



REPUBLIC OF KENYA



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Munguti v Mutisya & 11 others; Riamet & 3 others (Interested Parties) (Environment & Land Case 481 of 2015) [2024] KEELC 3409 (KLR) (22 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3409 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 481 OF 2015

OA ANGOTE, J

APRIL 22, 2024

BETWEEN

ANTHONY VINCENT MBINDYO MUNGUTI PLAINTIFF

AND

MATHEW MBALUKA MUTISYA 1ST DEFENDANT

**THE CHIEF REGISTRAR OF LANDS [THROUGH THE ATTORNEY
GENERAL] 2ND DEFENDANT**

ABSA BANK KENYA PLC 3RD DEFENDANT

TYSONS LIMITED 4TH DEFENDANT

VINCENT MULELA KILONZO 5TH DEFENDANT

MARGARET N'THENYA KILONZO 6TH DEFENDANT

ERIC MULI KILONZO 7TH DEFENDANT

**CHRIS TABU MULE (SUED AS THE ADMINISTRATOR AND/OR JOINT
ADMINISTRATOR OF THE ESTATE OF THE LATE PHILIP MULE KILONZO -
DECEASED) 8TH DEFENDANT**

CHARLES MUTAVI KILONZO 9TH DEFENDANT

M/S MAPACA LIMITED 10TH DEFENDANT

PAUL ASAMBA 11TH DEFENDANT

CARREN ASAMBA 12TH DEFENDANT

AND

SORONE OLE RIAMET INTERESTED PARTY

EMMANUEL LEMEILOI NAENKOP INTERESTED PARTY



KANAI OLE NASARIKE INTERESTED PARTY
EMOWUO SELF HELP GROUP INTERESTED PARTY

JUDGMENT

Background

1. Vide an Amended Complaint dated 18th October, 2021, the Plaintiff seeks the following reliefs as against the Defendants and the Interested Parties jointly and severally;
 - i. A declaration do issue in rem that the Plaintiff is the lawful owner as purchaser for good consideration of all that property known as L.R No 13872/4 situate in Karen, Nairobi.
 - ii. An order do issue compelling the 2nd Defendant, Chief Registrar of Lands to enter the Plaintiff's name into the Register as the lawful proprietor of the property known as L.R No 13872/4 situate in Karen, Nairobi upon presentation of the transfer documents.
 - iii. A permanent injunction do issue to jointly and/or severally restrain the 1st Defendant and Interested Parties whether by themselves, or by any other person claiming through them from trespassing, entering onto, transacting, charging, alienating, sub-dividing, or in any other manner dealing adversely with the Plaintiffs' land known as L.R No 13872/4.
 - iv. Save for acts necessary for purposes of registering the Plaintiff as proprietor of the land known as L.R No 13872/4, a permanent injunction do issue to restrain any other Defendant herein whether jointly and/or severally, and whether by themselves or by any other persons claiming through or howsoever otherwise them from trespassing, entering onto, transacting, charging, alienating, sub-dividing, or in any other manner dealing adversely with the Plaintiffs' land known as L.R No 13872/4.
 - v. Against the 1st Defendant and/or the Interested Parties, an order of general damages for conversion of property and nuisance.
 - vi. An order cancelling the fraudulent transfer of the property known as L.R No 13872/4 situate in Karen into the name of the 1st Defendant.
 - vii. Costs of the suit.
 - viii. Any further orders that the Court may deem just and fit to grant
2. It is the Plaintiff's case that on 20th December, 2002, he accepted an offer to purchase a parcel of land known as L.R 13872/4 situate in Karen, Nairobi (hereinafter the suit property); that the offer aforesaid was from the Administrators of the Estate of the late Philip Mule Kilonzo, through its agents Tysons Limited and that he paid the entire purchase price and subsequently signed a sale agreement on 14th July, 2003.
3. It is the Plaintiff's case that the suit property was one of the 11 sub-divisions of L.R 13872, charged to Barclays Bank by the Administrators of the Estate of the late Philip Mule Kilonzo to secure money and that due to the foregoing, it took time for the Administrators of the Estate of the late Kilonzo to complete the survey, registration of deed plans and opening of individual files at the Ministry of Lands.
4. According to the Plaintiff, a rent file was eventually opened by the Ministry of Lands and he paid rent in 2007; that in 2008, the Administrators executed a transfer of the property to him and that due to the



time taken to complete the survey, registration of deed plans and opening of individual files aforesaid, and the delay in getting the Administrators to execute the transfer, he was unable to register the transfer in his names.

