



**Kimathi & 6 others (t/a Umoja Investors SHG) v Maina t/a Geomath Management & 2 others
(Environment & Land Case 22 of 2022) [2024] KEELC 1381 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1381 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 22 OF 2022
LN GACHERU, J
MARCH 7, 2024
(FORMERLY THIKA ELC CASE NO. 51B OF 2020)**

BETWEEN

**HANNAH WACHEKE KIMATHI 1ST PLAINTIFF
CHARLES CHACHA MWANGI & 5 OTHERS 2ND PLAINTIFF
T/A UMOJA INVESTORS SHG**

AND

**JULIUS KIMANI MAINA T/A GEOMATH MANAGEMENT ... 1ST DEFENDANT
SAMSON MACHARIA NJUGUNA 2ND DEFENDANT
LAND REGISTRAR, MURANG'A 3RD DEFENDANT**

JUDGMENT

1. In an Amended Complaint dated 25th January 2023, the Plaintiffs herein have sought for Judgements against the Defendants herein jointly and severally for the following Orders; -
 - a). A permanent injunction to restrain the 1st and 2nd Defendants either by themselves, their servant, agents and/or employees from sub-dividing, selling, disposing of, transferring, or alienating the whole or any portion of the parcel of land known as Mitubiri/Wempa Block 1/5948, to any other third parties other than the Plaintiffs.
 - b). A declaration that the Plaintiffs are the bonafide owners of the parcel of land known as Mitubiri/Wempa Block 1/5948.
 - c). A mandatory order to issue against the 1st and 2nd Defendants to execute all the necessary documents including but not limited to the application for Consent of the Land Control



Board and transfer forms to facilitate effecting of the transfer of land known as Mitubiri/wempa Block 1/5948 in favour of the plaintiffs.

- d). An order compelling the 3rd Defendant to cancel the entry of title deed re-issued on 20th November 2019, for the land parcel known as Mitubiri/wempa Block 1/5948 in the name of the 2nd Defendant and restore the original entry dated 29.09.2011 of the said land parcel.
 - e). Costs of the suit and interest at court rates from the date of the judgment until payment in full.
 - f). Any other relief the Court deems fit to grant.”
2. In their statement of claim, the Plaintiffs averred that on or about year 2011, they purchased land parcel number Mitubiri/Wempa Block 1/5948 (suit property), from the 1st Defendant, which parcel of land was subdivided into 12 plots.
 3. Further, that the 1st Defendant issued the Plaintiffs with share certificates and payment receipt in respect of the aforesaid purchase. The Plaintiffs thereafter took possession of the suit premises which they sub-divided into 12 plots.
 4. The Plaintiffs also alleged that the 2nd Defendant who is a stranger to them has recently asserted ownership of the suit land, and has threatened to evict them from the suit land.
 5. The Plaintiffs contended that the 2nd Defendant is claiming to have sold the suit land to the 1st Defendant, but that the transaction was never concluded. The Plaintiffs also averred that they are innocent purchasers for value and should be declared so.
 6. Further, that in respect of any unfinished transactions between the 1st and 2nd Defendants over the suit property, then the same ought not to be brought against the Plaintiffs herein.
 7. The Plaintiffs further asserted that the 2nd Defendant made a false report to the effect that the title to the suit land was lost, and was re-issued with a new title dated 20th November 2019, whereas, the 2nd Defendant previously had sold the suit land to the 1st Defendant and a consent to transfer had been obtained.
 8. Therefore, the Plaintiffs are apprehensive that the 2nd Defendant could take advantage of the fact that he is the registered owner of the suit property to evict them from their respective portions of land and sell the suit land to third parties.
 9. It is the Plaintiffs’ contention that they have been in occupation of the suit land since 2011, when they purchased it, and have since developed some of the plots situated on the suit land wherein, they reside with their families.
 10. They also alleged that their efforts to acquire title deeds in respect of the suit property have been stalled by the 1st Defendant.
 11. The suit is opposed by the 1st and 2nd Defendants herein who filed their respective Statements of Defence. The 3rd Defendant though served with summons to enter appearance did not file a Defence.
 12. The 1st Defendant filed his Statement of Defence, and a Notice of Indemnity to Co-Defendant dated 6th August 2021, and filed on 9th November 2021, wherein he denied all the allegations levelled against him by the Plaintiffs.
 13. Further, the 1st Defendant admitted to having purchased the suit property from the 2nd Defendant, but alleged that the 2nd Defendant has refused to transfer the suit land to him, even after receiving the full purchase price and also having obtained the Land Control Board Consent.



