



REPUBLIC OF KENYA



**Murithii v Osome & 4 others (Environment & Land Case  
486 of 2013) [2024] KEELC 3970 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3970 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 486 OF 2013**

**A OMBWAYO, J**

**APRIL 30, 2024**

**BETWEEN**

**GEORGE KINYANJUI MURITHII ..... PLAINTIFF**

**AND**

**GRACE RODAH OSOME ..... 1<sup>ST</sup> DEFENDANT**

**MOLYNE CREDIT LTD ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR NAKURU ..... 3<sup>RD</sup> DEFENDANT**

**ANN WAMBUI MWANGI ..... 4<sup>TH</sup> DEFENDANT**

**JANET NELIMA NYUKURI ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs commenced this suit vide a Plaint dated 29<sup>th</sup> July, 2013 against the Defendants seeking the following orders:
2.
  - a. A declaration that the Plaintiff is the lawful owner of Plot No. NJORO/NGATA BLOCK 1/5104 and Plot No. NJORO/NGATA BLOCK 1/5105.
3.
  - b. An order revoking the title deed issued to the 1<sup>st</sup> Defendant for NJORO/NGATA BLOCK 1/5104 and cancellation of charge registered against the said title in favour of the 2<sup>nd</sup> Defendant.
4.
  - c. A declaration that the Plaintiff is the lawful owner of NJOR/NGATA BLOCK 1/5105 and revocation of the title deeds issued to the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.



5.
  - d. Costs of this suit.
6.
  - e. Any other or further relief this honourable court may deem fit and just to grant.
7. The 3<sup>rd</sup> Defendant entered appearance and filed its statement of defence dated 1<sup>st</sup> October, 2013 where it denied the allegations in the plaint.
8. The 4<sup>th</sup> Defendant filed her statement of defence dated 16<sup>th</sup> September, 2013.
9. The 4<sup>th</sup> Defendant averred that she acquired the suit property Njoro/Ngata Block 1/5105 from the 1<sup>st</sup> Defendant. She admitted the contents of paragraph 9 of the Plaint and denied all the other allegations.
10. The 5<sup>th</sup> Defendant on the other hand filed her amended statement of defence and counter claim dated 30<sup>th</sup> March, 2019. She averred that she is the registered owner of the suit property Njoro/Ngata Block 1/5105 having purchased the same from the 4<sup>th</sup> Defendant. She prayed for judgment against the Plaintiff (now Defendant) for:
  11.
    - a. General damages for wrongful occupation/possession.
  12.
    - b. Vacant possession of all that parcel of land known as Njoro/Ngata Block 1/5105 failure to which there be an order of eviction.
  13.
    - c. Costs of the counter claim.
  14.
    - d. Interest on (a) and (c) at court rates.

#### Plaintiffs' Case

15. George Kinyanjui Mureithi testified as PW1 where he testified that he knew the 1<sup>st</sup> Defendant through the sale of his two suit properties. He produced copies of the title deeds marked as P-exhibits 1(a) and 1 (b).
16. He testified that he built a house on plot No.5104 and the 1<sup>st</sup> Defendant proposed to buy both the plot and house. He further testified that they signed a sale agreement on 14/6/2012 through advocate David Mongeri. He testified that he sold the two plots for a consideration of Kshs. 5.6 million. That the 1<sup>st</sup> Defendant agreed to pay a deposit of Kshs.500,000 on 27/6/2012 but the same was not paid. He testified that she later deposited in his account Kshs. 350,000/= which she informed him that it was to go towards construction of the house. PW1 testified that the 1<sup>st</sup> Defendant again borrowed him some money which he deducted from the Kshs. 350,000/= and he was left with Ksh. 45,000/= out of what the 1<sup>st</sup> Defendant had given him. He testified that she never deposited any other monies and he used what she had paid in the construction of the house.
17. PW1 produced a copy the sale agreement which was marked as P-exhibit 2. He went on to testify that the balance of the purchase price was never paid. He also testified that the 1<sup>st</sup> Defendant requested for



a copy of the title deed and since he only had the originals, he gave her to go and make copies which she later returned them. He further testified that he went to the Lands office where he was informed that the Green card bears the name of the 1<sup>st</sup> Defendant and that the title deeds he had are fake. He explained that the 1<sup>st</sup> Defendant exchanged his original title deeds and gave him fake ones. That she was arrested and charged in criminal case No.2059/2013. He produced a copy of the charge sheet which was marked as P-exhibit 3.