5. The Plaintiff contends that for over 6 years, his Advocate's attempts to trace the original Grant for the property from the other Counsel in the transactions, the bank and the Administrators of the Estate and the Ministry of Lands was futile; that they traced the original Grant to the Bank in 2015; that the Bank directed them to its Advocates and that the bank's Advocates confirmed having the mother title for purposes of another transaction and promised to give his Advocates the day book number from the Ministry of Lands after lodging their documents for registration.
6. The Plaintiff averred that upon learning of the same, his Advocates began putting together documents to lodge the instrument of transfer; that they conducted a search on the title which revealed that the suit property was transferred to the 1st Defendant, allegedly by the bank and that the Nairobi County Government records shows that the property is registered in the name of the 1st Defendant.
7. The Plaintiff asserts that the alleged transfer of the suit property to the 1st Defendant is fraudulent; that the particulars of fraud by the 1st Defendant include printing a fake Grant for IR 13872; making a fake instrument of transfer of the suit property and purporting that the bank was the owner of the suit property in the transfer and forging signatures of some of the donees of the Power of Attorney donated by the bank.
8. Further particulars of fraud were set out to include the Defendant purporting that a deceased Advocate witnessed the execution of the fake instrument of transfer; using the fake instrument of transfer to transfer the suit property to himself without the knowledge and consent of the Plaintiff and opening a rates record for the suit property at the Nairobi County Government.
9. The Plaintiff states that upon inquiring about the status of the suit property from the bank, the bank responded that it did not execute any instrument of transfer of the suit property to the 1st Defendant, any other person or entity; that it does not own or have any charge over the suit property; that what it had in its custody is the original Grant at the time of the alleged transfer and that its donees did not sign the Power of Attorney, one being abroad and the other having left its employment.
10. It was the Plaintiff's position that the original Grant does not contain entry 16 showing the fraudulent transfer; that the Advocate who allegedly attested and verified the transfer died more than 7 years ago; that he has sued the 2nd Defendant because it either knowingly or unknowingly abetted the fraudulent transfer of the suit property into the 1st Defendant's names and that the 10th, 11th and 12th Defendants have no stake in the suit property.
11. It is the Plaintiff's case that similarly, the Interested Parties are strangers to the suit property and all their purported documents are forgeries; that in any event, their documents only make reference to L.R No 13872/5 and 8 and that in particular, Kanai Ole Nasarinke and Emmanuel Lemeilo Naenkop did not have any title and could not convey a good title to the 1st Defendant.
12. The Plaintiff maintains that the Interested Parties are equally guilty of fraud the particulars of which include falsely changing land rates and rent records at the Nairobi City County Government offices without his knowledge and with the intent to defraud him; purportedly offering the suit property to third parties including the 1st Defendant and knowing that they have no rights to the property and frustrating his claim to the property by seeking to be joined into the suit under false pretexts subjecting him to a lengthy court process.



13. The Plaintiff states that he remains in possession and occupation of the suit property with a permanent house thereon where he has lived with his family from the year 2008; that he as all the completion documents and duly paid stamp duty before presenting the title to the suit property for transfer to the 2nd Defendant for registration and that the 1st Defendant and the Interested Parties are illegally claiming the suit property.
14. The 1st Defendant filed an Amended Defence and Counterclaim in which he asserted that he is the absolute and indefeasible proprietor of the suit property holding a good and valid title thereto against the general public and specifically against the Plaintiff; that he is a bona-fide purchaser for value; that he paid consideration thereof and that he has been remitting all the relevant statutory monies.
15. The 1st Defendant averred that the purported acquisition of the suit property by the Plaintiff was irregular, void ab initio and of no legal consequence as the Administrators of the Estate of the late Philip Mule Kilonzo and had no capacity to transfer the suit property and that in the alternative, the contract for the sale of the suit property to the Plaintiff was null and void because as at 20th December, 2002 and/or 14th July, 2003, the suit property was non-existent.
16. According to the 1st Defendant, the other Defendants are abetting the Plaintiff's illegal acquisition of the suit property and are parties to a conspiracy to defraud him, the particulars of which include facilitating entries 2,3, 4,5, 10, 11, 14 and 15 on the grants which are at variance or grossly inconsistent or have been super-imposed on select pages of the Plaintiff's list of documents dated 2nd June, 2015 and leaving out entries which are missing in the Plaintiff's list of documents and noticeable on other documents and that the Plaintiff is relying on an incomplete sale agreement dated 14th July, 2003 and an invalid transfer.
17. Further particulars of the alleged conspiracy to defraud include the Plaintiff's alleged purchase and construction on the property without the requisite approvals; tampering with entries and documents and signing the same with a view to misrepresenting his interest in the suit property; mis-representing L.R 13872 Karen (Sub-plot C), being un-surveyed land as the suit property as at 20th December, 2002 and retaining an original grant once a sub-division has been undertaken.
18. The 1st Defendant further stated that the Plaintiff is guilty of swearing false Affidavits and colluding to deliberately backdate the agreement to the 14th July, 2003 knowing that the aforesaid date was fictitious. The 1st Defendant seeks that the suit against him be dismissed and seeks as against the Defendants in the Counterclaim the following reliefs;
 - i. A declaration to the effect that the 1st Defendant (now Plaintiff in the Counterclaim) is the absolute and indefeasible owner/proprietor of the subject property i.e L. R 13872/4.
 - ii. A permanent injunction against the Plaintiff (now Plaintiff in the Counterclaim) and against all Defendants, from selling or conspiring to sell, charging or conspiring to charge, mortgaging or conspiring to mortgage, alienating or conspiring to alienate the suit property L.R No 13872/4 and/or be restrained by an order of permanent injunction from interfering or threatening to interfere or threatening to waste the suit property whatsoever, hereinafter or anytime in the future.
 - iii. An order of eviction and /or ejection of the Plaintiff and/or his authorized agents from the subject property ie. L.R No 13872/4.
 - iv. In the alternative and without prejudice to number (iii)above, an order of demolition of the Plaintiffs (now 1st Defendant in the Counterclaim) permanent structure/house standing on



the 1st Defendants'(now Plaintiff in the Counterclaim) parcel of land known i.e. L.R No 13872/4.