14. It is the 1st Defendant's assertion that indeed the Plaintiffs herein are innocent/bonafide purchasers and are thus entitled to the reliefs sought in the Amended Plaint.
15. The 1st Defendant accused the 2nd Defendant of fraud which he particularized as follows: Selling the suit property to the 1st Defendant and then refusing to transfer the suit land to him. Depositing the original title deed of the suit land with the 1st Defendant, then clandestinely reporting that the same had gotten lost. Misrepresenting facts and having a new title deed for the suit land issued to him, while knowing very well that he personally deposited it with the 1st Defendant, after selling the same to him.
16. Further, the 1st Defendant averred that he executed a formal sale of land agreement with the 2nd Defendant dated 4th July 2011, and he paid the full purchase price for the suit property, following which the 2nd Defendant handed over to the 1st Defendant the Original Title Deed for the suit property, the Land Control Board Consent and signed Transfer forms.
17. It was his allegation that he subsequently misplaced the transfer forms executed by the 2nd Defendant in respect of the sale of the suit land, and that whenever he approached the 2nd Defendant to sign new transfer forms, the 2nd Defendant became elusive and prevaricated.
18. He also averred that the 2nd Defendant misrepresented facts at the lands office to the effect that the title for the suit land was lost, leading to issuance of a new title dated 20th November 2019, with intention of selling the said land to other third parties, to the detriment of the Plaintiffs and 1st Defendant.
19. It was his contention and admission that the Plaintiffs have been in possession of the suit property since buying their respective plots. However, he has not been in a position to issue them with title deeds, because the 2nd Defendant refused to sign the transfer forms to enable him acquire ownership of the suit land, so that he can transfer to the Plaintiffs.
20. The 1st Defendant averred that the 2nd Defendant wishes to benefit fraudulently in terms of maintaining ownership over the suit land while, at the same time, retaining the purchase price paid by the 1st Defendant in year 2011 in respect of the suit land.
21. It was his contention "on a without prejudice basis", that any claim proved by the Plaintiffs was solely or substantially caused by the fraudulent act or omission of the 2nd Defendant herein. He further averred that the claim does not disclose any reasonable cause of action against him.
22. In his Notice of Indemnity to Co-Defendant dated 6th August 2021, the 1st Defendant claims to be entitled to full indemnity from the 2nd Defendant in respect of the sums the Plaintiffs may be awarded by this Court, on grounds that the 2nd Defendant sold the suit land to the 1st Defendant, but refused to transfer the same to the him to enable the latter execute a transfer in favour of the Plaintiffs; and, for fraudulently acquiring a new title deed in respect of the suit land whilst knowing that the title was in the custody of the 1st Defendant pursuant to the sale agreement executed in year 2011 between the 1st and 2nd Defendants.
23. The 2nd Defendant also filed his Statement of Defence and a Counter-Claim drawn by the Law Firm of M/S Kanyi Kiruchi & Co. Advocates, filed on 1st December 2021.
24. In his Statement of Defence and Counterclaim, the 2nd Defendant denied all the allegation made in the Plaint and further averred that he is the bonafide registered owner of the suit property, Mitubiri/Wempa Block 1/5948.
25. He denied ever having sold the suit land to the Plaintiffs nor the 1st Defendant as alleged. It was his contention that the Plaintiffs herein are trespassers on his parcel of land.



26. Further, he alleged that the Plaintiffs being trespassers on his parcel of land, he has all the right to demand that they vacate from the suit land forthwith, since the Plaintiffs are not innocent purchasers, as 1st Defendant did not have the title to the suit land.
27. The 2nd Defendant further averred that the Plaintiffs failed to carry out due diligence as required by law before entering into a contract for the purchase of land parcel number MITUBIRI/WEMPA BLOCK 1/5948. He asserted that had the Plaintiffs undertaken due diligence by obtaining a Certificate of Official Search in respect of the suit land, they would have established that the suit land did not belong to the 1st Defendant.
28. It was his contention that the Plaintiffs are strangers to him and have entered into the suit property without his consent as the registered owner thereof. He reiterated that the Plaintiffs should be evicted from the suit land as their possession and construction are illegal.
29. The 2nd Defendant denied the existence of any sale agreement entered into between himself and the 1st Defendant in respect of the suit land and he contended that any such Agreement was invalid as a.
30. He filed a Counter claim, wherein he reiterated his defence and further averred that he is the absolute registered owner of the suit property, and he never sold the same to the Plaintiffs.
31. He alleged that the Plaintiffs have trespassed or encroached on his parcel of land, and have done so illegally, without his consent, and therefore their actions are illegal.
32. He particularized the Plaintiffs fraudulent dealing as;-
 - a. Trespassing on private property,
 - b. Constructing on private property being the suit land,
 - c. Refusing to heed the call to desist from further trespass and/or construction,
 - d. Feigning or acting negligently in the circumstances.
33. Therefore, the 2nd Defendant's counter claim against the Plaintiffs is for an order of eviction, and/or demolition so as to grant him vacant possession.
34. His prayers in the counter claim are;
 - a. An order of permanent injunction be issued as against the Plaintiffs by themselves, servants, agents, employees or anybody else claiming through them from trespassing, building, farming or in any other way interfering with land parcels Mitubiri/wempa Block 1/5984.
 - b. That an order of eviction, demolition of all the Plaintiffs illegal structures erected on land parcel Mitubiri/wempa Block 1/5984 at the Plaintiff's costs with the supervision of the are OCS so as to render vacant possession.
 - c. Mesne profits and/or damages for trespass for costs and interest of the said.
 - d. Cost and interest of the counterclaim.
 - e. Any further relief that this Honourable Court be pleased to grant.
35. The matter proceeded by way of viva voce evidence. The Plaintiffs gave evidence for themselves and called no witness. The Defendants too gave evidence for themselves and called no witness.



Plaintiffs' Case.