18. It was his testimony that the 1<sup>st</sup> Defendant was charged with forgery of transfer forms. He added that the signature in the transfer forms were not his. He produced a copy of his transfer form for plot No. 5104 which was marked P-exhibit No.4. He testified that the 1<sup>st</sup> Defendant then took a loan with the title of plot No.5104 which he only came to know this about when the auctioneers posted a notification of sale. He produced a copy of the notification of sale dated 15/6/2013 which was marked as P-exhibit No.5. He testified that the green card for the plot No.5104 under entry No.3 dated 27/6/2012 showed that the 1<sup>st</sup> Defendant is the registered proprietor. He went on to testify that entry No.4 showed the issuance of title deed while entry No.5 dated 10/8/2012 and showed the charge. He produced copies of the green card for the suit properties which were marked as P-exhibits 6 (a) and (b). He also produced copies of the alleged fake title deeds which were marked as P-exhibits 7 (a) and 7 (b). He also produced a copy of the alleged forged documents which was marked as P-exhibit 8. He testified that the said agreement stated that the purchase price was Kshs 5 million paid in cash. He added that the same agreement did not bear the advocates stamp.
19. PW1 testified that the application for Land control Board Consent was forged as the signature was not his. He produced the alleged forged LCB application which was marked P-exhibit 9. He further testified that the 1<sup>st</sup> Defendant transferred the suit property No.5105 to the 4<sup>th</sup> Defendant. He produced a copy of the transfer for of plot No. 5105 which was marked as P-exhibit 10. He went on to testify that the loan taken by the 1<sup>st</sup> Defendant has not been paid. He testified that in the notification of sale, the 2<sup>nd</sup> Defendant was asking for Kshs. 4,787,639.
20. The witness testified that he is currently in occupation of the suit properties and that the 1<sup>st</sup> Defendant never took possession. He further testified that he came to know that second plot was sold when it was fenced. That he called the 1<sup>st</sup> Defendant who confirmed that she had sent workers to fence it and that she will pay within a week and when she didn't pay, he pulled down the fence. He testified that at some point the 1<sup>st</sup> Defendant had asked him to write a document to state that he had sold her the land so that she could obtain a loan form the bank to pay him. He added that he never gone to the land control board.
21. On cross examination by Cheche for the 1<sup>st</sup> Defendant, the witness confirmed that the criminal case against the 1<sup>st</sup> Defendant was still ongoing. He further confirmed that he never signed the transfer exhibits No.4. He stated that he went to the Lands Office after about 5 months from the time the alleged fake title deeds were given to him where he then placed a caution. He however admitted that he could not recall the time he placed the said caution. He also stated that he was not aware of any loan taken from the 2<sup>nd</sup> Defendant. He further stated that on the sale agreement, they usually sign against their names in the 2<sup>nd</sup> page and not the 1<sup>st</sup> page. He stated that the 1<sup>st</sup> Defendant exchanged the first page. He also stated that the other purchasers got their title. He added that plot No.5104 is currently registered in the 1<sup>st</sup> Defendant's name while plot No.5105 in the 5<sup>th</sup> Defendant.
22. He stated that he wrote a note stating that he had sold the suit property to the 1<sup>st</sup> Defendant so that she could use it to get money from the bank and pay him. He stated that the note was with the police and confirmed that he never gave the 1<sup>st</sup> Defendant authority to take any money from the bank using his titles.



23. Upon cross examination by Mr. Ndungu for the 2<sup>nd</sup> Defendant, he stated that he signed his statement and added that he had a ½ acre land which he had subdivided into 4 pieces. He admitted that he could not recall the registration number of the mother title as he was given one acre by his father in 2008 which he subdivided into two halves. He stated that in one half he built his house while the other half he subdivided and sold one quarter while the other quarter comprised of the two suit plots in dispute. He explained that he had used about Kshs 2.6 million in developing his house.
24. He stated that one Mburu Kamau introduced him to the 1<sup>st</sup> Defendant as a buyer and that in the agreement, he was to be paid Kshs. 500,000 but that she paid Kshs. 350,000 to his bank account. He admitted that he did not have a record of the said transaction. That the said money was used for the construction of the house. He stated that he gave the 1<sup>st</sup> Defendant the original titles deeds so that she could make photocopies and attach them to the agreement to enable her get money from the bank. PW1 was referred to paragraph 8 of his statement which stated that the 1<sup>st</sup> Defendant asked for copies of the titles so as to do a search. In response, he stated that he had confused in his statement. He further stated that he went to the Land Registrar after about 3-4 months after he had given the 1<sup>st</sup> Defendant his title deeds and he was informed that his registration details had changed. He explained that he then put a caution, but he admitted that he could not recall if he made any payment. He further explained that he reported the 1<sup>st</sup> Defendant to the DCI.
25. PW1 stated that he was not sure whether the 1<sup>st</sup> Defendant would forge the purchase price for the suit properties in the sale agreement. He stated that the transfer forms, P-exhibit No.4 was for plot no.5104 but confirmed that the KRA pin and signature was not his. He stated that he never gave the 1<sup>st</sup> Defendant his documents. He admitted that he is married and that his wife never gave any spousal consent. He stated that the 1<sup>st</sup> Defendant was charged in a criminal case in 2013 which case is still ongoing. He further stated that he came to know of the 2<sup>nd</sup> Defendant when auctioneers came to the house and that after going to the Lands office, he was also told that there was a loan taken by the 1<sup>st</sup> Defendant. That the auctioneers wished to sell the property and that he placed a caution about 3 days after the auctioneers came then reported to the police. He also confirmed that he could not recall the exact time he went to the police as it has been a long time.
26. PW1 confirmed that in 2013 he came to learn that he had been conned and that the 2<sup>nd</sup> Defendant had charged the property for Kshs.2 million. He further confirmed that he cannot blame the 2<sup>nd</sup> Defendant for charging the title as he had not registered a caution as he only came to know later. He stated that he has sued the 2<sup>nd</sup> Defendant so that they can state how came to give a loan to the 1<sup>st</sup> Defendant.
27. On cross examination by Mr. Orege for the 5<sup>th</sup> Defendant he stated that he did not give possession of the suit property to the 1<sup>st</sup> Defendant but only allowed her to fence it. He further stated that he removed the fence when he heard that it had been placed by the 5<sup>th</sup> Defendant. He also stated that the 5<sup>th</sup> Defendant had planted maize but he was the one who harvested them. He added that the 5<sup>th</sup> Defendant's husband had given him the go ahead to harvest and that he later removed the fence.
28. He stated that he sold parcel No.5105 for Kshs 700,000 to the 1<sup>st</sup> Defendant while the other parcel for Kshs 4.9 million. He further stated that the alleged fraudulent agreement indicated Kshs 500,000 had been paid which he confirmed that he never received. He also confirmed that the advocates had not explained to him the agreement. He admitted that he may not have fully understood the agreement. PW1 also admitted that he could not recall when the 1<sup>st</sup> Defendant made the deposit of Kshs350,000 and he could only confirm with the bank. He admitted that the record of the money he gave the 1<sup>st</sup> Defendant was at home. He denied going to the Land Registrar after harvesting the maize.