- v. Mesne profits until final determination of the present suit.
 - vi. In the alternative and without prejudice to number (v) above, an order for compensation by way of general damages for wrongful use and/or possession of the 1st Defendant's (now Plaintiff in the Counterclaim) parcel of land ie L.R No 13872/4.
 - vii. Costs and interest thereof of the suit from the date of filing till determination.
 - viii. Any other equitable relief that this Honourable Court may consider just and expedient in the circumstances.
19. The 3rd Defendant filed a Defence to the 1st Defendant's Counterclaim denying the assertions set out therein and averred that the 1st Defendant does not have the necessary locus to institute the Counterclaim not being the registered and/or beneficial owner of the suit property and that it is a total stranger to the 1st Defendant and one Kanai Ole Nasarinke, the latter to whom the 1st Defendant claims to have obtained his title over the suit property.
20. It is the 3rd Defendant's case that the suit property known as L.R 13872, registered in the name of Philip Mule Kilonzo was charged to it by a charge registered on 5th April, 1991; that the said Philip Mule Kilonzo passed away on 29th July, 1997 and Grant of Letters of Administration Intestate issued by the High Court at Nairobi on 11th February, 1998 and that the said Grant was duly registered against property on 9th May, 2003.
21. The 3rd Defendant averred that pursuant to a request by the Administrators of the Estate of the late Philip Mule Kilonzo, it allowed them to sub-divide the property and sell 10 portions thereof with the agreement that the sale proceeds would be remitted to the 3rd Defendant in settlement of the outstanding debt secured by the subsisting charge and that it has at all material times held the original title over the suit property except in instances where the same has been released with its authority to facilitate registration of the transactions relating to the various sub-divisions.
22. The 3rd Defendant maintained that the original title to the suit property has since creation of the Charge in 1991, been in its custody and that of its Advocates; that it did not sell or transfer the land and has never sold or transferred the suit property or any portion thereof to Kanai Ole Nasarinke and that the 1st Defendant has denied knowledge of the purported transfer dated 30th December, 2014 whereas this document was presented to the lands Registry for registration and by which the suit property was allegedly transferred to him.
23. The 3rd Defendant stated that it did not authorize the signing of the purported transfer dated 30th December, 2014, which transfer is in any event not stamped nor registered; that Alfonse Mbithi Kisilu left its employ over 10 years ago while Joseph Onyango Odipo was deployed to Mauritius over 6 years ago; that while Charles Mboga is still an employee, he has denied signing the transfer; that the Advocate who purportedly witnessed the said transfer passed away seven years ago and that the alleged transfer was fraudulent which was confirmed and verified by the Chief Lands Registrar.
24. The 3rd Defendant urged that there is no privity of contract between it and the Plaintiff nor between the Administrators of the Estate of the Late Philip Mule Kilonzo and the 1st Defendant hence no cause of action has been established.
25. The 4th Defendant filed a Defence to the 1st Defendant's Counterclaim on 16th September, 2016. It denied the assertions set out in the Counterclaim stating that sometime in the year 2002, it received