36. PW1 Hannah Wacheke Kimathi, adopted her witness statement dated 29th June 2020, as his evidence in chief. She also produced her bundle of documents as P. Exhibits 1-8.
37. It was her further evidence that they purchased 10 plots within Mitubiri/ Wempa Block 1/5948, from the 1st Defendant herein. She identified the sale agreements in page 23 of her witness statement. It was her further claim that the purchase was done in 2012, but the share certificate was issued in 2017.
38. It was her evidence that they purchased the plots in issue from Julius Kimani Maina, the 1st Defendant, who issued them with share certificates in 2017, and he promised to issue them with title deeds thereafter, which he has not done todate.
39. Further, that at the time of purchase, the 1st Defendant held a title deed in the name of 2nd Defendant, which she identified on page 20 of the 1st Defendants bundle of documents. However, in June 2019, the 2nd Defendant approached them and demanded that they leave the suit land.
40. That the 2nd Defendant had a title deed, which she identified on page 11 of the 2nd Defendant's bundle of documents. She stated that they have erected their houses/ homes on the suit land, and therefore, they lodged restrictions against the title to protect their interests.
41. In cross exam by counsel for 1st Defendant, she testified that she purchased her plot in 2012, and at the time of the purchase, the suit land was in the name of the 2nd Defendant, but the title was with the 1st Defendant, who was a land dealer.
42. She also stated that 1st Defendant had a sale agreement with the 2nd Defendant, and a signed transfer. She also confirmed that upon entering into the suit land, she developed it and that is where she stays, and had lived thereon without interruption until 2019.
43. She further reiterated that the 2nd Defendant went to the land and indicated that he had not sold the suit land to the 1st Defendant. The 2nd Defendant later told them that he had sold the land to the 1st Defendant who failed to pay all the purchase price, and he still owe him money.
44. That they reported the matter to the Police at Makuyu, and visited the land registry where they confirmed the land was registered in the name of 2nd Defendant, and the land Registry was Thika. However, the land records were later transferred to Muranga Lands Registry.
45. PW2, Charles Chacha Mwangi, the chairman of Umoja Self Help Group, also adopted his witness statement dated 29th June 2020. He also produced a list of documents contained in the amended Plaintiff as P. Exhibit No 9, which were share certificates.
46. He testified that he purchased land from Njirani Mwema self-help group, wherein Njirani Mwema had bought the land from Julius Kimani, the 1st Defendant herein. That Julius took them to the land and showed them the documents, which he had received from the 2nd Defendant.
47. It was his evidence that the documents shown to them was for Mitubiri/ Wempa Block 1/ 5948, which is the suit land. That he was satisfied that the land had been purchased by the 1st Defendant from 2nd Defendant, as he was shown the Transfer form.
48. Later, Julius the vendor gave them share certificates, and they were shown the original title deed, and therefore, they paid the full purchase price and took possession, and built structures thereon.



49. He testified that they later got a report that the 2nd Defendant was claiming ownership of the suit land, and that Julius had not transferred the land to them, and the title was still reading 2nd Defendants name.
50. He further testified that 2nd Defendant had claimed that the title deed was lost, and he obtained a replacement, and therefore, they reported the matter to the Police at Makuyu Police Station, and later filed this case.
51. In cross exam by counsel for 1st Defendant, he alleged to have purchased the Land from Njirani Mwema Self Help Group, and that Njirani Mwema took them to Julius, the 1st Defendant, who had initially bought the suit land and subdivide it.
52. He also testified that Julius showed them the original title deed, in the name of the 2nd Defendant, but Julius did not transfer the land to his name or to them. He also testified that after the purchase, he fenced their land and erected pillars thereon.
53. It was his testimony that later the 2nd Defendant appeared and threatened to evict them. That they reported the matter to the Police and later filed this case, as 2nd Defendant had a title deed for the suit property, as he alleged the first one was stolen, which was not the case.
54. In cross exam by 2nd Defendant, he confirmed that 2nd Defendant had alleged that he did not sell the suit land to 1st Defendant. He also confirmed that the 1st Defendant showed them a sale agreement, but he could not recall the date of the sale agreement. He confirmed that the transfer form is not dated, and that they were 2nd purchasers.
55. In re exam, he confirmed that they were shown the documents and he was satisfied that Julius Kimani had bought the suit land from the 2nd Defendant, and therefore, Julius had the obligation of ensuring the land was transferred to them.

1st Defendant's Defence.

56. DW1, Julius Kimani Maina, adopted his witness statement dated 6th August 2021. He told the court that he is a Surveyor by profession.
He also produced a bundle of documents as his Exhibits, marked D.Exhibit 1.
57. He denied the Plaintiffs' claim, and stated that the dispute herein began in 2011, when he purchased the suit land from 2nd Defendant, Samson Njuguna Macharia. That Samson had gone to his office with one Joseph Murigi and told him he was selling his parcel of land at Makuyu.
58. He alleged that Samson took him to the land showed him the extend of the said land, and purchase price was 520,000/=. That after due diligence, he confirmed that the land belonged to Samson, and so they went to the Advocates office by the name of Sospeter for sale agreement, and he started paying for the land. That eventually he paid him the full purchase price and he produced the acknowledgement notes as exhibits in Court.
59. It was his further evidence that they did a transfer at Kandara Investment offices, and he produced documents to that effect. That they appeared before the Land Control Board for consent, which consent was given, and he produced it as exhibit. Further that a transfer was drawn and executed before an advocate. He produced the transfer documents as exhibits.
60. He further stated that the 2nd Defendant gave him the original title deed, which he produced as exhibit. He alleged that he misplaced the transfer documents, and he therefore did not transfer the land



immediately- to himself. That he tried to call the 2nd Defendant so that he could sign another transfer, but he declined, as he asked for more money.

