



**Ndegwa & 4 others v Mang’ethi & 4 others (Environment & Land Case  
259 of 2017) [2024] KEELC 3974 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3974 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 259 OF 2017**

**JG KEMEI, J  
APRIL 29, 2024**

**BETWEEN**

**STEPHEN NGUGI NDEGWA ..... 1<sup>ST</sup> PLAINTIFF  
EDWARD GITAU ..... 2<sup>ND</sup> PLAINTIFF  
RUTH MACHARIA KIMANI ..... 3<sup>RD</sup> PLAINTIFF  
GRACE WANJIRU KAMAU ..... 4<sup>TH</sup> PLAINTIFF  
CHARLES KIMANI WANJOHI ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**NJOGU MANG’ETHI ..... 1<sup>ST</sup> DEFENDANT  
GEORGE KARENJE KIMANI ..... 2<sup>ND</sup> DEFENDANT  
TABITHA NJERI NDEGWA ..... 3<sup>RD</sup> DEFENDANT  
THE LAND REGISTRAR, KIAMBU ..... 4<sup>TH</sup> DEFENDANT  
JOHN KIMANI NJOROGE ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This suit was initially filed in Nairobi High Court ELC No. 334 of 2010 and later upon establishment of this Court and on account of geographical jurisdiction, it was transferred here on 9/2/2017. Vide an Amended Plaint dated 12/11/2021, the Plaintiffs claim against the Defendants pertains parcel of land known as LR No. Githunguri/githiga/290 (hereinafter the suit land). The Plaintiffs’ claim against the 5<sup>th</sup> Defendant is for an order for the cancellation of the suit land Title deed held by the 5<sup>th</sup> Defendant and the rectification of the register of the Title of the said parcel by deleting the 5<sup>th</sup> Defendant’s name and substituting it with that of the 1<sup>st</sup> Plaintiff.



2. Regarding the 1<sup>st</sup> Defendant, the Plaintiffs claim for general damages for trespass unto the suit land on 7/10/2009 and destroying properties valued at Kshs. 3.2M and damages for fraudulent transfer of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
3. The Plaintiffs' further claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is for compensation for loss of the suit land on account of the 4<sup>th</sup> Defendant's fraudulent transfer of the land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants against whom interlocutory Judgment had been entered. The 1<sup>st</sup> Plaintiff avers that in the year 1999 he contributed Kshs. 275,000/- to purchase the suit land for use by members of Christian Church of Christ Githiga (the Church) who agreed that the sale agreement would be prepared in the name of the 1<sup>st</sup> Defendant as a purchaser on behalf of the Church. That on 2/8/1999 the Plaintiffs were put in possession of the suit land by the then registered owner who handed over the original title deed of the suit land to the 1<sup>st</sup> Plaintiff. The Plaintiffs had enjoyed possession of the suit land from the said date until 7/10/2009. That in the year 2003 the Plaintiffs placed cautions on the suit land to safeguard their interests and while they remained in force, the 4<sup>th</sup> Defendant registered the suit land in the 1<sup>st</sup> Defendant's name on 15/10/2003. Further without notice to the Plaintiffs and any Court order, the 4<sup>th</sup> Defendant on 10/12/2009 removed the said cautions hence the Plaintiffs' contention that the transfer of the suit land to the current registered owners was irregular, illegal and fraudulent.
4. The Plaintiffs enumerated particulars of frauds against the 1<sup>st</sup> and 4<sup>th</sup> Defendants at para 13 of the Plaintiffs' inter alia causing transfer of title without legal or equitable interest; registration of the 1<sup>st</sup> Defendant despite existence of cautions on the suit land register; removing cautions without any Court order to that effect and subsequent transfer of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants while knowing that the transfer to the 1<sup>st</sup> Defendant as tainted with fraud. The Plaintiffs pray for Judgment thus;
  - a. An order of injunction restraining the 5<sup>th</sup> Defendant from selling, transferring exchanging, giving away, parting with, or creating a Charge over LR No. Githunguri/githiga/290 until this suit is heard and determined or further order of this Court.
  - b. General damages against the 1<sup>st</sup> and 4<sup>th</sup> Defendants for fraudulent transfer of LR No. Githunguri/githiga/290.
  - c. An order of rectification of register of Title to LR No. Githunguri/githiga/290 by deleting the name of the 5<sup>th</sup> Defendant and substituting them with that of the 1<sup>st</sup> Plaintiff who is to hold in trust for the other Plaintiffs heled the land in trust for the Plaintiffs.
  - d. Costs of this suit.
5. The suit is opposed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants.
6. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not file their defences. Interlocutory Judgment was entered against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 22/3/2011.
7. The 4<sup>th</sup> Defendant filed its statement of defence dated 10/5/2022. Denying the Plaintiffs claim, the 4<sup>th</sup> Defendant stated that if at all there was destruction on the suit land, it was not privity to it. On removal of the cautions, the 4<sup>th</sup> Defendant maintained that if at all they were removed then the same was done procedurally based on the documents lodged at the Land Registry and within the statutory provisions of the [Land Registration Act](#).
8. In similar fashion the 5<sup>th</sup> Defendant filed his defence dated 28/3/2022 and denied the Plaintiffs' claim in toto and put them to strict proof thereof. He contended that he is an innocent purchaser of the suit land for valuable consideration from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That when he purchased the suit land, it had no encumbrance and no developments thereon and as a registered proprietor of the suit land,