- instructions from the Administrators of the Estate of the late Philip Mule Kilonzo; that they indicated that they wish to sell the property known as L.R No 13872 Karen, sub plot C which formed part of the Estate of the late Philip Mule Kilonzo and that the 4th Defendant, as a registered property agent, acted in their capacity and gave a letter of offer to the Plaintiff. The 4th Defendant maintains that they have not been involved in any illegality, misrepresentation or fraudulent act in relation to the suit property.
26. The 5th, 6th, 7th, 8th and 9th Defendants filed their Defence to the Counterclaim on 15th July, 2016. They denied the assertions as set out in the Counterclaim stating that at all material times, the 5th, 6th, 7th & 8th Defendants were Administrators of the Estate of the late Philip Mule Kilonzo whereas the 9th Defendant was a beneficiary thereto; that one Ole Kanai Nasarinke has never been a part of the Estate of the late Philip Mule Kilonzo and that the deed plans could not have been in his possession as alleged.
 27. The Defendants state that the deceased died on 29th July, 1997; that they applied for Administration of the deceased's Estate vide Succession Cause No 2627 of 1997 where the Grant of the Letters of Administration was issued and thereafter confirmed; that if any person had a claim against the Estate of the deceased, they should have presented their claim before the Succession Court and that the property known as L.R 13872 formed part of the Estate of the deceased and had been charged with the 3rd Defendant who has always had custody of the original title.
 28. According to the Defendants, upon their request, the 3rd Defendant allowed the sub-division of the property into 11 plots; that they intended to sell 10 sub plots with a view to settling the outstanding debt secured by the subsisting charge; that vide a sale agreement dated 14th July, 2003, they sold the suit property to the Plaintiff; that the 5th -8th Defendants executed a transfer in favour of the Plaintiff and that they did not sell the suit property to the 1st Defendant.
 29. They contend that the 1st Defendant has not demonstrated that the person he purchased the property from had any title to pass to him; that any cause of action would lie against any such party and that the Counterclaim is unmerited and should be dismissed.
 30. The 10th, 11th and 12th Defendants filed a Defence to the 1st Defendant's Counterclaim on 1st July, 2016. They denied the assertions as set out in the Counterclaim stating that the 1st Defendant has no locus to institute the Counterclaim not being the registered owner of the suit property; that they are strangers to the 1st Defendant and one Kanai Ole Nasarinke whom the 1st Defendant claims to have acquired title from and that further, the Plaintiff's Counterclaim does not disclose a reasonable cause of action against them.
 31. The Defendants averred that the property known as L.R 13872 registered in the name of Philip Mule Kilonzo was charged to the 3rd Defendant by a Charge registered on 5th April, 1991; that the deceased passed away on 29th July, 1997 and the Grant of Letters of Administration issued on the 11th February, 1998 and that the Grant was registered against the title on 9th May, 2003.
 32. According to the Defendants, pursuant to a request by the Administrators of the Estate of the late Philip Mule Kilonzo, the 3rd Defendant allowed them to sub-divide the property and sell 10 portions with the agreement that the sale proceeds would be remitted to the 3rd Defendant in settlement of the outstanding debt and that as Chargee, the 3rd Defendant has at all material times held the original title to the suit property except in instances where the same was released with its authority to facilitate registration of the transactions relating to the various sub-divisions.
 33. The Defendants maintain that the original title over the property has always been in the custody of the 3rd Defendant and does not bear any entry in favour of the 1st Defendant; that the 3rd Defendant has never sold or transferred the suit property to the 1st Defendant or Kanai Ole Nasarinke; that the 1st



- Defendant has denied knowledge of the purported transfer dated 30th December, 2014 yet this is the transfer document that was presented to the lands registry for registration and by which the property was transferred to the 1st Defendant.
34. The Defendants urge that there is been no privity of contract between the Defendants and/or the 3rd Defendants and the 1st Defendant or between the Administrators of the Estate of the late Philip Mule Kilonzo hence no cause of action has been established against them and that they reiterate the averments by the Plaintiff in the main suit and by the 3rd Defendant in its Defence to Counterclaim dated 11th April, 2016.
 35. The 1st -3rd Interested Parties filed a Defence and Counterclaim to the Plaint in which they denied the assertions as set out in Plaintiff stating that they were the legitimate owners of L.R No 13872(mother title) as it was then known, and by extension hold valid proprietary interest in the present suit property and that the proprietary interests aforesaid can only be defeated by way of the Plaintiff effecting compensation for the property pursuant to the provisions of the Constitution and the various laws.
 36. The Interested Parties contend that the Plaintiff has no legitimate rights to the suit property having no title thereto and is not entitled to legal protection thereof; that the sale of the suit property to the Plaintiff was irregular and void ab initio; that the Estate of the late Philip Mule Kilonzo had no capacity to transfer, and execute any legal instrument or enter into a binding contract with the Plaintiff and that as at 20th December, 2002 and/or up-to 14th July, 2003, there existed no defined sub-plot known as L.R No 13872/4 and the Plaintiffs claim relates to a non-existent parcel.
 37. The Interested Parties contend that the 10th -12th Defendants acting in consort with the 3rd, 5th -9th Defendants seek to defeat the express and/or implied provisions of the Law of Succession Act by use of Grant of Letters of Administration that had been revoked, and averments and pleadings effecting the grant in respect of the estate should be struck out; that the sale was affected with a view to defeating their rights over the property; that there has been no transfer in law by the 5th -8th Defendants to the Plaintiff and if any exists, it is fraudulent, null and void.
 38. According to the Interested Parties, the Plaintiff and the 2nd -12th Interested Parties are engaged in a conspiracy to defraud it and by extension the Government of Kenya, Ministry of Land and Housing and Urban development and/or the Commissioner of Lands and/or the National Land Commission; that the particulars of fraud include facilitating entries 2,3,4,5,10,11,14 and 15 on select pages of the Plaintiffs bundle dated 2nd June, 2015; relying on an incomplete sale agreement and invalid transfer not drawn or registered contrary to the law and purchasing and building on the property knowing it was not available for sale and without the requisite approvals.
 39. The Interested Parties set out further particulars of conspiracy to include tampering with records with a view to creating an impression that the said sub-plot is in fact L.R No 13872/4; signing the sale agreement and transfer without having legitimate interest in the property; transacting in the suit property knowing that it is not administratively feasible to retain an original grant once the mother title has been subjected to sub-division and undertaking a sale and transfer of the suit property without the deed plans having been duly processed.
 40. Further particulars of conspiracy were set out to include backdating the sale agreement dated 14th July, 2003 and manipulating the respective entries under the Original Grant to the benefit of the Plaintiff;
 41. The Interested Parties state that they shall at the hearing aver that the suit property is, and was at all material times trust land and/or community land and could only be managed in accordance with the law relating to trust or community land.