61. The 1st Defendant confirmed having subdivided the land and selling to the Plaintiffs, although the land was registered in the name of Samson Macharia, the 2nd Defendant, but he gave them the history of the land.
62. It was his testimony that by the time he found the transfer documents, there was a caution on the title due to this case. He identified the Green card which showed existence of a caution and that a new title deed had been issued to Samson Macharia Maina. He alleged that he did not know how Samson obtained another title deed.
63. He denied that he had refused to transfer the land to the Plaintiffs, and also confirmed that the 2nd Defendant gave him the original title deed, and he was still willing to transfer the land to them, given an opportunity to do so.
64. In cross exam by counsel for the Plaintiffs, he stated that he still has the original title deed in the name of Samson, and that he had carried a search before the purchase, and the land was still in the name of Samson.
65. Further, that according to the Green card, another title deed was issued on 20th November 2019, and that was after the 2nd Defendant had given him the original title deed. But he had reported to the 2nd Defendant that he had lost the transfer documents, and he was hopeful that he would find the transfer documents and then transfer to the Plaintiffs, thus reasons why he asked for transfer fees.
66. On cross exam by the 2nd Defendant, he confirmed that 2nd Defendant sold to him the land in 2011, and they both went to an advocate on 4th July 2011, and that the 2nd Defendant gave him the original title deed. He also confirmed that he sold the land after the purchase from 2nd Defendant.
67. It was his evidence that he paid all the purchase price to the 2nd Defendant, and he does not have any balance. He also confirmed that they appeared before the Land Control Board on 9th May 2012, and 2nd Defendant could not take him to Land Control Board, before the full purchase price had been paid. He also confirmed that the Plaintiffs have built on the suit land. It was his allegation that the 2nd Defendant has not transferred the land to him.
68. In re exam, he confirmed that there is a sale agreement between himself and the 2nd Defendant, Samson Macharia. It was his evidence that he could not get a consent from Land Control Board, when there was a debt. Further, that 2nd Defendant could not give him original title deed, if he owed him any money.

2nd Defendant's Defence.

69. DW2, Samson Macharia Njuguna, from Methi Swani area and a peasant farmer denied the claim. He admitted that his mother and himself agreed to sell the suit land, and he consulted a land broker, who introduced him to 1st Defendant, and they met.
70. That after agreeing on the purchase price, they started the transfer process, an 1st Defendant gave him some money for filing a succession cause. That the purchase price was Ksh 520,000/=, but the purchaser only paid Ksh.150,000/=, and he gave him all the documents. He denied knowing anything about the transfer of his land to 1st Defendant.
71. That later in 2015, when he visited the suit land, he found that the Plaintiffs had built thereon, and he asked them to vacate. He confirmed that the land is still in his name, and he later got another title deed in his name, which he obtained in 2019.



72. He claimed that the 1st Defendant owe him ksh 370,000/= as balance of the purchase price, but the land is being utilized by the Plaintiffs, but he had a title deed for the suit land. He confirmed that he does not live on the suit land, but elsewhere.
73. In cross exam by counsel for the Plaintiffs, he stated that the land was for his father Jacob Njuguna Mwati, but his name is not on the Green card. He also stated that he met the 1st Defendant in 2010, and the sale agreement was drawn in 2011.
74. He also confirmed having given the 1st Defendant the transfer documents, so that he could get the title in his name. It was his further evidence that in 2010, the land was still registered in the name of the government, but later got registered in his name. He also confirmed that they appeared before the Land Control Board, for the consent, and they obtained.
75. He denied refusing to transfer the land to 1st Defendant, but he said he can only do so after he has paid the full purchase price. He also confirmed obtaining 2nd title after applying for it, and he alleged that he had lost the earlier title deed. It was his allegations that the 1st Defendant took the original title deed from the Lands office, without his knowledge.
76. In cross exam by counsel for 1st Defendant, the 2nd Defendant he confirmed that he gave some documents to 1st Defendant. He also stated that he did not file the documents that he used to obtain the 2nd title deed. It was his allegation that the title deed was taken unlawfully from him by the 1st Defendant. That reported the matter to the Police, though he did not have the OB number, nor was the 1st Defendant arrested
77. It was his allegations that the 1st Defendant owes him ksh 370, 000/= as the 1st Defendant has not fully paid the purchase price. He admitted signing the sale agreement, and he denied acknowledging receipt of all the purchase price. He told the court that the signature thereon is not his. He however did not report to the police the issue of the signature, and that is why he disagreed with his advocate.
78. After the viva voce evidence, parties were directed to file and exchange written submissions. In compliance, the Plaintiffs filed their submissions on 14th July 2023 through J. Ngumo Mbogo & Co Advocates. The 2nd Defendant filed his submissions in person on 13th July 2023. This court has not seen the submissions by 1st Defendant.
79. In their submissions, the Plaintiffs stated that there was sufficient evidence that the 2nd Defendant sold the suit land to 1st Defendant, who later sold the land to the Plaintiffs. Further, that there is evidence that the Plaintiffs have built permanent structures on the suit property, the 1st Defendant has not transferred the purchased portions of the suit property to the Plaintiffs, the 2nd Defendant has obtained another title, and has threatened the Plaintiffs with eviction.
80. It was their submissions that the action of 2nd Defendant amounted to fraud, as he knew very well where the original title deed was. The Plaintiffs relied on the definition of Fraud, as stated 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. “It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved”