29. PW1 stated that he came to know that the 5<sup>th</sup> Defendant had bought the land from the 4<sup>th</sup> Defendant from the Lands office. He also stated that he would not evict the 5<sup>th</sup> Defendant if he is paid the current value of the land. He further stated that he had cancelled his agreement with the 1<sup>st</sup> Defendant and that he has not refunded the Kshs. 45,000. He confirmed that before their agreement, the 1<sup>st</sup> Defendant had done a search. He stated that he cannot allow the 1<sup>st</sup> Defendant to cultivate since he is yet to be paid. He further stated that he did not know the agent or his whereabouts. He admitted that he owes the 5<sup>th</sup> Defendant an apology for destroying her property
30. Upon cross examination by Ms. Cheruiyot for the 3<sup>rd</sup> Defendant, PW1 confirmed that he gave the 1<sup>st</sup> Defendant his original titles which are currently with the CID. He stated that the 1<sup>st</sup> Defendant gave him fake title deeds. He added that he saw the transfer documents in the 1<sup>st</sup> Defendant's name but denied that he had signed it. He was referred to P-exhibit No.4 where he denied knowing an advocate by the name Oumo.
31. PW1 clarified to the court that he did not produce the transfer documents for land parcel No. 5104 as it had escaped his mind. He acknowledged that the photo in the transfer form exhibit 4 is his. He further clarified that he did not know how the person got his photo. He also clarified that the PIN and ID number are his but the signature does not belong to him. PW1 confirmed that with the said events that transpired, he was rather confused. He clarified to the court that he was sure that he was in his right frame of mind.
32. Upon re-examination, he stated that the auctioneers notice is dated 6/6/2013 and added that he could not recall the date it was put up. He further stated that the title the 1<sup>st</sup> Defendant took to the bank bore her name but that she had not acquired it genuinely since he never signed the transfer. He stated that the bank did their search and found the 1<sup>st</sup> Defendant's name. That he reported to the police who after investigations charged the 1<sup>st</sup> Defendant. He stated that the 1<sup>st</sup> Defendant never took possession of the house and that currently the house is incomplete but that he has employed a caretaker. He further stated that he was present when the fence was put up and later destroyed it when he heard it was put up by the 1<sup>st</sup> Defendant. He added that he sold the land since he needed the money. He also stated that he gave the 1<sup>st</sup> Defendant Kshs. 305,000 as a separate debt.
33. David Mongeri an advocate practicing under the name Mongeri & Co advocates in Nakuru testified as PW2. He testified that on 14/6/2012 he was in his office when he received two parties the Plaintiff (Vendor) and 1<sup>st</sup> Defendant (Purchaser) who wanted him to prepare a sale agreement. He further testified that he perused the title Njoro Ngata/Block1/5104 and 5105 and prepared a sale agreement. That the purchase price was Ksh5.6 million and the 1<sup>st</sup> Defendant was to pay a commitment amount of Kshs. 500,000 on 27/6/2012 while the balance was to be paid upon completion of the house. He testified that he signed and stamped pages 91 and 2 of the agreement together with the vendor's witnesses.
34. He testified that the parties never came back to him to confirm payment of Kshs500,000. He further testified that he was called at the DCI Nakuru where he was shown another agreement dated 3/1/2012 for the same property but that the clauses on page 1 had been altered. It was his testimony that the agreement indicated the price was Kshs. 5,000,000/= and everything was shown to have been paid in cash. He added that the 1<sup>st</sup> page did not have his signature and stamp while the 2<sup>nd</sup> page was what he had signed. He produced a copy of agreement dated 16/6/2012 which was marked as PEX11. He testified that he did not draw or stamp the agreement at DCI.
35. Upon cross examination by Cheche for the 1<sup>st</sup> Defendant, PW2 confirmed that the parties voluntarily came to his office. He further confirmed that he signed and stamped the 2<sup>nd</sup> page of both agreements.