42. Vide their Counterclaim, they seek that the Plaintiffs' suit to be dismissed and seek the following reliefs;
- i. A declaration to the effect that the Interested Parties, hold a good, valid and legitimate proprietary interest in the subject property ie. L.R 13872/4.
 - ii. A permanent Injunction against the Plaintiff (now 1st Defendant in counterclaim) and against all Defendants (by Counterclaim), from selling or conspiring to sell, charging or conspiring to charge, mortgaging or conspiring to mortgage, alienating L.R No 13872/4 and/or be restrained by an order of permanent injunction from interfering or threatening to interfere or threatening to waste the suit property whatsoever hereinafter at any time in the future.
 - iii. An order of eviction and/or ejection of the Plaintiff and/or his authorized agents from the subject property ie. L.R No 13872/4.
 - iv. In the alternative and without prejudice to the number (iii) above, an order of demolition of the Plaintiffs' (now 1st Defendant in the Counterclaim) permanent structure/house standing on L.R No 13872/4.
 - v. Mesne Profits until final determination of the present suit.
 - vi. In the alternative and without prejudice to number (v) above, an order for compensation by way of general damages for wrongful use and/or possession of L.R No 13872/4.
 - vii. Costs and interests thereof of the suit, from the date of filing to determination.
 - viii. Any other equitable relief that this Honourable Court may consider just and expedient in the circumstances.
43. The 3rd, 10th, 11th and 12th Defendants filed a Defence to the Interested Parties Counterclaim on 15th May, 2017. The Defendants denied the assertions as set out in the Interested Parties Counterclaim stating that the Interested Parties do not have the necessary locus to bring the Counterclaim not being the registered or beneficial owners of the suit property; that they are total strangers to the Interested Parties and that the Interested Parties' Counterclaim does not disclose a cause of action against them.
44. They contend that the property known as L.R No 13872 registered in the names of Philip Muele Kilonzo was charged to the 3rd Defendant by way of a charge registered on 5th April, 1991; that the said Philip Muele Kilonzo passed away on 29th July, 1997 and Grant of Letters of Administration Intestate were issued by the High Court on 11th February, 1998 and that the grant was duly registered against the title on 9th May, 2003.
45. According to the Defendants, pursuant to a request by the Administrators of the Estate of the late Philip Muele Kilonzo, the 3rd Defendant allowed the Administrators to sub-divide the property and sell 10 portions thereof with the agreement that the sale proceeds would be remitted to the 3rd Defendant in settlement of the outstanding debt secured by the subsisting charge and that as Chargee of the property, the 3rd Defendant has at all times held the original title except in instances where the same has been released with its authority to facilitate registration of the transactions relating to the various sub-divisions.
46. The Defendants stated that the original title over the suit property has since the creation of the Charge in 1991 been in the custody of the 3rd Defendant or its Advocates and the same does not bear and has never borne an entry in favour of the 1st Defendant and/or the Interested Parties; that the Interested Parties have no bona fide legal interest in L.R No. 13872 or any of its sub-divisions and that the Counterclaim is misconceived and should be dismissed.



