



**Njinu v Orkesi & 5 others; Tumpes (Interested Party) (Environment & Land Case 671 of 2015) [2024] KEELC 3765 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3765 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 671 OF 2015**

**MD MWANGI, J**

**APRIL 11, 2024**

**BETWEEN**

**FRANCIS MWAURA NJINU ..... PLAINTIFF**

**AND**

**PAUL ODUPOY ORKESI ..... 1<sup>ST</sup> DEFENDANT**

**PETER GITONGA WANJOHI ..... 2<sup>ND</sup> DEFENDANT**

**SOLOMON YANKASO MEITUTUO ..... 3<sup>RD</sup> DEFENDANT**

**JAMES KIOI NGANGA ..... 4<sup>TH</sup> DEFENDANT**

**COCOTECH HOUSING CO-OPERATIVE SOCIETY LIMITED .... 5<sup>TH</sup>  
DEFENDANT**

**COUNTY LANDS REGISTRAR, KAJIADO ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**KERENKE OLE TUMPES ..... INTERESTED PARTY**

**JUDGMENT**

**Background**

1. The Plaintiff commenced this suit vide the Plaint dated 13th July, 2015 which was re-amended on 23rd March, 2022 seeking the following reliefs against the Defendants;
  - a. A declaration that the transfer of LR. Number Kjd/olchorro-Onyore/6835 to the 3rd Defendant was illegal, fraudulent and the same be recalled and cancelled.



- b. A declaration that the sub-division of the Original Land and transfer of resultant portion LR. Number Kjd/olchorro- Onyore/17188 measuring 3 acres by the 3rd Defendant to the 2nd Defendant was illegal and fraudulent.
- c. A declaration that the transfer of LR. Number Kjd/olchorro-Onyore/17188 by the 2nd Defendant to the 4th Defendant and from the 4th Defendant to 5th Defendant were tainted with illegality and fraud.
- d. Orders that the transfer of the Original Land by the 1st Defendant to the 3rd Defendant be recalled and cancelled.
- e. Order that all subsequent transfers of resultant sub-divisions of LR. Number Kjd/Olchorro-Onyore/6835 being LR Number Kjd/Olchorro-Onyore/17188 and 187 be recalled and cancelled.
- f. The transfer of LR. Number Kjd/Olchorro-Onyore/ 17188 to the 5th Defendant be recalled and cancelled.
- g. Orders that the 1st Defendant does specifically perform his contract with the Plaintiff and that the Defendants do deliver up all documents of title and those documents necessary to complete the sale and transfer of the Suit Property to the Plaintiff within 15 days failing which the Deputy Registrar to sign the Transfer over LR. Number Kjd/Olchorro-Onyore/17188 to the Plaintiff.
- h. Any further relief the Court may deem fit to grant.
- i. Costs of this suit.

#### **Plaintiff's case**

2. In his statement of claim, the Plaintiff alleges that the 1st Defendant was a beneficiary of the property known as L.R. Number Kjd/Olchorro-Onyore/6835 (herein after known as “the Original Land”) situate in Kajiado measuring approximately 4.37 Hectares having inherited it from his mother Temeso Ene Obkesi. The Plaintiff alleges that on the 26th March, 2012 he entered into an Agreement for Sale with the 1st Defendant for the purchase of a portion land measuring 3 acres that was to be excised from the Original Land at a consideration of Kshs. 3,300,000/=. That the Original Land was subsequently sub-divided and LR. Number Kjd/ Olchorro-Onyore/17188 (“the Suit Property”) excised therefrom. The Plaintiff states that pursuant to the said Agreement, he paid a sum of Kshs. 1,000,000/= as deposit and the balance was to be paid after subdivision and transfer of the Suit Property into his name.
3. It is the Plaintiff's assertion that on or about March 2015, the 1st Defendant delivered to him a Title Deed and the Transfer forms duly executed for a parcel of land known LR. Number Kjjd/Olchorro-Onyore/17102, purporting it to be the suit property that was excised from the Original Land. The Plaintiff paid the balance of the purchase price to the 1st Defendant upon receipt of the documents in the belief that it was the suit property, the subject matter of his agreement with the 1<sup>st</sup> Defendant.
4. When the Plaintiff moved to take possession of the suit property, he was barred by the 3rd and 4th Defendants who were claiming prior title to the suit property. The Plaintiff conducted his investigations on the location of the Titles L.R Number Kjd/Olchorro-Onyore/17102, Kjd/Olchorro-Onyore/17187 and Kjd/Olchorro-Onyore/17188. The investigations revealed that:
  - a. The parcel of Land LR. Number Kjd/Olchorro-Onyore/17102 was not excised from the Original Land as per the agreement between the Plaintiff and the Defendant, rather, it was a