He added that he had an original copy of the agreement he prepared on 14/6/2012. He also stated that he could not tell if the parties may have had any other deals. He admitted that he was summoned to the police (DCI) on 31/5/2013.

36. Upon cross examination by Ikua for the 2<sup>nd</sup> Defendant, PW2 confirmed that the Plaintiff and another person came to his office and he prepared an agreement. He further confirmed that they never left the original title with him since no commitment had been made. He stated that he was informed at the police station that the purchaser had used the agreement dated 3/1/2012 to sell the property to another person. He also stated that he had been summoned to CID in May 2013 and that he was not shown any copies of transfer executed by the parties.
37. On cross examination by Mr. Orege for the 5<sup>th</sup> Defendant, he confirmed that the parties had not provided the price for each of the parcels of land. The price of Kshs. 5.6 million was amalgamated for both parcels.

This marked the close of the Plaintiff's case.

2<sup>nd</sup> Defendant's case

38. Moses Anyango testified that he works for the 2<sup>nd</sup> defendant as the finance Director. His statement filed on 18/3/2015 was adopted as his evidence in chief. He also produced his list of documents which were marked as 2<sup>nd</sup> DEX1. He produced a copy of title marked as DEX2 the second title marked as 2<sup>nd</sup> DEX 3(a) and 3(b). He also produced a further list of documents dated 22/4/2018 filed on 26/4/2018. They were produced and marked as follows:

Certificate of official search 2<sup>nd</sup> DEX 4

LCB – 2<sup>nd</sup> DEX5

LCB -2<sup>nd</sup> DEX6

Charge- 2<sup>nd</sup> DEX7

Valuation report -2<sup>nd</sup> DEX 8

Supplementary list of documents - 2<sup>nd</sup> DEX 9

Loan statement -2<sup>nd</sup> DEX 10.

39. He testified that the 1<sup>st</sup> Defendant visited the 2<sup>nd</sup> Defendant on 27/6/2012 and applied for a loan of kshs2,000,000. He further testified that she gave the title for Njoro/Ngata Block 1/5104 registered in her name as security for the loan. He went on to testify that the 2<sup>nd</sup> Defendant conducted its due diligence and confirmed that the 1<sup>st</sup> Defendant as the registered owner. That they received the valuation report and registered a charge.
40. It was his testimony that the loan was disbursed to the 1<sup>st</sup> Defendant on 16/8/2012 and the 1<sup>st</sup> Defendant stopped the repayment, they exercised their statutory power of sale. They thereafter engaged the services of an auctioneer who advertised the property for sale. He testified that the sale could not proceed as the Plaintiff filed the present suit. He testified that the land was registered in the 1<sup>st</sup> Defendant's name. He further testified that the title deed was genuine while that of the Plaintiff was fake. He also testified that he was familiar with the transfer process including the documents required for the same which he testified that he gave them to 1<sup>st</sup> Defendant. He urges the court to dismiss the suit. He also testified that he was aware of the judgment in criminal No 2037 of 2013 where the 1<sup>st</sup> Defendant was acquitted. He testified that the loan was yet to be paid as the 1<sup>st</sup> Defendant has since defaulted.



41. On cross examination by Ngure for the Plaintiff he stated that the open market value of the charged property as per the valuation report was 5,000,000. He further stated that the 1<sup>st</sup> Defendant paid only one instalment of Kshs. 110,637 and the remaining balance was 6.2 million. He confirmed that the 1<sup>st</sup> Defendant did not have an account with them as they are money lenders and not a bank. He further confirmed that they did not file the customers statement. That the title was issued on 27/6/2012 while the loan was advanced on 16/8/2012.
42. On cross examination by Ademeyon for the 3<sup>rd</sup> Defendant, he confirmed that the Land Registrar was not a party or witness in the case as there was no claim against him.
43. Upon cross examination by Orege or the 5<sup>th</sup> Defendant he confirmed that the case was in respect to Njoro/Ngata /Block1/5104 and 5105.

On reexamination, he stated that he never noticed any irregularity.

