of the 3<sup>rd</sup> Defendant and that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants must have conspired to fraudulently transfer the suit property to the 3<sup>rd</sup> Defendant.
18. In the Counterclaim, the 2<sup>nd</sup> Defendant prayed for the following orders:
  - a. The Certificate of Lease issued to the 2<sup>nd</sup> Defendant on 01/02/2017 be cancelled and the same be vested to the Plaintiffs.
  - b. A permanent injunction do issue against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants severally and jointly restraining them, their agents and all those claiming through them for harassing or interfering with the possession of the Plaintiffs whatsoever.
19. In response, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants opposed the 2<sup>nd</sup> Defendant's Defence and Counterclaim. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants averred that the 2<sup>nd</sup> Defendant had no property to sale to the Plaintiffs and any sale agreements executed and ownership documents issued are null and void and of no legal effect.
20. They averred that an implied or constructive trust has not arisen in favor of the Plaintiffs with respect to any sale agreements or occupation of the suit land and that the 1<sup>st</sup> Defendant issued the 3<sup>rd</sup> Defendant a lease through a process that was procedural, regular and valid.

### **Hearing and Evidence**

21. The Plaintiffs presented the testimony of 7 witnesses to support their suit. PW1, who is the 7<sup>th</sup> Plaintiff, testified that she and the 8<sup>th</sup> Defendant were introduced to a "land broker" in Ruai, Mr. Gatimu, who took them to the suit property in Kamulu; that Mr. Gatimu showed them two plots that were remaining out of the one acre, and told them that the owner of the suit property was Charles Mugo and that at that time, the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs had already constructed on the suit property.
22. PW1 stated that she entered into a sale agreement dated 25<sup>th</sup> March 2015 and paid the purchase price of Kshs. 450,000, for which she was issued a receipt; that she was later given a certificate and paid Kshs. 30,000 for processing of a title and that she moved into her house in 2017, and a month later, a village elder informed her that he was a representative of the 3<sup>rd</sup> Defendant, who was the owner of the suit property.
23. In cross-examination, PW1 stated that the plot she bought was described as Plot No. 16; that she has built a permanent house, which she is still occupying; that she did not obtain approvals from the Nairobi City County and that she discovered that the suit property was in the 3<sup>rd</sup> Defendant's name at the County Government of Nairobi offices.
24. PW2, the 1<sup>st</sup> Plaintiff, relied on her witness statement dated 6<sup>th</sup> October 2017 as her evidence in chief. She also relied on her documents, which included a sale agreement dated 18<sup>th</sup> December 2014; a search from Drumvale Farmers Society Ltd dated 6<sup>th</sup> June 2014; a search from the Lands Office dated 11<sup>th</sup> September 2013; receipts dated 18<sup>th</sup> December 2014 and 30<sup>th</sup> December 2014; and photographs of her house constructed on the suit property.
25. She testified that the payments were made to Chamuki Property Agents, the 2<sup>nd</sup> Defendant; that she has been on the suit property for eight years; that she was issued with an ownership certificate by Chamuki Property Agents and that she did not obtain approvals from the County Government of Nairobi before constructing her house on the land in 2015. According to PW2, the Nairobi City County informed her that they could not approve plans without the owner having title to the land.