he holds an indefeasible title subject to Section 26 of the [Land Registration Act](#). He also averred that there were previous proceedings in Nairobi High Court No. 1338 of 2007 between *Njogu Mang'ethi v Francis Wakaria Kanogu* which is relevant to the instant suit. Both Defendants urged the Court to dismiss the Plaintiffs' suit with costs.

### The evidence

9. The 2<sup>nd</sup> Plaintiff, Edward Gitau took the stand as PW1. He adopted his witness statement dated 9/2/2023 as his evidence in chief. He also produced a copy of the title deed, certificates of official search, sale agreement dated 30/7/1999, evidence of payment of the purchase price and photographs of the Church destroyed as P.Exh 1 - 5. He testified that the 1<sup>st</sup> Plaintiff (now deceased) and 1<sup>st</sup> Defendant were members of the Cornerstone Pentecost Church of Africa that was later renamed Christian Church of Christ Githiga. That members of the Church wished to buy a plot and the suit land was identified and purchased at Kshs. 275,000/- and the Church was put into vacant possession of the suit land. That a Church was then constructed and the original title of the suit land was given to the officials of the Church. That the Plaintiffs placed cautions over the suit land and in their pendency, the 1<sup>st</sup> Defendant caused himself to be registered as the proprietor of the suit land and subsequently transferred it to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That the 1<sup>st</sup> Defendant should have transferred the suit land to the Plaintiffs.
10. In cross, PW1 said the green card entry No. 8 showed that cautions Nos. 6 and 7 were removed by a Court order he did not know about. That the suit land was not bought in the 1<sup>st</sup> Defendant's name. That the 2<sup>nd</sup> Defendant destroyed the properties in the suit land which were valued at Kshs. 3.2M. That there was a sale agreement in respect of the suit land between the former owner of the suit land and the Church. Shown page 17, PW1 admitted that the agreement was not signed by Francis Wakaria Kanoga and the 1<sup>st</sup> Defendant; no purchase price was disclosed. PW1 conceded that he did not witness the said sale agreement. That he was aware of the case between Francis Kanoga and Njogu Mangethi (1<sup>st</sup> Defendant) and was shown Court orders in HCC No. 649 of 2004 which ordered that the land be registered in the 1<sup>st</sup> Defendant's name. PW1 admitted that the Church was aware of the suit land yet it did not appeal. That the Church placed cautions on the suit land but they were removed without their knowledge. That the Church was demolished in the presence of the police on the strength of a Court order. That the 5<sup>th</sup> Defendant is the current registered owner of the suit land having bought it from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and is in possession.
11. The 4<sup>th</sup> Defendant closed its case without calling any witness.
12. The 5<sup>th</sup> Defendant took the stand as DW1 and adopted his witness statement as evidence in chief. He produced the documents in the List of Documents dated 28/3/2022 as Dexh 1 - 12.
13. It was his evidence that he conducted a search on the suit land before purchasing it as shown by a search dated 23/7/2019. That there was no caution on the land; he entered into the sale agreement on 8/8/2019; he did not have the past history of the land and that he attended Land Control Board and obtained consent and is in possession of the land conducting timber business and farming. He added that when he took over possession of the suit land, there was a structure on the land belonging to the former owner which was demolished.
14. In cross, DW1 stated that orders in HCCC No. 649 of 2004 were issued on 4/1/2005 directing the Land Registrar to register the suit land in the 1<sup>st</sup> Defendant's name.
15. That was the end of the 5<sup>th</sup> Defendant's case.