5<sup>th</sup> Defendant's case

44. Janet Nelima Nyukuri the 5<sup>th</sup> Defendant produced her statements dated 4/9/2023 and 30/9/2019 which were adopted as her evidence in chief. She also produced her list of documents and supplementary list of documents dated 3/9/2013 and 30/3/2019 respectively. She testified that she is the owner of plot number 5105 after purchasing it from the 4<sup>th</sup> Defendant. She further testified that she had done her due diligence and the search dated 30/1/2023-DEX1 confirmed that the 4<sup>th</sup> Defendant was the owner. She also testified that she purchased the land vide a sale agreement dated 6/2/2013 for a consideration of Kshs. 880,000 which she paid the full amount – 5<sup>th</sup> DEX2. She testified that she had the banker's cheque -5<sup>th</sup> DEX 3 and the receipt for payment for search- 5<sup>th</sup> DEX4 and the transfer forms - 5<sup>th</sup> DEX5. She testified that she fenced the land and purchased the maize- 5<sup>th</sup> DEX6. It was her testimony that she was given a power of Attorney from her husband which was registered on 5/12/2018. She testified that she donated the power to her husband as she had gone for studies- 5<sup>th</sup> DEX6.
45. Upon cross examination by Ngure for the Plaintiff, she admitted that the lower court judgement was not signed. She further confirmed that she didn't see the Plaintiff damaging the fence and that he was never charged. I do not have evidence. She stated that she had purchased the plot from the 4<sup>th</sup> Defendant who obtained the property from the 1<sup>st</sup> Defendant. She admitted that she did not know how the 1<sup>st</sup> Defendant acquired the property.
46. On cross examination by Karanja for the 2<sup>nd</sup> Defendant, she confirmed that she had obtained her PHD in January and that she was not a party to the transaction between the Plaintiff and 1<sup>st</sup> Defendant.

Submissions

47. The Plaintiff filed his submissions dated 28<sup>th</sup> October, 2023 where he gave a summary of the pleadings as well as his evidence and that of the Defendants. He submitted that the 1<sup>st</sup> Defendant never filed a defence despite having entered appearance. He further submitted that she is deemed to have admitted the allegations against her thus the Plaintiff's case against her is uncontested.
48. The Plaintiff submitted that the 1<sup>st</sup> Defendant tricked him into releasing the genuine title deeds in the pretext that she was going to make photocopies. It was his argument that the 1<sup>st</sup> Defendant substituted the said titles with the fake ones. He added that the 1<sup>st</sup> Defendant made a fake agreement by replacing the first page of the genuine one with a page indicating that she had paid the purchase price in full.



49. He went on to submit that in reality, the 1<sup>st</sup> Defendant had only paid Kshs. 500,000 leaving a balance of Kshs. 5,100,000 which she never paid. That she proceeded to forge transfer documents and transferred the suit properties to herself. The Plaintiff submitted that the fraudulent intention of the 1<sup>st</sup> Defendant can be imputed from her conducted where she got a loan with the suit property as security and defaulted on repayment.
50. The Plaintiff relied on Section 26 (1) of the [Land Registration Act](#) and the cases in *Elijah Makeri Nyangw'ra V Stephen Mungai Njuguna & Another* [2013] eKLR and *Marcus Kiranga Nimrod & Another V Nesity Kuthii Justus & Another* [2019] eKLR. In conclusion, he urged the court to allow his case as prayed.
51. The 1<sup>st</sup> Defendant filed her submissions dated 1<sup>st</sup> December, 2023 where she gave a background of the case and identified four issues for determination. The first issue was whether the suit land claimed by the Plaintiff belongs to him. She submitted that the Plaintiff's right of ownership of the suit parcels was relinquished when he sold the same to the 1<sup>st</sup> Defendant. She further submitted that she was acquitted in the false criminal charges against her. It was her submission that the particulars of fraud pleaded by the Plaintiff were not proved against her or any of the other Defendants.
52. The second issue was if the suit is fatally defective for failing to enjoin the Attorney General in accordance with Section 14 (a) of the [Government Proceedings Act](#) when suing a government official. The 1<sup>st</sup> Defendant submitted that the orders sought against the 3<sup>rd</sup> Defendant can't be made as its only the Attorney General who can be sued on behalf of the government. She further submitted that no notice had been served and therefore the proceedings are against the government who are not enjoined as a party to the suit. It was her submission that it is trite law that the court cannot grant orders against a party who has not been made a party to the suit. She relied on sections 12(1) and 13 of the [Government Proceedings Act](#) (GPA)
53. The third issue is whether the statutory notice was issued to the Attorney General before suing the Land Registrar. She relied on section 13A of the GPA and submitted that it is mandatory that a notice is issued before filing a suit against the government failure which the suit is incompetent. The 1<sup>st</sup> Defendant urged the court to strike out the suit for being incompetent. The final issue is whether the Plaintiff is entitled to the orders sought. She relied on the cases of *Koinange and 13 Others V Koinange* (1986) and *Chesulut V Timothy Sangok* Appeal No. 265 of 1999 and submitted that a party not only plead fraud but must also adduce evidence to support the said particulars of fraud.
54. The 2<sup>nd</sup> Defendant on the other hand filed its submissions dated 6<sup>th</sup> November, 2023. It gave a summary of the case and identified four issues for determination. One, whether the Plaintiff proved his allegations of fraud by the 1<sup>st</sup> Defendant to the required standard of proof. It submitted in the negative and added that the documents used to transfer the plots from the Plaintiff to the 1<sup>st</sup> Defendant included his ID, Photo and KRA pin. It submitted that there was no allegation that the said documents were forged thus the same were provided by the Plaintiff. The 1<sup>st</sup> Defendant also submitted that the 1<sup>st</sup> Defendant was acquitted of fraud charges in *Nakuru CMC Criminal Case No. 2059 of 2013*. It further submitted that the Plaintiff failed to call the purported document examiner to testify on the issue of the signature. It relied on the case of *Eviline Karigu* (Suing as the Administratrix of Estate of Late Muriungi M'Chuka alias Miriungu M'Gichuga V M'Chabari Kinoro [2022] eKLR where the court cited the case of *Kinyanjui Kamau V George Kamau* [2015] eKLR. It submitted that the Plaintiff failed to prove the allegations of fraud to the required standard.
55. The 2<sup>nd</sup> Defendant submitted that the Plaintiff was complicit and/or negligent in the land dealings to the extent that the 1<sup>st</sup> Defendant ended up being the registered owner of the suit plots. It submitted