26. PW2 stated that the search showed that the suit property was in the name of Drumvale Farmers Co-operative Society Ltd; that she had been paying rates and had receipts which were issued in the name of Drumvale and that the land was not in Charles Mbogo's name, the 2<sup>nd</sup> Defendant.
27. PW3, the 8<sup>th</sup> Plaintiff, adopted his statement dated 9<sup>th</sup> October 2017 and his bundle of documents dated 26<sup>th</sup> April 2017 as PEXB1. He testified that he paid for Plot No. 13 of the suit property through the bank and he delivered the bank receipt to Charles Mugo, the 2<sup>nd</sup> Defendant. PW3 produced in evidence the receipt for Kshs. 450,000 issued to him by Charles Mugo.
28. It was his evidence that they executed an agreement of 25<sup>th</sup> March 2015 and that he built a bungalow on the land, whose photographs he exhibited. He stated that Charles Mugo informed him that the agreement needed to be in the name of Drumvale, who was the owner of the land and that the official search showed that the land belonged to Charles Mugo.
29. PW4, the 9<sup>th</sup> Plaintiff, adopted his statement. He stated that he bought Plot No. 5 from Mr. Mugo who was in the office of Mr. Gatimu; that he conducted a search at Drumvale offices and that Mr. Mugo showed him documents which showed that he had bought the suit property from its previous owner.
30. PW5, the 4<sup>th</sup> Plaintiff, relied on his statement dated 28<sup>th</sup> September 2018 as his evidence in chief. He stated that he bought his land from Charles Mugo in May 2014 and has been on the land since 2015; that Mr. Mugo showed him an allotment letter and a sale agreement from the previous owner, Jonathan Kituna Nzioka and that he has built on the land although he did not get approvals from Nairobi City Council before constructing his house.
31. It was the evidence of PW5 that he did a search which showed the owner of the land was Drumvale Society; that the search at Drumvale showed that the initial owner of the land was Jonathan Kituna, and that Mr. Kituna's name was cancelled from the register, and replaced with that of Mr. Mbogo.
32. PW6, the 2<sup>nd</sup> Plaintiff, adopted her statement dated 28<sup>th</sup> September 2018 as her evidence in chief. She stated that she bought the land from Charles Mugo at KShs. 425,000 after conducting a search at lands offices; that they did not give her a copy of the search but indicated that it belonged to Drumvale Society; that she has since built a house on the land which she lives in and that she did not have approvals to build from the Nairobi City County.
33. It was the evidence of PW2 that while Mr. Mbogo told her that there was a mother title, he did not show it to her; that she had to wait for the mother title to be subdivided and that Mr. Charles Mbogo issued her with an ownership certificate dated 13<sup>th</sup> April 2014 in the name of Chamuki Property Agents.
34. PW7, the 10<sup>th</sup> Plaintiff, adopted his statement as his evidence in chief. He stated that he bought the land from Charles Mugo; that they had an agreement and that he did not conduct a search.
35. DW1, the 3<sup>rd</sup> Defendant, adopted his statement dated 18<sup>th</sup> March 2017 as his evidence in chief. He also produced bundles of documents marked as DEXB1-6, DEXB 7,8,9 and 10.
36. DW1 testified that he bought the suit property on 27<sup>th</sup> May 2001 from Jonathan Nzioka, the 1<sup>st</sup> Defendant. He produced in evidence the sale agreement. He informed the court that he received documents for registration of the land in his name in 2015 and submitted the same for registration in March 2017.
37. It was his evidence that he was also given a Lease in 2015 in his name, the same having been transferred from Drumvale Limited and that he surrendered the Lease and was issued with a Certificate of Lease in his name.



38. DW1 stated that the Plaintiffs have trespassed on the suit land and built on it and that he reported the matter to the police and was given an OB number. He asserted that the Plaintiffs had fake share certificates and the alleged sub-division was also fake because he has the title document for the land. The other Defendants did not testify.

### **Submissions**

39. Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiffs have not proved their case to the required standard and that the evidence they have tendered before this court falls short and their claim should fail.

40. It was submitted that the Plaintiffs have no cause of action against them and their remedy lies elsewhere and that the Defendants have furnished this court with the Lease Certificate showing that the 1<sup>st</sup> Defendant was initially registered as the absolute owner of the suit property, and later on sold the same to the 3<sup>rd</sup> Defendant.

41. According to the 3<sup>rd</sup> Defendant's counsel, the Certificate of Lease issued by the Registrar to the 3<sup>rd</sup> Defendant should be taken as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. Counsel relied on the provision of Sections 24(a) and 26 of the *Land Registration Act*.

42. Counsel further submitted that while the Plaintiffs have alleged fraud on the part of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, the Plaintiffs have not dispensed the duty of proving their case of fraud to the standard required by law. The Plaintiffs did not file submissions.

### **Analysis and Determination**

43. This court has considered the pleadings and evidence of the parties in this suit. The issues for this court's determination are as follows:

- a. Whether the Plaintiffs obtained title from the 2<sup>nd</sup> Defendant legally.
- b. Whether the 1<sup>st</sup> Defendant legally transferred the suit property to the 3<sup>rd</sup> Defendant

44. It is not disputed that the 1<sup>st</sup> Defendant was allotted the suit property by Drumvale Farmers Co-operative Society Limited (Drumvale) in 1998. The Plaintiffs and the 2<sup>nd</sup> Defendant assert that the suit property was thereafter sold to the 2<sup>nd</sup> Defendant, who in turn, subdivided the suit property and sold it to the Plaintiffs.