## The written submissions

16. Parties elected to file their written submissions which I have read and considered.
17. The Plaintiffs through the firm of Mwaura Shairi & Co. Advocates filed submissions dated 15/5/2023. Rehashing the facts of the case as outlined in their Amended Complaint, they impugned the 1<sup>st</sup> Defendant's registration as the owner of the suit land during the subsistence of cautions they registered. That the removal of the cautions on account of a Court order was fraudulent because no such order was produced in Court and the Ruling dated 2/3/2009 did not vest the suit land in the 1<sup>st</sup> Defendant's name. That the 1<sup>st</sup> Defendant's subsequent transfer was in breach of trust bestowed on him by the Church officials and his registration was through a fraudulent scheme and as a result, no legal or equitable interest could be passed on to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and later to the 5<sup>th</sup> Defendant. That the Plaintiffs have therefore proved their case of fraud against the 1<sup>st</sup> – 4<sup>th</sup> Defendants and deserve the prayers sought at para. 15 of their Complaint.
18. On behalf of the 4<sup>th</sup> Defendant, Ruth Kerubo Senior State Counsel filed submissions dated 8/6/2023. Two issues were drawn for determination to wit; whether the Plaintiffs have proven fraud on the part of the 4<sup>th</sup> Defendant in the registration and transfer of the suit land and whether the Plaintiff has proven fraud on removal of the cautions. The 4<sup>th</sup> Defendant answered the issue in the negative and submitted that the registration of the 1<sup>st</sup> Defendant as owner of the suit land was done on strength of Nbi HCC No. 649 of 2004 and was thus in compliance of a Court order. On removal of cautions the same was also done in compliance of a Court order dated 5/3/2009 issued in ELC No. 1338 of 2007 and thus no fraud on its part has been established in line with Sections 107 and 109 of the *Evidence Act*.
19. The 5<sup>th</sup> Defendant through his learned Counsel Andrew Gachoka filed extensive submissions dated 15/6/2023. Analyzing the evidence adduced in Court, he submitted that the sale agreement was not signed by the parties, it lacked the terms and conditions of sale including the purchase price and that the transfer of the suit land from Francis Kanoga to the 1<sup>st</sup> Defendant was valid in light of the Court's Judgment dated 4/1/2005 which was never appealed against. That at the time he was enjoined a party herein, the 5<sup>th</sup> Defendant was already in possession and occupation of the suit land and he filed a co-claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants dated 28/3/2022. That he is a bona fide purchaser for value and his title is protected under Section 26 *Land Registration Act* and no evidence of fraud has been presented to the required standard by the Plaintiffs as alleged. He defended his title and reiterated the right to own land as enshrined under Article 40 Constitution of Kenya and Sections 24 and 25 of *Land Registration Act*.