- that relying on the state of things, it was now the registered owner where it proceeded to acquire its rights as a chargee of suit plot no. 5104.
56. It also submitted that the Plaintiff's allegation that he gave the 1<sup>st</sup> Defendant the original title deeds to make her copies is suspect, negligent and amounts to being complicit. It submitted that there is no proof that the Plaintiff terminated the sale agreement between himself and the 1<sup>st</sup> Defendant. It argued that there was no evidence to prove the allegation by the Plaintiff that the 1<sup>st</sup> Defendant requested him to advance her some monies. It was further argued that the Plaintiff and 1<sup>st</sup> Defendant were engaged in some dubious arrangements and the Plaintiff being complicit, he has to bear the consequences.
57. The second issue is whether the Plaintiff's claim extinguishes or supersedes the 5<sup>th</sup> Defendant's title to plot no. 5105 and the 2<sup>nd</sup> Defendant's right as chargee over plot no. 5104. The 2<sup>nd</sup> Defendant submitted that it is not in dispute that the 1<sup>st</sup> Defendant borrowed a loan of Kshs.2,000,000 from it. That the same was charged with plot no. 5104 as security for repayment of the loan and interest. It submitted that it conducted its due diligence on the suit property and it produced the loan statement which confirmed that the outstanding loan amount was Kshs. 6,415,894. The 2<sup>nd</sup> Defendant submitted that the 1<sup>st</sup> Defendant's right as a chargee over plot 5104 was acquired regularly and as such it is a bona fide acquirer of right with no notice of fraud or irregularity.
58. The third issue is what reliefs are available to the Plaintiff and the repercussions with respect to the rights of the 2<sup>nd</sup> and 5<sup>th</sup> Defendants. It submitted that if there is any payment the 1<sup>st</sup> Defendant did not make, his remedy lies in enforcing the contract between himself and the 1<sup>st</sup> Defendant. It further submitted that the law does not sanction the Plaintiff's claim to extinguish the rights of the 2<sup>nd</sup> Defendant as chargee and 5<sup>th</sup> Defendant as proprietor yet they had nothing to do with the agreement between the Plaintiff and 1<sup>st</sup> Defendant.
59. On the final issue of costs, the 2<sup>nd</sup> Defendant relied on Section 27 of the *Civil Procedure Act* and submitted that costs follow the events. It submitted that it was an innocent bona fide acquirer of right as charge over plot 5104 and urged the court that it be awarded costs of the suit. The 2<sup>nd</sup> Defendant submitted that the Plaintiff's recourse lies in getting the balance of the purchase price from the 1<sup>st</sup> Defendant. It urges the court to uphold its rights as a charge over parcel no. 5104.
60. The 5<sup>th</sup> Defendant filed her submissions dated 17<sup>th</sup> November, 2023 where she gave a background of the case and submitted that PW1's evidence is only consistent with clear consensus ad idem between PW1 and the 1<sup>st</sup> Defendant giving rise to ownership of the suit parcels by the 1<sup>st</sup> Defendant. She submitted that PW2 confirmed preparing the sale agreement between PW1 and the 1<sup>st</sup> Defendant. It was her submission that she entered into a sale agreement with the 4<sup>th</sup> Defendant and produced exhibits to fortify her evidence. She relied on the Court of Appeal case of *Weston Gitonga & 10 Others V Peter Rugu Gikanga & Another* [2017] eKLR and submitted that she has demonstrated that she innocently purchased the suit property from the 4<sup>th</sup> Defendant for Kshs. 880,000 after performing her due diligence and without any notice of irregularity regarding the title.
61. She further relied on the Court of Appeal case of *Khadija Mohamed V Amina Duba & Another* [2022] KECA 442(KLR) and submitted that the transaction between herself and the 4<sup>th</sup> Defendant was legitimate and made in good faith along with the title she possesses. The 5<sup>th</sup> Defendant submitted that the Plaintiff has not made any claim of fraud or illegality against her to warrant impeachment of her lawfully acquired title over parcel no. Njoro/Ngata Block 1/5105. She relied on the case of *Eunice Grace Njambi Kamall and Another V The Hon, Attorney General and 5 Others* [2013] eKLR and submitted that she performed due diligence before purchasing the suit property by conducting a search then entering into a sale agreement with the 4<sup>th</sup> Defendant. The 5<sup>th</sup> Defendant relied on Section



26 of the [Land Registration Act](#) and submitted that the title deed issued by the Land Registrar is prima facie evidence of complete and irrefutable ownership.