45. The evidence before this court shows that after the Plaintiffs purchased the land from the 2<sup>nd</sup> Defendant, they developed their respective plots albeit without the approval of the Nairobi County Government. The Plaintiffs' claim that they are the rightful owners of the suit property.

46. On the other hand, the 3<sup>rd</sup> Defendant claims that he is the registered proprietor of the suit property having purchased the same from the 1<sup>st</sup> Defendant, and that the 2<sup>nd</sup> Defendant did not have any land to pass to the Plaintiffs or at all.

47. The 3<sup>rd</sup> Defendant's case is that the Plaintiffs are trespassers. They have sought for eviction orders against the Plaintiffs and a permanent injunction barring them from accessing and dealing with the suit property.

48. The Plaintiffs have challenged the issuance of the Certificate of Lease to the 3<sup>rd</sup> Defendant in 2017, on the basis that the same was fraudulent. They claim that at the time the Certificate of Lease was issued



to the 3<sup>rd</sup> Defendant, the 1<sup>st</sup> Defendant had already transferred the suit property to the 2<sup>nd</sup> Defendant, who in turn sold the property to them.

49. Section 107 of the *Evidence Act* provides that a person who seeks to establish a case based on the preponderance of certain facts must prove that such facts exist. The said section provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that 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.”

50. The standard of proof in civil cases, to which a party should prove their case is on a balance of probabilities. However, where a party claims the incidence of fraud, they not only need to articulate the grounds of such fraud, but must prove it to a degree that is higher than on a balance of probabilities. This was asserted by the Court of Appeal in *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* (1878) 7 Ch. D 473 at 489.”

51. In the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR, the court held as follows:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (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 the 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..” In case where fraud is alleged it is not enough to simply infer fraud from the facts.”

52. It is the Plaintiffs’ case that they bought the suit property from the 2<sup>nd</sup> Defendant, Charles Mugo trading as Chamuki Property Agents. To determine whether the Plaintiffs are the bona fide purchasers of the suit property, it is necessary to investigate the root of title. This was held by the Supreme Court in the case of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] eKLR as follows:

“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. 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.”

53. Seven of the ten Plaintiffs gave testimony that they purchased a portion of the suit property from the 2<sup>nd</sup> Defendant. They presented copies of the sale agreements between themselves and the 2<sup>nd</sup> Defendant, with Charles Mugo signing the agreements in his name.
54. The Plaintiffs also exhibited Plot Ownership Certificates issued to them between April 2014 and March 2015 by Chamuki Property Agents, in which Charles Mugo is indicated as the Director. Further, the Plaintiffs adduced photographs of the residential houses constructed on their respective plots on the suit property.
55. While the Plaintiffs claim that they undertook due diligence before purchasing the respective plots, they failed to adduce copies of the search certificates from the Lands Registry as well as from Drumvale Farmers Cooperative Society. The entirety of their case consequently rests on the validity of title held by the 2<sup>nd</sup> Defendant.
56. The 2<sup>nd</sup> Defendant filed a bundle of documents although he did not testify. Those documents were neither produced as exhibits, nor subjected to cross-examination. As already stated, the 2<sup>nd</sup> Defendant’s claim is centered on the purported sale agreement between himself and the 1<sup>st</sup> Defendant.
57. Section 3(3) of the [Law of Contract Act](#) prescribes the conditions for a valid contract for the sale of land. It provides that:
  - “ 3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
    - (a) the contract upon which the suit is founded—
      - (i) is in writing;
      - (ii) is signed by all the parties thereto; and
    - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”
58. While the sale agreement in the 2<sup>nd</sup> Defendant’s bundle appears to be signed by the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant, there is no stamp of the advocate or any details of the person before whom the sale agreement was signed. What is there is a signature and a date and nothing else.
59. Indeed, it is not possible to identify any witness who attested to the sale agreement between the two Defendants. This goes against the essence of having an agreement signed by a witness, who should be identified from the agreement by his name.
60. In the absence of details of any witness to the sale agreement, and considering that neither the 1<sup>st</sup> Defendant nor the person who purported to have signed the sale agreement did not testify, the said



agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant failed to conform to the conditions set out in Section 3(3) of the [Law of Contract Act](#).