## Analysis and Determination

20. Having considered the pleadings, evidence and submissions tendered before Court, the issues that fall for determination are;
  - a. Whether the Plaintiffs have requisite capacity to sue?
  - b. Whether the Plaintiffs have proven fraud on the part of the 1<sup>st</sup> and 4<sup>th</sup> Defendants?
  - c. Whether or not the 5<sup>th</sup> Defendant is a bona fide purchaser for value?
  - d. What orders should the Court make?
21. The first issue was raised by the 5<sup>th</sup> Defendant and it is imperative to address it as a priority. It is trite that capacity or locus standi of a party means the right to appear before and be heard in a Court of law. In the case of *Christopher Mutiembu Machimbo & 3 Others v County Surveyor, Trans-Nzoia &*



- [4 others](#) [2022] eKLR it was emphasized that without it, even when a party has a meritorious case, he cannot be heard because of that. Locus standi is so important that in its absence a party has no basis to claim anything before the Court.
22. The Plaintiff in their Amended Complaint described themselves at para. 1 as ‘adult persons’ and their names appear individually as 1<sup>st</sup> – 5<sup>th</sup> Plaintiffs’. The 1<sup>st</sup> Plaintiff swore the Verifying Affidavit in his own capacity and on behalf of his co-Plaintiffs. The Authority to Act dated 12/7/2010 is signed by 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs authorizing the 1<sup>st</sup> Plaintiff to plead and act on their behalf in the suit. Nowhere in their pleadings have the Plaintiffs indicated they have lodged this suit as the Church officials or trustees of the Church they purport to agitate the claim for herein.
23. It is trite that a society registered under the Societies Act, including a religious organization, can only sue or be sued through its officials. See the case of [Trustees Kenya Redeemed Church & Anor vs Samuel M’Obiya & 5 others](#) [2011] eKLR. In this case the Plaintiffs did no more than to state their names and without disclosing their official capacities if at all.
24. Order 1 Rule 8 of the [Civil Procedure Rules](#) provides as follows on who may sue/defend;
- “ 8 . One person may sue or defend on behalf of all in same interest [Order 1, rule 8.]
- (1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
- (2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.
- (3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the Court to be made a party to such suit.”
25. The [Halsbury’s Law of England](#), 3<sup>rd</sup> Edition Volume 18 paragraph 239 states as follows:
- “The trustees of a registered society or branch or officers authorized by its rules may bring or defend actions of legal proceedings with respect to any property, right, or claim of the society or branch and may sue and be sued in their proper names without other description other than the title of their office.”
26. In the case of [Peter Ngugi Geoffrey & 3 Others v Mitbitini SDA Church](#) [2019] eKLR the Court held:
8. In the Complaint the Defendant is described as a Church registered under the *Societies Act*. The Plaintiff has not exhibited any form of registration in respect to the Defendant’s entity. It is trite that a non-juristic person is incapable of suing or being sued in its name. If indeed the Defendant is registered under the *Societies Act*, then the right thing was to have it sued through its officials. None has been disclosed.



9. In the instant matter the suit was filed against a religious organization. It is not a body corporate which would then mean it would be sued as a legal personality. That being so it lacks the capacity to be sued in its own name.
10. A Society can only sue or be sued through its officials. That is the law. Having failed to sue the officials or trustees of the Defendant, or the specific members of the Defendant I find that the Preliminary Objection as raised is a pure point of law.”
27. The totality of the above authorities leads to but one conclusion that the Plaintiffs lack locus standi to sue on behalf of the Church. The suit is defective and non-starter ab initio. This finding alone is sufficient to dispose the suit conclusively but the Court will delve into the rest of the issues as below. The first issue is thus answered in the negative.
28. Unto the second issue, it is evident that the Plaintiffs seek cancelation of title of the suit land and rectification of title register to have the land registered in the 1<sup>st</sup> Plaintiff's name for the rest of the Plaintiffs. That they bought the suit land for Kshs. 275,000/- upon which they were given vacant possession in 1999. That the original title deed for the suit land was given to the Church officials after members agreed that the sale agreement be prepared in the 1<sup>st</sup> Defendant's name on behalf of the Church. Later in 2003, they placed cautions against the suit land title to safeguard their interest but while they subsisted and without their consent, the 1<sup>st</sup> Defendant was registered as the owner of the suit land hence the suit.
29. It is trite that he who alleges must prove. Sections 107 – 109 of the Evidence Act provide as follows;
107. Burden of proof
- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. Incidence of burden
- 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.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
30. The standard of proof in civil claims like the instant is balance of probabilities. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. This is unofficially described as the 51% test. This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.
31. To bolster their claim, the Plaintiffs produced a copy of title deed for the suit land issued to Francis Wakaria Kanogu on 4/12/1974 whose ownership is also confirmed by the certificate of official search dated 28/11/2008. They also produced a copy of handwritten sale agreement between Francis and Njogu Mangethi drawn by Njoroge Baiya Advocate dated 30/7/1999. The said agreement in kikuyu