81. They also relied on the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000]eKLR, where the Court stated that;
- “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 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
82. The Plaintiffs submitted that they have discharged their burden of proof on the required standard that they are bonafide purchasers, and owners of their respective portions of land from the suit land, and are entitled to the orders sought in their Plaint. They urged the court to enter judgement in their favour.
83. On his part, the 2nd Defendant submitted that the Plaintiffs have failed to produce sufficient evidence to warrant the grant of the orders sought. That Plaintiffs did not carry due diligence before entering into the sale agreement, because if they did so, they would have noted that the suit land was registered in the name of the 2nd Defendant, and not 1st Defendant
84. It was his submissions that the Plaintiffs are to blame for their misfortunes, and they are strangers to the 2nd Defendant, and thus intruders. He urged the court to allow his counter claim.
85. Further, that the suit land is registered in his name, and at no time was it in the name of 1st Defendant, and so 1st Defendant could not sell the said land to 3rd Parties, Plaintiffs included. That he did not give 1st Defendant consent to transfer the land, and his action is geared towards taking away what belongs to 2nd Defendant.
86. He also submitted that if there was any agreement between the 1st Defendant and himself, which he denied, then the same is overtaken by Limitation of action, by default or on the part of 1st Defendant, and that the Plaintiffs are strangers in his parcel of land. He urged the court to allow his counter claim dated 23rd March 2021.
87. The above are the pleadings, evidence by the parties and their written submissions. This court has carefully considered the available evidence and the exhibits produced, and finds as follows;
88. There is no doubt that the suit land is in the name of 2nd Defendant herein Samson Macharia Njuguna, having been registered so on 6th December 2010. The title deed was issued to him on 29th September 2011. It is also not in doubt that this title deed is in possession of the 1st Defendant, which he produced as D. EXHIBIT 11. This title was registered under The Registered [Land Act](#), Cap 300(repealed).
89. Further, it is not in doubt that another title deed was issued in favour of 2nd Defendant on 20th November, 2019, on allegations that he had lost the original title, and its production was dispensed with. The 2nd Defendant confirmed that he alleged that he had lost the original title deed, and was subsequently issued with a 2nd one.
90. It is also not in doubt that the original title deed issued on 29th November 2011, was given to 1st Defendant by 2nd Defendant, as there was a sale agreement between the two of them.
91. From the available evidence, it is evident that the Plaintiffs bought their parcels of land from the 1st Defendant, who had subdivided the suit land after entering into sale agreements with the 2nd Defendant. Further, it is not in doubt that the Plaintiffs have built permanent structures on the suit land, but they have not been given title deeds of their respective parcels of land.



92. There was evidence that the 2nd Defendant threatened to evict the Plaintiffs on allegations that the 1st Defendant has not finished paying the purchase price, and thus this suit. Consequently, the Plaintiffs lodged a restriction on the suit property due to this case. The 2nd Defendant has denied selling the suit land to 1st Defendant, and he filed a Counter-claim.
93. The above are the undisputed facts. The court finds the issues for determination are:
1. Whether there was a valid sale agreement between the 1st Defendant and 2nd Defendant?
 2. Whether the Plaintiffs are innocent purchasers for value of the suit property?
 3. Whether the 2nd Defendant is entitled to any claim over the suit land?
 4. Whether the Plaintiffs are entitled to the orders sought in the Plaint?
 5. Whether the 2nd Defendant is entitled to his prayers in the counter claim?
 6. Who should pay costs of the suit?

1. Whether there was a valid sale agreement between the 1st Defendant and 2nd Defendant.

94. In their evidence, the Plaintiffs told the court that they purchased the suit land from the 1st Defendant on the strength of the documents that were in his possession. Among the documents was a sale agreement dated 4th July 2011, between the 1st and 2nd Defendants.
95. The Defendants also referred to the said sale agreement, which was produced by the 1st Defendant as D. Exhibit 1. The purchase price was Ksh.520,000/=. The 1st Defendant alleged that he paid the full purchase price. The 2nd Defendant, though had alleged that he had not sold the land to 1st Defendant, admitted the said transaction, but denied having been paid the full purchase price. The 2nd Defendant's contention is that he has not been paid the full purchase price.
96. This Sale agreement is in writing, and is witnessed by Sospeter Advocate. It contains the description of the parties entering into the contract, has description of the property being purchased and the purchased price. It meets the criteria for a valid sale agreement. See the case of Nelson Kivuvani vs Yuda Komora & Ano. Nairobi Hccc No. 956 of 1991, the court- held: -

“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligation express or implied of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”

97. Further section 3 (3) of the Law of contract provides;
- (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:
98. This has been emphasized in section 38 of the Land Act, which provides,

“(1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land



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

99. Therefore, from the above this court finds the sale agreement entered by the 1st and 2nd Defendants on 4th July 2011, is a valid agreement for sale of land, which agreement is enforceable and parties were bound by the terms and obligations set thereon.

2. Whether the Plaintiffs are innocent purchasers for value of the suit property?

100. An innocent purchaser for value without notice is someone who exchanges value for property without any reason to suspect any irregularities in the transaction. See case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, where the Court of Appeal pronounced itself on the doctrine of bonafide purchaser for value without notice. It commenced off by definition as outlined in Black’s law Dictionary 8th Edition as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

101. The Supreme Court of Kenya described bonafide Purchaser as one who buys something for value without notice of another’s claim to the property, and without constructive notice of any defects in or infirmities, claim, or equities against the seller’s titles. See the Case of Dina Management ltd vs County Government of Mombasa & 5 Others (SC PET. NO.8 (E10) 2021).

102. For one to be considered as an innocent purchaser for value, he/she must prove that he/she has acquired a valid and legal title, that she/he carried due diligence to determine the lawful owner, from whom she/he acquired a legitimate title and that she/he paid valuable consideration.

103. The principles to be considered in a case of innocent Purchasers for value were elucidated in the case of Katende V Haridar & Company Limited [2008] 2 E.A.173 as quoted by the Court of Appeal in the case of Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR, where the former held:

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.”

104. What is not in doubt is that the suit property is registered in the name of Samson Macharia Njuguna, the 2nd Defendant herein. There are two title deeds, one issued on 29th November 2011, under Cap 300(repealed). It has not been cancelled, and is in possession of 1st Defendant. Under Section 27 of The Registered Land Act(repealed), the person named on a certificate of title is deemed to be absolute and indefeasible owner, with all rights and privileges appurtenant thereto.
105. Samson Macharia is the registered owner, and therefore he is deemed to be the absolute owner. However, under section 28 of the said Act, his right can be defeated as provided by the Act.
106. The second title was issued on 20th November 2019, after the 2nd Defendant alleged that he had lost his title deed, but in fact he had handed it over to the 1st Defendant. This certificate of title was issued under the Land Registration Act, 2012. Section 26 of the Land Registration Act 2012 provides;

“26.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, 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.