Hearing and Evidence

47. The matter proceeded for hearing on 21st March, 2023. The Plaintiff, as PW1, adopted his witness statement dated 29th November, 2021 as his evidence in chief and the bundle of an even date as PEXHB1.
48. It was his evidence that on 20th December, 2002, he accepted an offer from the Administrators of the Estate of the late Philip Mule Kilonzo through its agents, Tysons Limited, to buy a parcel of land in Karen, Nairobi being L.R No 13872/4, a sub-division of a larger parcel of land being L.R 13872; that he paid Tysons limited the agreed deposit of Kshs 150,000/= and the balance of the purchase price of Kshs 1, 350,000 on 4th April, 2003 and that he subsequently signed an agreement for sale on 14th July, 2003.
49. PW1 stated that the suit property was one of the 11 sub-divisions of L.R No. 13872 and was charged by the Administrators to Barclays Bank to secure a borrowing; that between July, 2003 and 2008, the Advocates attended to the preparation and execution of the transfer as he was out of the Country and that during the said period, his Advocates wrote to the Vendor's Advocates requesting for the original title.
50. It was his evidence that on 17th May, 2007, the vendor's Advocate asked his Advocates to send another fresh set of transfer documents for their Client's execution and further asked that his Advocates obtain a Rent Clearance Certificate and the Commissioner's consent to transfer; that his Advocates forwarded the draft instrument on 6th July, 2007 and the same was returned on 17th July, 2007 proposing amendments and that the engrossed transfer was sent to the Vendor's Advocates for signature.
51. PW1 averred that on or about 8th May, 2008, Charles Kilonzo, one of the Administrators returned unsigned copies of the Transfer stating that he had since ceased being an Administrator of the Estate and requested that the Transfer be amended accordingly; that the amendment was done and shared with the Vendor's Advocates on 14th May, 2008; that the Vendor's Advocate released the signed transfer on or about 29th June, 2010 and that his Counsel thereafter embarked on tracing the land registry file so as to obtain a Rent Clearance Certificate and Consent to transfer.
52. It was Mr. Munguti's testimony that his Advocates requested for the release of the original Grant for use in registering the transfer instrument but the same could not be traced; that on 13th June, 2014, HHM Advocates released the original Deed Plan and on 16th June, 2014, they provided him with a copy of the original Grant stating that they did not have the original and that through a letter dated 2nd December, 2014, one Mr Asamba Paul confirmed that the 3rd Defendant has the original Grant for purposes of registering a different transaction over plot L.R 13872/8.
53. PW1 stated that after receiving a copy of the Grant, they conducted a search whose results received on 13th April, 2015 revealed that the suit property was allegedly transferred to the 1st Defendant for Kshs 22, 000,000; that when he went to pay land rates, he found the suit property was registered in the 1st Defendant's name and that he promptly lodged a complaint with the National Land Commission and the Directorate of Criminal Investigations at the Department of Land Fraud.
54. PW1 stated that the correspondence from the 3rd Defendant's Advocate revealed that they had always had custody of the original Grant which does not have an entry L.R 13872/4 in favour of the 1st Defendant; that the Bank did not sell or transfer the suit property; that the Bank's Donees of the Power of Attorney that signed the instrument of transfer did not do so one being abroad and another having left its employment and that the Advocate who had allegedly attested and verified the execution of the Transfer had died about 7 years before the alleged attestation and verification



55. It was Mr. Munguti's evidence that the alleged transfer to the 1st Defendant is fraudulent; that similarly, the 10th, 11th and 12th Defendants are strangers and have no stake or claim on the suit property and that equally, the Interested Parties are strangers to the property and all their purported documents are fraudulent.

56. The Defendants did not testify.

Submissions

57. The Plaintiff filed submissions on 31st October, 2023. Counsel submitted that the Plaintiff has proved his ownership of the suit property by virtue of having purchased the same and has through overwhelming evidence, showed fraud on the part of the 1st Defendant and the Interested Parties.

58. Counsel submitted that in the case of Munyu Maina vs Hiram Gathiha Maina, [2013] eKLR the Court of Appeal was categorical that when a registered proprietor's root of title is under challenge, 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.

59. Counsel submitted that a trust exists in relation to the suit property; that in the case of Samson Kuria Kangethe & Another vs Charles Chebungei [2020]eKLR, the Court, while dealing with a case of similar nature, found that the Defendant had failed to prove its acquisition of the property and as such the same was acquired illegally, unprocedurally and through a corrupt scheme and the title could not stand. Counsel also cited the cases of Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others [2015] eKLR.

60. According to Counsel, the Plaintiff was illegally prevented from registering title over his land through a corrupt, irregular and unprocedural scheme by the 1st Defendant, and that the Court is empowered under Section 80 (1) Of the [Land Registration Act](#) to order for rectification of the register by cancelling any fraudulent registration and registering the Plaintiff as the lawful proprietor.

Analysis and Determination

61. Having considered the pleadings, evidence and submissions, the issues that arise for determination are;

- i. Whether the 1st Defendants title to L.R 13872/4 was fraudulently acquired?
- ii. What are the appropriate orders to issue?

62. The Plaintiff has instituted this case seeking, inter-alia, a declaration that it is the legitimate proprietor of the suit property and entry thereof in the Lands Register; cancellation of the fraudulent transfer of the property in the 1st Defendants name and permanent injunctive orders restraining interference with the suit property.

63. Whereas all the Defendants and Interested Parties entered appearance and filed their respective Defences, no testimonies were rendered on their behalf. Subsequently, they failed to substantiate the allegations made in their Defences and produce any evidence to counter the Plaintiff's testimony. It therefore follows that the Defences on record remain mere allegations and the Plaintiff's evidence is uncontroverted and unchallenged. In the same vein, the 1st Defendant's and the Interested Parties Counter-claims fail for want of prosecution.

64. The above notwithstanding, it is now settled that uncontroverted evidence is not automatic evidence. The burden on the Plaintiff to prove his case remains the same and that burden of proof is in no way lessened because no contrary evidence was adduced.



65. This was expressed by Court of Appeal in Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau [2016] eKLR thus;

“The suggestion, however, implicit, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff’s case is proved on a balance of probabilities cannot possibly be correct...While the defendant’s failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities. The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”

66. It is trite that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

67. Sections 109 and 112 of the same Act provides as follows:

- “109. 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.
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.”

68. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in Mumbi M’Nabea vs David M. Wachira [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not... The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M’airanyi & Others vs Blue Shield Insurance Company Limited - Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

69. The Court will be guided by the afore-stated principles noting that there is no contest regarding the validity of the adduced evidence by the Plaintiffs.