language was translated by Mwaura Shairi Advocate on 24/12/2013 as per the certificate of translation contained therein.

32. In cross, PW1 conceded that the sale agreement was not signed by Francis and Njogu and that the witnesses to the agreement were not witnesses in this suit. It is also evident from the sale agreement that the purchase price was not indicated. No evidence was tendered on how the payment if at all, was effected.

33. Section 3 (3) of the Law of contract states as follows;

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

34. The above position is replicated in Section 38 of the Land Act that;

(1) 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 to by a witness who was present when the contract was signed by such party.

(2) Subsection (1) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.”

35. Flowing from above it is clear that a contract for transfer of land must be in writing and signed by parties to it. In this case the sale agreement that was produced fell short of the above requirements for want of signatures and further consideration (purchase price) was not indicated.

36. Moreover, PW1 in his testimony denied knowledge of the Court orders that led to the removal of cautions placed on the suit land. However, in cross examination, he contradicted himself and stated that he was aware of the suit between Francis and Njogu and further that the Church was aware of HCCC 649 of 2004 but never appealed the orders. That by the time they learned that the cautions had been removed from the suit land, the land had already been transferred to a third party. Indeed, he explained that the 5<sup>th</sup> Defendant was the current registered owner of the suit land he bought after the cautions had been removed and the structures thereon having been removed. This evidence gives credence to the DW1’s testimony that he bought the suit land free from encumbrance.



37. On allegations of fraud levelled against the 1<sup>st</sup> and 4<sup>th</sup> Defendants, the Plaintiffs did not proffer any evidence to support the assertions. The standard of proof in alleging fraud was discussed in the case of *Vijay Morjaria v Nansingh Madbusingh Darbar & another* [2000] eKLR, the Court held as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
38. The Court of Appeal in the case of *Jephther O. Opande v Mary Atemo Gathiriga* [2019] eKLR stated that standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be higher than the ordinary standard of balance of probabilities. Additionally the same Court in *Vivo Energy Kenya Limited v Maloba Petrol Station & 3 others* [2015] eKLR it was held that where fraud is alleged, it must be specifically pleaded and particulars thereof given. That bare allegations out forward by a party won’t suffice. A similar position was taken by the Supreme Court in the case of *Fanikiwa Limited & 3 Others v Sirikwa Squatters Group & 17 others* [2023] KESC 105 (KLR).
39. According to Section 112 of the *Evidence Act*, when any fact is especially within the knowledge of any party to proceedings, the burden of proving or disapproving that fact is upon him. The question as to how title to the suit property was transferred albeit fraudulently in this case (according to the Plaintiffs) was a fact within the personal knowledge of the Plaintiffs, who had the burden of proving that the 1<sup>st</sup> Defendant did not acquire a good title.
40. The totality of the pleadings and evidence adduced in Court show that the suit land was transferred to the 1<sup>st</sup> Defendant upon removal of the cautions by Court order issued in ELC No. 1338 of 2007 on 15/10/2009. Subsequently it was transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 21/1/2010 – see copy of green card at page 12 of the Plaintiffs’ trial bundle. PW1 conceded that the Church was aware of the suit but never challenged its outcome. Applying the standard of proofing fraud, the Court therefore finds that the Plaintiffs’ evidence falls short of the said standard. Consequently, the second issue also is answered in the negative.
41. The third issue is whether or not the 5<sup>th</sup> Defendant is an innocent purchaser for value. In defending his title, the 5<sup>th</sup> Defendant produced a copy his title deed in respect of the suit land issued on 3/9/2019. He also produced of official search dated 23/7/2019 which shows the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were registered joint owners of the suit land as at 21/1/2010, copies of deposit slips for payments he made towards the purchase totaling Kshs. 2.2M and the sale agreement between him and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered on 8/8/2019.
42. The 5<sup>th</sup> Defendant posited that he is a bona fide purchaser for value without notice. The Black’s Law Dictionary 8th Edition defines “bona fide purchaser” 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.”