62. She submitted that the Plaintiff cannot impeach the 5<sup>th</sup> Defendant's ownership of the lawfully acquired title. The 5<sup>th</sup> Defendant urged the court to dismiss the Plaintiff's suit with costs and judgment be entered for it as per her counter claim with costs. She submitted that in the alternative, in the event the Plaintiff's suit is allowed, that the court orders the 4<sup>th</sup> Defendant to refund a sum of Kshs. 880,000 to it with interest at court's rate from 6<sup>th</sup> February, 2013.

#### Analysis and Determination

63. I have considered the pleadings and the evidence on record and I am of the view that the following issues need to be determined:

64.

- a. Who is the legal owner of the suit property?

65.

- b. Whether the 2<sup>nd</sup> Defendant is a bona fide acquirer of right with no notice of fraud or irregularity.

66.

- c. Whether the Plaintiff is entitled to the orders sought

67.

- d. Whether the 5<sup>th</sup> Defendant is entitled to the orders sought in her Counterclaim.

68. In dealing with the first issue for determination, it is important to establish the root of the titles. The Plaintiff contends that on 14<sup>th</sup> June, 2012 he entered into a sale agreement with the 1<sup>st</sup> Defendant for the sale of the suit properties at a consideration of Kshs. 5,600,000. It was a term of the agreement that the 1<sup>st</sup> Defendant was to pay a deposit of Kshs. 500,000 on 27<sup>th</sup> June, 2012. The Plaintiff testified that he was not paid the said or any amount of the purchase price. He added that the 1<sup>st</sup> Defendant forged documents and transferred the suit properties to her name. He also testified that he never signed any transfer documents to the 1<sup>st</sup> Defendant.

69. The Plaintiff testified that the sale agreement dated 3<sup>rd</sup> January, 2012 between himself and the 1<sup>st</sup> Defendant is not valid. PW2, the advocate who drafted the sale agreement testified that he executed the sale agreement dated 14<sup>th</sup> June, 2012. He confirmed that the Plaintiff and 1<sup>st</sup> Defendant left his office and that he was not certain whether the purchase price was paid. He also confirmed the sale agreement dated 3<sup>rd</sup> January, 2012 did not have its signature and stamp in the first page. It is noteworthy that the 1<sup>st</sup> Defendant never testified to counter the Plaintiff's claim neither did he file any defence.

70. The 2<sup>nd</sup> Defendant testified that on 27<sup>th</sup> June, 2012 the 1<sup>st</sup> Defendant took a loan of Kshs2,000,000 with them. He went on to testify that they caused a charge to be registered against Plot No. 5104. He stated that they had conducted its due diligence and confirmed that the 1<sup>st</sup> Defendant as the registered owner. He added that the 1<sup>st</sup> Defendant only paid the first installment of Kshs. 110,637 after which she defaulted. He stated that the remaining balance together with accrued interest was Kshs. 6.2 million. The 2<sup>nd</sup> Defendant testified that they have since exercised their statutory power of sale.

71. The 5<sup>th</sup> Defendant on the other hand testified that she is the owner of plot number 5105 after purchasing it from the 4<sup>th</sup> Defendant. She further testified that she had done her due diligence and



the search dated 30/1/2023 confirmed that the 4<sup>th</sup> Defendant was the owner. She added that she had purchased the land vide a sale agreement dated 6/2/2013 for a consideration of Kshs. 880,000 for which she paid the full amount. She stated that she had purchased the plot from the 4<sup>th</sup> Defendant who had previously acquired from the 1<sup>st</sup> Defendant. She however admitted that she did not know how the 1<sup>st</sup> Defendant acquired the property.

72. It is this court's view that the foundation of this suit lies with the sale agreement dated 14<sup>th</sup> June, 2012 and the alleged fake agreement dated 3<sup>rd</sup> January, 2012. I say so because this were the only two agreements between the Plaintiff and the 1<sup>st</sup> Defendant who are the "initial owners" of the suit properties. This court has carefully looked at the two agreements and the key aspect in determining the first issue is to establish whether the terms of the agreement were met.

Section 3 (3) of the *Law of Contract Act* provides as follows:

"(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;..."

73. In the case of Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs Northwest Metropolitan Regional Hospital Board (1973) I WLR 601 at 609, the court held as follows:

"The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."

74. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. It is the Plaintiff's case that in line with the sale agreement dated 14<sup>th</sup> June, 2012, the 1<sup>st</sup> Defendant was to pay Kshs. 5,600,000 as purchase price for the suit properties. He testified that the 1<sup>st</sup> Defendant only paid Kshs. 305,000 and she later requested a loan of Kshs. 305,000 from the Plaintiff. The Plaintiff confirmed that he only retained Kshs. 45,000 as part of the purchase price.
75. It is not in dispute that the Plaintiff's case remained uncontroverted since the 1<sup>st</sup> Defendant never testified disproving the said allegations. In addition, PW2 confirmed that he only witnessed, signed and stamped the sale agreement dated 14<sup>th</sup> June, 2012 to which he admitted that he was not sure whether any purchase price was paid by the 1<sup>st</sup> Defendant.
76. It is this court's view that even though the Plaintiff alleged that the sale agreement dated 3<sup>rd</sup> January, 2012 was fake, the burden was on the 1<sup>st</sup> Defendant to prove that she indeed paid for the suit properties in full. However, she blatantly failed to do so thus breaching the terms of the agreement to wit, failure to pay the balance of the purchase price.
77. The implication of non-payment of the full purchase price would therefore result in breach of the contract and would thus mean that no title had passed to the 1<sup>st</sup> Defendant. It is this court's view that any subsequent transactions with regard to the suit property would therefore be null and void.
78. The 2<sup>nd</sup> and 5<sup>th</sup> Defendants produced before this court copies of title issued to the 1<sup>st</sup> Defendant as proof of ownership. The Supreme Court in the case of Dina Management Limited v County Government



of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) cited the case of Munyu Maina V Hiram Gathiha Maina [2013] KECA, where the court held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

79. The 2<sup>nd</sup> Defendant testified that it conducted its due diligence and confirmed that the 1<sup>st</sup> Defendant was the registered owner before issuing her the loan. The 5<sup>th</sup> Defendant on the other hand admitted that she did not know how the 1<sup>st</sup> Defendant acquired the property. It is this court’s view that the Defendants’ failed to prove how the 1<sup>st</sup> Defendant acquired the suit property. Furthermore, none of the Defendants called the Land Registrar to testify on their behalf.
80. This court therefore finds that the only legal owner of the suit property is the Plaintiff by virtue of breach of the sale agreement dated 14<sup>th</sup> June, 2012.
81. Going to the second issue for determination, it is not in dispute that the 1<sup>st</sup> Defendant borrowed a loan of Kshs.2,000,000 from the 2<sup>nd</sup> Defendant as evidenced by the charge and loan statements. It argued that it had conducted its due diligence on the suit property and it produced the loan statement which confirmed that the outstanding loan amount was Kshs. 6,415,894. It is its contention that it is therefore a bona fide acquirer of right with no notice of fraud or irregularity.
82. It is this court’s view that having established that the root of title for the 1<sup>st</sup> Defendant was never proved, it meant that the 1<sup>st</sup> Defendant had not acquired a valid title. This court therefore finds that the 2<sup>nd</sup> Defendant is not a bona fide acquirer of right without notice of fraud.
83. Having then established that the Plaintiff is the legal owner of the suit property, he is therefore entitled to the orders sought in the plaint.
84. It is noteworthy that the critical party in this case was the 1<sup>st</sup> Defendant who failed to testify in support of how she acquired the suit properties. Based on that, the implication clearly had a ripple effect to the parties who dealt with the suit properties in this case the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants’. It therefore meant that even the sale agreement produced by the 5<sup>th</sup> Defendant dated 6<sup>th</sup> February, 2013 where she claimed that she had lawfully purchased the suit property from the 4<sup>th</sup> Defendant is null and void. This therefore means that the 5<sup>th</sup> Defendant’s counterclaim dated 30<sup>th</sup> March, 2019 fails in totality.
85. This court notes that the 1<sup>st</sup> Defendant claims that the 3<sup>rd</sup> Defendant was never issued with a notice of intention to sue. I find that the same is rather an afterthought as the 3<sup>rd</sup> Defendant in fact entered appearance and even had representation in court through its attorney Ms. Cheruiyot.
86. The upshot of the above is that the Plaintiff has established his case on a balance of probabilities.
87. Consequently, this court grants judgment in favour of the Plaintiff in the following terms:
88.
  - a. A declaration that the Plaintiff is the lawful owner of Plot No. NJORO/NGATA BLOCK 1/5104 and Plot No. NJORO/NGATA BLOCK 1/5105.



- b. An order be and is hereby issued directing the Land Registrar Nakuru to cancel the title deeds issued to the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants in respect Plot No. NJORO/NGATA BLOCK 1/5105.
- c. An order be and is hereby issued directing the Land Registrar Nakuru to cancel the title deed issued to the 1<sup>st</sup> Defendant in respect Plot No. NJORO/NGATA BLOCK 1/5104.
- d. The Land Registrar be and is hereby directed and ordered to effect rectification of the registers of the parcels of land referred in (a) above to the Plaintiff's name.
- e. An order be and is hereby issued directing the Land Registrar, Nakuru to cancel the charge registered against Plot No. NJORO/NGATA BLOCK 1/5104 in favour of the 2<sup>nd</sup> Defendant.
- f. The Defendants shall bear the costs of the suit.

It is so ordered.

Judgment dated, signed and delivered on the 30<sup>th</sup> April, 2024

**A.O. OMBWAYO**

**JUDGE**

ELC 486 OF 2013	0
-----------------	---