70. It is the Plaintiffs' case that he is the lawful proprietor of the suit property, a sub-division of L.R 13872, having purchased it from the Administrators of the Estate of Philip Mule Kilonzo, through its agents Tysons Limited; that he paid the full purchase price of Kshs 150,000 being the 10% deposit and thereafter the balance of Kshs 1, 250,000 and was given vacant possession thereof and that he constructed his family home on the suit property on which he has lived with his family since 2008.
71. According to the Plaintiff, despite having purchased the same, he was unable to get the original Grant to effect the transfer; that when he eventually obtained a copy of the Grant, a search conducted thereon revealed that the property was registered in the name of the 1st Defendant and that the aforesaid registration is fraudulent and is liable to be revoked. He adduced into evidence the copy of the title document for L.R 13872 and the sub-division approval documents thereof.
72. PW1 also adduced the signed offer letter from Tysons Limited; payment receipts for the balance of the purchase price being Kshs 1, 350,000/=; Sale Agreement dated 14th July, 2003 and correspondence leading thereto; approved structural drawings; correspondence on execution of transfer documents; correspondence requesting for the original Grant and completion documents and letter and response from LSK indicating the purported witnessing Advocate, John Ougo, of the 1st Defendant's advocate, died before witnessing of the purported transfer.
73. The Plaintiff also adduced in evidence the application for a search dated 1st April, 2015; the Transfer Instrument dated 30th December, 2014 between Barclays Bank and the 1st Defendant; Land Rates records in the name of the 1st Defendant; complaint letters to the NLC and the DCI; correspondence and response from Barclays Bank of Kenya with respect to the alleged transfer of the suit property to the 1st Defendant and correspondence from the 3rd Defendant's Counsel to the Chief Lands Registrar indicating that the 1st Defendant had procured the title fraudulently.
74. Also produced in evidence were the bundle of documents filed by the Interested Parties with respect to parcels 13872/5 and 13872/8; sale agreement dated 9th May, 2003 between the 1st Defendant and one Kanai Ole Nasarinke; land records in the names of Emmanuel Lemeloi and the Interested Parties and photographs of the suit property and all the completion documents.
75. To begin with, it is undisputed that the suit property is currently registered in the name of the 1st Defendant, having been so registered on 20th January, 2015 pursuant to the provisions of the [Land Registration Act](#). Subsequently, the law applicable to the 1st Defendants title is the [Land Registration Act](#), 2012.
76. Section 26 (1) of the [Land Registration Act](#), No. 3 of 2012 embodies the doctrine of indefeasibility of title as envisaged under the Torrens System of registration. It provides thus;
- “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; (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



77. In the case of Charles Karaathe Kiarie & 2 Others vs Administrators of Estate of John Wallace Mathare (deceased) & 5 Others (2013) eKLR the Court of Appeal considered the application of the doctrine of indefeasibility of title stating that;

“The Registration of Titles Act is entirely a product of the Torren system of registration. The Word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and Pioneer and authors of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register, which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss, arising from an error in registration the person affected is guaranteed of government compensation. This statutory; presumption of indefeasibility and conclusiveness of title under the Torrens system can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved.”

78. It can be seen from the above provisions that whereas title is protected, the protection can be removed and the title impeached, if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme. This was discussed by the Court in Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others [2015] eKLR thus;

“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. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

79. The Black’s Law Dictionary defines fraud as follows:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of



an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”

80. It is trite law that fraud must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another*[2000]eKLR where the Court stated 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.”

81. As regards the standard of proof, the Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

82. Similarly, the Court of Appeal in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* [2020] eKLR, observed as follows:

“... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities...”

83. The Plaintiff has particularized the elements of fraud against the 1st Defendant to include printing a fake grant for L.R No 13872; making a fake instrument of transfer for L.R No 13872/4; purporting in the instrument of transfer that the Bank was the owner of the property; forging signatures of the donees of the Power of Attorney of the Bank; purporting that a deceased Advocate witnessed the execution of the fake instrument of transfer; using the fake instrument of transfer to transfer the suit property to himself and transferring the suit property to himself without his knowledge or consent.

84. The Plaintiff has similarly set out the particulars of fraud as against the Interested Parties, as falsely changing the land rates and rent records at the Nairobi City County Government offices without his knowledge and without any demonstrable ownership; adjusting land rates and rents records through collusion and fraud with the sole intent of defrauding him; purportedly dealing, offering for sale and/



or attempting to dispose of the suit property to third parties including the 1st Defendant; frustrating his attempts to recover the land by seeking joinder onto the suit on false pretences and subjecting him to costlier and prolonged legal recovery processes.