43. In the Ugandan case of *Katende v Haridar & Company Limited* [2008] 2 EA 173 it was held: -

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

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

44. The Court of Appeal in the case of *Weston Gitonga & 10 Others v Peter Rugu Gikanga & another* [2017] eKLR it was held that a bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner. The 5<sup>th</sup> Defendant led evidence of the due diligence he undertook before purchasing the suit land, he fully paid the consideration thereto and purchased the suit land in good faith. No evidence was tendered to demonstrate any fraud on the part of the sellers namely the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He conducted a search and relied on the registered outcome to proceed with the purchase.

45. The Court of Appeal in the case of *Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority & 4 Others* [2019] eKLR stated as follows on the Torrens system in Kenya;

“It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system. This was acknowledged in, among a long line of decided cases, this Court’s judgments in *Dr. Joseph Arap Ngok v Justice Moijo ole Keiwua & 5 others*, Civil Appeal No. Nai. 60 of 1997 and *Charles Karatbe Kiarie & 2 Others v Administrators of Estate of John Wallance Muthare (deceased) & 5 others*, Civil Appeal 225 of 2006.

Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.”

46. Based on the foregoing the Court finds that the 5<sup>th</sup> Defendant was a bona fide purchaser for value deserving of the protection accorded to him in law. Section 26 *Land Registration Act* provides;

“26. Certificate of title to be held as conclusive evidence of proprietorship



- (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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

47. Sections 24 (a) and 25 of the [Land Registration Act](#) stipulate the effect of registration in terms;

24. Interest conferred by registration Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

....

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

48. The right to own property is also protected under Article 40 of the [Constitution](#) of Kenya which states:-

“Protection of right to property.

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—



- a. of any description; and
  - b. in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
- a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
- a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
    - i. requires prompt payment in full, of just compensation to the person; and
    - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4). Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5). The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6). The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

49. Lastly what orders should the Court make? The Plaintiff had asked the Court to order an injunction against the 5<sup>th</sup> Defendant from dealing with the suit land. In absence of cogent evidence to support his case the prayer for injunction fails. Further the Court was asked to grant general damages against the 1<sup>st</sup> and 4<sup>th</sup> Defendants for fraudulent transfer of the suit land, I already found that the allegations hinged on fraud have not been proven and therefore this prayer is not merited. Regarding the prayer for rectification of register, Section 80 [Land Registration Act](#) is explicit that;

“ 80. Rectification by order of Court

- (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.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge



for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

50. Again, no evidence was presented to show that the 5<sup>th</sup> Respondent’s title was obtained by fraud or mistake to invoke the said provision. The prayer is disallowed.

51. Final orders;

a. The Plaintiffs’ suit is dismissed for want of proof.

b. Costs of the suit are in favour of the 5<sup>th</sup> Defendant payable by the Plaintiffs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 29<sup>TH</sup> DAY OF APRIL, 2024  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs – Absent

1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants – Absent

Court Assistant – Phyllis & Oliver