107. Such certificate of title can be impugned as provide by Subsection (1) (a) & (b), which state;
- (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”.
108. Therefore, if the 2nd Defendant’s title issued on 20th November 2019, is found to have been issued through fraud or misrepresentation, then it can be cancelled under section 80 of the said. See the case of Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR the Court held that;

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder



is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme.

109. It is evident that the 2nd Defendant, who had entered into a sale agreement with the 1st Defendant, had handed over the title deed issued on 29th November 2011, to the 1st Defendant. Though he denied this allegation, it was his evidence that he handed transfer documents to 1st Defendant. He cannot turn around and deny what is clear from the conduct of the parties.
110. After, having a misunderstanding with the 1st Defendant, and even after confirming that the Plaintiffs were on the suit land, he misrepresented himself before the Land Registrar that the original title deed had been lost. Consequently, he was issued with a 2nd title deed on 29th November 2019, which was acquired through misrepresentation.
111. This court having found that the 2nd Certificate of title was issued through misrepresentation, then as provided by Section 80 (1) of the Land Registration Act, this 2nd title is a candidate for cancellation, and the court proceeds to cancel the same. See section 80 of Land Registration Act which provides;
- “ 80.
- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
112. Having cancelled the 2nd title deed, the only valid title is the one dated 29th November 2011, which is in custody of 1st Defendant, but in the name of 2nd Defendant.
113. It was alleged that the 2nd Defendant sold the suit land to 1st Defendant, after they entered into a sale agreement dated 4th July 2011, obtained Land Control Board consent, and transfer form was signed. The 2nd Defendant denied signing the transfer form, but he did not avail any evidence from the document examiner to confirm that he did not sign the transfer form. His passport photo is attached thereto.
114. This court will believe the 1st Defendant’s evidence that the 2nd Defendant passed over to him the completion documents. With the completion documents in his custody, the 1st Defendants convinced the Plaintiffs that he was the beneficial owner of the suit property.
115. There are sale agreements produced by the Plaintiffs which show that they entered into a contract with the 1st Defendant, then the Plaintiffs paid the 1st Defendant the purchase price, and he put them into possession. By having the completion documents and the sale agreement between 1st Defendant and 2nd Defendant, the Plaintiffs needed no other evidence that 1st Defendant had purchased the suit property from 2nd Defendant. That was sufficient due diligence.
116. The Plaintiffs took possession of the suit land in 2012, and were only jolted by the 2nd Defendant in 2015, when he threatened to evict them as he claimed 1st Defendant still owed him some balance of the purchase price. Therefore, the court finds and holds that the Plaintiffs herein purchased the suit property from 1st Defendant in 2012, without any notice of irregularities and this court finds and holds



that they are innocent purchasers/ bona fide purchasers for value of their respective portions of land from the suit land.

3. Whether the 2nd Defendant is entitled to any claim over the suit land

117. In his Defence, the 2nd Defendant had alleged that he is the bona fide registered owner of the suit land. He denied ever selling the land to the 1st Defendant nor to the Plaintiffs. It was his claim that the Plaintiffs are trespassers or intruders to his land.
118. However, in his evidence in court, the 2nd Defendant admitted having entered into a Sale agreement with the 1st Defendant. He confirmed that the purchase price was ksh 520,000/=, which he alleged that the 1st Defendant only paid 150,000/= and there is a balance of ksh. 370,000/=. Therefore, the 2nd Defendant contention is that the 1st Defendant had not paid the full purchase price.
119. This court has found that the sale agreement dated 4th July 2011, is a valid sale agreement, which is enforceable by the parties. The 1st Defendant averred that he paid all the purchase price, and that is the reason why the 2nd Defendant gave him the original title deed and also obtained a Land Control Board consent to transfer the land. The 2nd Defendant also gave the 1st Defendant the transfer form, which contains his passport photograph and are signed by him.
120. The 2nd Defendant denied having signed the transfer form. However, with the production of sale agreement, transfer form and the original title deed, the evidential burden of proof shifted to the 2nd Defendant. See case of *Mbuthia Macharia vs Annah Mutua & Another* [2017] eKLR, discussed the burden of proof and stated thus:
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”
121. Further section 108 of the *Evidence Act* provides.
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
122. The 2nd Defendant did not call sufficient evidence to shift the evidential burden of proof from himself. He did not call the document examiner to confirm that he did not sign the transfer document. He did not call evidence from the Land Registrar to corroborate his evidence that the 1st Defendant took the title deed from the lands Registry without consent of the 2nd Defendant.
123. Further, it is evident that the Plaintiffs entered into the suit land in 2012, but the 2nd Defendant threatened them in 2015. Further, the 2nd Defendant credibility is called into question because he misrepresented facts so that he could obtain the 2nd title on 20th November 2019, which title deed has been cancelled by this court.
124. From the available evidence, it is clear that the 2nd Defendant sold the suit land to 1st Defendant, who subdivided the said land and sold to the Plaintiffs on the strength of documents handed over to the 1st Defendants by 2nd Defendant.



125. This Court has found and held that the Plaintiffs are innocent purchasers for value, without any notice. The 2nd Defendant was aware of their purchase of the suit land, possession and occupation of the same, and only threatened the Plaintiffs after he disagreed with the 1st Defendant.
126. With the signing of the transfer form, the 2nd Defendant transferred the suit land to the 1st Defendant, who subsequently sold the said land to the Plaintiffs herein. The Plaintiffs are the bona fide owners of their respective portions of land, and the disagreement between the Defendants herein should not disrupts the Plaintiffs quiet enjoyment of the suit land.
127. For the above reasons, this court finds and holds that the 2nd Defendant has no claim over the suit land, as he sold it to 1st Defendant in 2011, who later sold it to the Plaintiffs. If the 2nd Defendant has a dispute with the 1st Defendant, then he ought to have sued him or enforced the sale agreement dated 4th July 2011, but not to threaten the Plaintiffs with eviction.