85. The Plaintiff has succinctly set out the history of his acquisition of the suit property. He has adduced into evidence the title in respect of L.R. 13872, in the name of the late Philip Muele Kilonzo and approvals with respect to the sub-divisions thereof. He has also adduced the offer letter from Tysons Limited made on behalf of the Administrators of the Estate of Philip Muele Kilonzo for the sale of L.R. 13872, Plot C, which was later identified as the suit property vide the Sale Agreement dated 14th July, 2003.
86. The Plaintiff also adduced into evidence receipts for the payment of the purchase price and correspondence affirming that he completed his part of the sale and was awaiting completion documents from the vendor who undertook to provide the same. He also adduced correspondence from the 3rd Defendant, as Chargee of the suit property, who conceded to being in possession of the original Grant and who stated in its Defence that it had not released the same for any transaction.
87. In contesting the 1st Defendant's title, the Plaintiff has adduced into correspondence by the 3rd Defendant dated 6th May, 2015 in which they categorically state that the original Grant has been in their custody since 17th June, 2014 when they received the same for purposes of effecting the transfer of L.R. No 13872/8 and that they have not released the same to any person for any purposes.
88. The 3rd Defendant in its Defence also disowned the persons who allegedly executed the transfer dated 30th December, 2014 in favour of the 1st Defendant on its behalf stating that Alfonse Mbithi left their employment over 10 years ago, Joseph Onyango Odipo was deployed to Mauritius over 6 years ago, and Charles Mboga denied signing the aforesaid transfer. The 3rd Defendant did a letter to the Chief Lands Registrar communicating the said position.
89. In the same vein, correspondence by the Law Society of Kenya indicates that Ougo John Okello, who purportedly witnessed the transfer in favour of the 1st Defendant in 2014 was deceased at the time.
90. The Plaintiff having shown its acquisition of the suit property and having cast doubt on the 1st Defendant's title, the onus shifted to the 1st Defendant to defend the legitimacy of its title. This position was affirmed by the Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina*[2013]eKLR which held thus;

“We stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
91. In the present circumstances, the 1st Defendant has completely failed to show how it acquired its title. On the strength of the evidence adduced, the Court finds that its acquisition by the 1st Defendant was illegal and fraudulent.



92. The Court having found that the 1st Defendant's title was acquired fraudulently, the same is amenable to revocation and/or cancellation pursuant to the provisions of Section 80(1) of the [Land Registration Act](#) which provides as follows:
- “(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, 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.”
93. The Court of Appeal in *Wambui vs Mwangi & 3 Others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (Judgment) stated thus;
- “... no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedural or otherwise a product of a corrupt scheme... section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated.”
94. That being the case, it follows that the Plaintiff has established a case for the permanent injunctive orders and for the cancellation of the 1st Defendant's title.
95. The Plaintiff is also seeking for general damages for conversion and trespass. *Blackslaw Dictionary* 4th Edition defines conversion as the wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of willful interference without lawful justification with an item of property in a manner inconsistent with another's right whereby that other person is deprived of the use and possession of the property; an act that interferes with the dominion of the true owner's right and depriving him of the possession of the goods to an extent as to be inconsistent with the rights of the owner.
96. It defines actionable nuisance as anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights; and nuisance as anything that unlawfully worketh hurt, inconvenience or damage.
97. The Plaintiff asserts that the 1st Defendant and the Interested Parties breached his ownership rights by forging the transfer documents and using them to illegally register the 1st Defendant as a proprietor resulting in him suffering anguish, distress, and duress in asserting his ownership claim. It is on this basis that he seeks general damages.
98. Having found merit in the Plaintiff's case, the Court agrees that the 1st Defendant and Interested Parties' actions have injured the Plaintiff and he is entitled to general damages as sought.
99. In conclusion, the Court finds that the Plaintiff has established his case on a balance of probabilities and proceeds to make the following final orders;
- i. A declaration be and is hereby issued that the Plaintiff is the lawful owner as purchaser for good consideration of all that property known as L.R No 13872/4 situate in Karen, Nairobi.
 - ii. An order does hereby issue directing the Chief Land Registrar to cancel the transfer of the property known as L.R No 13872/4 situate in Karen in the name of the 1st Defendant.



- iii. An order does hereby issue compelling the 2nd Defendant, the Chief Land Registrar, to enter the Plaintiff's name into the Register as the lawful proprietor of the property known as L.R No 13872/4 situate in Karen, Nairobi upon presentation of the duly executed and attested transfer documents.
- iv. A permanent injunction does hereby issue restraining the 1st Defendant and Interested Parties whether by themselves or by any other person claiming through them from trespassing, entering onto, transacting, charging, alienating, sub-dividing, or in any other manner dealing adversely with the property known as land known as L.R No 13872/4 situate in Karen, Nairobi.
- v. Save for acts necessary for purposes of registering the Plaintiff as the owner of the land, a permanent injunction does hereby issue restraining any other Defendant herein whether jointly and/or severally, and whether by themselves or by any other person claiming through them from trespassing, entering onto, transacting, charging, alienating, sub-dividing, or in any other manner dealing adversely with the Plaintiff's land known as L.R No 13872/4 situate in Karen, Nairobi.
- vi. General Damages to the tune of 2,000,000/= to be paid to the Plaintiff jointly and severally by the 1st Defendant and the Interested Parties.
- vii. Costs of the suit shall be borne by the 1st Defendant and the Interested Parties.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF APRIL, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Evans Ochieng and Mr. Said for Plaintiff

Ms Karanja watching brief Mr. Osoro for 1st Defendant

Court Assistant: Tracy