61. Further, in its Defence, the 1<sup>st</sup> Defendant denied signing any sale agreement between himself and the 2<sup>nd</sup> Defendant. Further, the 2<sup>nd</sup> Defendant did not avail any proof to show that he indeed paid the purported purchase price of Kshs. 3 million for the suit property. For these reasons, the purported sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is invalid, null and void.
62. Having found that the 2<sup>nd</sup> Defendant did not lawfully obtain any interest in the suit property from the 1<sup>st</sup> Defendant, the Plaintiffs could not have gained a better title than him to the suit property. This is based on the legal principle of *nemo dat non quod habet*, wherein a person cannot give what they do not have.
63. The Plaintiffs' purported title and occupation of the suit land is therefore not lawful or valid. The Plaintiffs' claim of fraud, which was based on the fact that the suit property had already been conveyed to the 2<sup>nd</sup> Defendant, in the same way, fails. Indeed, the Plaintiffs have themselves to blame for buying land from the 2<sup>nd</sup> Defendant in view of the fact he was not the registered owner of the same, and could not have had the capacity to sell the land.
64. The second issue to determine is whether the 3<sup>rd</sup> Defendant's Certificate of Lease was lawfully issued to him. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants have in their counterclaim, asserted that the suit property was lawfully sold to the 3<sup>rd</sup> Defendant, through a sale agreement dated 27<sup>th</sup> May 2001.
65. The evidence adduced shows that the 1<sup>st</sup> Defendant was only able to obtain a Certificate of Lease on 24<sup>th</sup> January 2017, after which he transferred the land to the 3<sup>rd</sup> Defendant, who was issued with a Certificate of Lease dated 1<sup>st</sup> February 2017.
66. The 3<sup>rd</sup> Defendant produced in his bundle of documents a copy of the sale agreement dated 27<sup>th</sup> May 2001; a letter dated 21<sup>st</sup> July 1998 by Drumvale Cooperative Society confirming that the 1<sup>st</sup> Defendant has taken his allotment letter in respect of the suit property and a copy of the Certificate of Lease in the 1<sup>st</sup> Defendant's name issued on 1<sup>st</sup> February 2017.
67. The 3<sup>rd</sup> Defendant also adduced in evidence a copy of the official search for the suit property in his name, and the rates payment receipts issued to Drumvale Cooperative Society and Julius Kalanga Makori by the Nairobi City County.
68. The sale agreement between the 1<sup>st</sup> and 3<sup>rd</sup> Defendants dated 27<sup>th</sup> May 2001 is in writing, is signed by both parties and attested by two witnesses. The said agreement is therefore in conformity with Section 3(3) of the [Law of Contract Act](#).
69. Indeed, the Plaintiffs and the 2<sup>nd</sup> Defendant have not challenged the legal process which the 1<sup>st</sup> and 3<sup>rd</sup> Defendants acquired their respective Certificates of Leases neither have they presented any evidence of fraud on the acquisition of the said Certificates of Leases.
70. In the circumstances, it is the finding of this court that the suit property was lawfully transferred to the 3<sup>rd</sup> Defendant by the 1<sup>st</sup> Defendant. Contrary to the Plaintiffs' claim, it is the finding of the court that the 2<sup>nd</sup> Defendant did not obtain any title or right over the suit property.
71. It is obvious to this court that the 2<sup>nd</sup> Defendant fraudulently held himself out to be the proprietor of the suit property. The Plaintiffs unfortunately fell prey to his scheme and can only seek a refund and damages from him.
72. For those reasons, the court makes the following final orders:



- a. The Plaintiffs' suit and the 2<sup>nd</sup> Defendant's Counter claim are dismissed with costs.
- b. A declaration be and is hereby issued that the suit property being Nairobi Block 118/126 is lawfully registered in the name of the 3<sup>rd</sup> Defendant.
- c. The Plaintiffs are hereby directed to give vacant possession of Nairobi Block 118/126 to the 3<sup>rd</sup> Defendant within 30 days from the date hereof, failure of which demolition and eviction orders to issue.
- d. The Costs of the 3<sup>rd</sup> Defendant's Counter claim shall be borne by the 2<sup>nd</sup> Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH, 2024.**

**O. A. Angote**

**Judge**

**In the presence of;**

Mr. Ashioya for Plaintiff

Mr. Bwonwonga for 1<sup>st</sup> and 2<sup>nd</sup> Defendant

Court Assistant - Tracy