4. Whether the Plaintiffs are entitled to the orders sought in the Pleint.

128. The Plaintiffs have sought for various prayers in their amended Pleint. This court has found and held that there is evidence that the 1st Defendant purchased the suit land from the 2nd Defendant, and 2nd Defendant gave him the original title deed, which was issued on 29th November 2011.
129. There was also evidence that the 2nd Defendant threatened the Plaintiffs with eviction on allegations that the 1st Defendant has not finalized payment of the purchase price. The 2nd Defendant alleged that the Plaintiffs are trespassers and / or intruders.
130. It is also evident that the 2nd Defendant had obtained another title deed on allegation that the original title deed was lost. With that allegation, there is possibility that the 2nd Defendant might dispose off the suit land to third parties. However, this court has cancelled the 2nd title deed.
131. The 2nd Defendant had alleged in his Counter-claim that the suit land belongs to him. It is evident that there's pull and push over the issue of purchase price. This disagreement should be resolved by the two Defendants. However, the said disagreement should not affect Rights of the Plaintiffs to enjoy quiet enjoyment of their parcels of land. If the 2nd Defendant is to carry out his threat of eviction, then the Plaintiffs will suffer irreparable loss.
132. But, how can they enjoy this right without interference from the 2nd Defendant or the Defendants herein? The Plaintiffs can only be protected through a restraining Order against the Defendants herein. The Plaintiffs have sought for Permanent Injunction against the Defendants herein.
133. What is a Permanent Injunction? It is a court order requiring a person to do or cease doing specific action that is issued as a final judgement. It is also clear that permanent injunction is granted after the court has made a final determination in the case. These orders prevent the Defendant from continuing with a particular action or behavior. See the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR where the Court held inter alia as follows:

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the



issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

134. This court has heard the evidence, and is convinced that the 2nd Defendant herein is determined to evict the Plaintiffs herein from the suit property because of disagreement with 1st Defendant, over an unpaid purchase price. The rights of the parties have been determined and therefore, this court finds and holds that the Plaintiffs are entitled to the prayer of Permanent injunction. See the case of Bandari Investments & Co. Ltd vs Martin Chiponda & 139 Others (2022) eKLR, where the Court held; “Permanent injunction is perpetual restraint and is issued after the suit is heard and finally determined. Permanent Injunction fully determines the rights of the parties before the Court and is normally meant to perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiffs to be protected.”

135. On prayer No b, the Plaintiffs had sought for a declaration that the Plaintiffs are the bona fide owners of the parcel of land known. This court has indeed found and held that the Plaintiffs herein innocently purchased the suit property for value without any notice any defect. Consequently, the court finds that the Plaintiffs are entitled to the prayer of being declared innocent purchasers. See the case of Midland Bank Trust Co. Ltd and another v. Green and another [1981] 1 ALL ER 155, as quoted by the Court in In re Estate Of M’mbwiria M’airanyi [2019] eKLR rightly held: -

“... the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened on his conscience and the composite expression was used to epitomise the circumstances in which equity would, or rather would not, do so. ... Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice.... it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or when notice came to be regulated by statute the requirement for good faith became obsolete. Equity still retained its interest in, and power over, the purchaser’s conscience. ... good faith there is stated as a separate test which may have to be passed even though absence of notice is proved.”

136. A bonafide purchaser has been defined by the Court in the case of Lawrence Mukiri ...Vs... Attorney General & 4 Others [2013] eKLR as

“... a bona fide purchaser for value is 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 the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;”

137. In prayer No c, the Plaintiffs prayed for Mandatory Order against the 1st and 2nd Defendants to execute all the necessary documents for transfer of the suit property in favour of the Plaintiffs.



138. It is evident that a Mandatory Order is an official order given by a court of law telling someone that they must do something or stop something. For this order to be issued, a hearing must be held and thereafter court determines whether to issue the mandatory order or not.
139. The court herein heard the matter, and it is clear that the Plaintiffs purchased the suit property, but the 1st Defendant has not issued them with title deeds. Though the court has declared the Plaintiffs as innocent purchasers for Value without notice, they can only legally own the suit property by possession of certificate of title, as provided by Section 26 of [Land Registration Act](#), which states;
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
140. Therefore, it is evident that a title deed or certificate of title is the actual proof of ownership of property. But how can such title deed be obtained? The Plaintiffs can only obtain their title documents if the transfer documents are signed/ executed by the Defendants herein. This has not happened because of the dispute between the 1st and 2nd Defendants. The Plaintiffs are therefore entitled to protection by this court.
141. The circumstance under which the court would grant mandatory injunction was set out by the Court of Appeal in the case of *Maher Unisaa Kari v Edward Oluoch Odumbe* (2015) eKLR, where the Court held;
- “The test for granting a mandatory injunction is different from that enunciated in the *Giella vs Casman Brown* case which is the locus classicus case for prohibitory injunctions. The threshold in mandatory injunctions is higher than in the case of prohibitory injunctions and the Court of Appeal in the case of *Kenya Breweries Ltd vs Washington Okeyo* (2002) EA 109 had occasion to discuss and consider the principles that govern the grant of mandatory injunctions. The Court of Appeal held that the test for grant of a mandatory injunction was as correctly stated in VOL 24 of Halsbury’s Laws of England 4th Edition paragraph 948 that:-
- “A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”
142. It is not in dispute that the Plaintiffs are in possession of their respective portions of the suit land. They do not have titles documents because of the actions of the Defendants herein. The Plaintiffs can only enjoy right of ownership, if the court would issue the mandatory order as sought.
143. The Plaintiffs have sought for orders that the 3rd Defendant should be compelled to cancel the title deed issued on 20th November 2019, and restore the title deed of 29th November 2011. It is evident that no land can have several title deeds issued on different dates. The 2nd Defendant caused the issuance of a 2nd title deed through misrepresentation.



144. Section 80 of the Land Registration, provides instances of when title deed can be impeached. It is also evident that only courts can cancel or rectify land registers. See the case of Kisumu Misc No. 80 of 2008 Republic V Kisumu District Lands Officer & another [2010] eKLR, where the Court held;

“it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.

145. The court has already made an order for cancellation of the 2nd title deed issued on 20th November 2019. Consequently, this court finds and holds that the Plaintiffs are entitled to prayer No. d.

146. Further, the Plaintiffs sought for costs of the suit. Costs are granted at the discretion of the court as provided by Section 27 of the Civil Procedure Code. Costs follow the event, and are ordinarily granted to the successful litigant unless special circumstances dictate otherwise. See the case of Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 others [2013] eKLR, where it was held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (FrippvsGibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

147. The Plaintiffs are the successful litigants and are thus entitled to costs of the suit.

5. Whether the 2nd Defendant is entitled to the orders sought in the Counter claim?

148. In his counter claim, the 2nd Defendant sought for s order of Permanent injunction and eviction of the Plaintiffs herein, for being trespassers to his suit property.

149. However, this court has found that the Plaintiffs are bona fide purchasers and are entitled to the suit property. The 2nd Defendant has not proved the Plaintiffs are trespassers, on the suit land, wherein they should be evicted.

150. The standard of proof applicable in civil cases is on a balance of probabilities. The Court in Miller Vs Minister of Pensions [1942] 2 ALL ER 372 defined the standard of proof on a balance of probabilities in these terms;

“It must carry a reasonable degree of probability... If the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged., but if the probabilities are equal, it is not”.

151. The onus of adducing evidence in support of any claim advanced in a suit falls on the party making the claim. In the case of Hellen Wangari Wangechi Vs Carumhibit era Muthini Gathua [2005] e KLR, the Court held as follows:

“It is a well-established fact that whoever asserts a fact is under an obligation to prove it in order to succeed.”



152. Section 107, of the *Evidence Act*, 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 facts it is said that the burden of proof lies on that person.”

153. Further, Sections 109 and 112 of the *Evidence Act* (CAP. 80) provides:

S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

S.112 “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

154. The 2nd Defendant averred that the 1st Defendant was in breach of the contract for sale of the suit property and therefore, has no legal claim to the property. The 2nd Defendant did not offer any explanation to the Court why he executed a transfer form whereby, he transferred the suit land to the 1st Defendant or for handing over the original title for the suit property to the 1st Defendant if it were true that part of the purchase price in respect the suit land remained unpaid by the 1st Defendant.

155. The 2nd Defendant urged the Court to find and hold that there was no valid contract for the sale of the suit property as between him and the 1st Defendant due to breach by the 1st Defendant, or, in the alternative, due to operation of law. The 2nd Defendant has not furnished the Court with any evidence such a Notice or Letter of Demand authored by the 2nd Defendant and addressed to the 1st Defendant demanding for payment of any outstanding amount of the purchase price for the suit property. The 1st Defendant produced acknowledgement notes showing that the 2nd Defendant had received money from the 1st Defendant. There was no evidence to dispute that the signature thereon was not for 2nd Defendant.

156. Consequently, the court finds and holds that the 2nd Defendant failed to proof any of his claim as contained in his counter claim. It is evident that the 2nd Defendant herein as the vendor of the suit land received the purchase price thereof, and if this court would allow his counter claim, then it would amount to allowing an unjust enrichment. Accordingly, the 2nd Defendant’s Counter-claim is dismissed entirely.

6. Who should pay costs of the suit?

157. The court has found and held that costs follow the event, and the Plaintiffs have proved their case, on the required standard. They are entitled to costs. The 2nd Defendant largely contributed to the filing of this case, by threatening the Plaintiffs.

158. However, the 1st Defendant is not blameless because after selling the suit land to the Plaintiffs, he went ahead and demanded transfer fees from the Plaintiffs, but did not issue them with their respective title deeds. He did not bring any action against the 2nd Defendant for breach of the sale agreement. The 1st Defendant inaction allowed the 2nd Defendant to apply for 2nd title, who in turn threatened the Plaintiffs with eviction. Therefore, the 1st Defendant herein is liable to pay costs of the suit.



159. Having carefully considered the available evidence, and the rival written submissions, the court finds that the Plaintiffs have proved their case against the Defendants herein jointly and severally on the required standard of balance of probabilities.
160. For the above reasons, Judgement is entered for the Plaintiffs against the Defendants herein jointly and severally in terms of prayers No. (a), (b), (c), (d) and (e), of the Amended Plaint dated 25th January 2023.
161. However, the court finds the 2nd Defendants' counter claim is not merited, and the same is dismissed entirely with costs to the Plaintiffs.
162. Therefore, the Plaintiffs are entitled to costs of the suit and the Counter-claim by the 2nd Defendant.
- It is so delivered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 7TH DAY OF MARCH, 2024

L. Gacheru

Judge

Delivered online in the presence of:

M/s Kinyua h/b Mr Ngumo for Plaintiffs

Absent for 1st Defendant

Absent for 2nd Defendant

Absent for 3rd Defendant

Joel Njonjo – Court Assistant

L. Gacheru

Judge

7/3/2024