property acquired elsewhere by the 1st Defendant from the 2nd Defendant who on his part acquired it from the Interested Party to deceive the Plaintiff.

- b. Further, that when the succession proceedings were completed and the 1st Defendant obtained the title to the Original Land, he fraudulently transferred it to the 3rd Defendant without any consideration and without the consent of the Land Control Board or that of the 1st Defendant's wife. No stamp duty was paid for the purposes of registration of the transfer in favour of the 3<sup>rd</sup> Defendant.
  - c. It was a further finding that, on 26th February, 2015, the 3rd Defendant caused the Original Land to be subdivided into parcels L.R. No. Kjd/Olchorro-Onyore/17187 and Kjd/Olchorro-Onyore/17188 measuring 8 and 3 acres, respectively. The 1st Defendant then directed the 3rd Defendant to transfer L.R NO. Kjd/Olchorro-Onyore /17188 to the 2nd Defendant without consideration; no consent from the Land Control Board nor from the 3rd Defendant wife's consent. Again, no stamp duty was paid for the transfer. The Plaintiff argues that the 3rd Defendant holds the title as an agent of the 1st Defendant with the intention of depriving the Plaintiff of the title.
  - d. The Plaintiff also learnt that after 2 months of being registered as the proprietor of the Suit Property, the 2nd Defendant under instructions from the 1st Defendant, transferred the said parcel to the 4th Defendant again without any consideration, the requisite consents or payment of stamp duty.
  - e. The Plaintiff avers that the remaining portion L.R. No. Kjd/Olchorro-Onyore/17187 is still held by the 3rd Defendant in trust for the 1st Defendant who resides on the very parcel of land.
  - f. Based on the above findings, the Plaintiff holds that the transfers between the Defendants was done purely to deprive him of his bargain.
5. As against the 6th Defendant, the Plaintiff faults it for failing to register a restriction against the Suit Property despite registering one as against 17187. The 6th Defendant is accused of being partisan as it registered restrictions in favour of the 2nd Defendant but declined the Plaintiff's request to register one on the Suit Property without any reason whatsoever in collusion with the 2nd Defendant.
  6. As a result of the non-registration of the restriction, the 6th Defendant proceeded to deal with the Suit Property by allowing a transfer from the 4th Defendant to the 5th Defendant in total disregard of matters of fraud raised by the Plaintiff in the Letters of 29th May, 2015 and 5th June, 2015.
  7. The 6th Defendant is therefore accused of illegally transferring and registering the parcels 17187 and 17188 from the 1st Defendant to the 3rd Defendant, then to the 2nd and finally to the 4th Defendants without the requisite documents, consents and payment of statutory fees and stamp duty. The transfers were illegal and ought to be recalled and cancelled.
  8. The Plaintiff asserts that the 2nd, 3rd and 4th Defendants fraudulently colluded and conspired with the 1st Defendant to breach his agreement with the 1<sup>st</sup> Defendant and cause the property to be transferred to them with the sole aim of deceiving and depriving the Plaintiff of his bargain. The Particulars of fraud and deceit are particularized therein.
  9. The Plaintiff further accuses the 5th Defendant of purporting to enter into an agreement to purchase the suit property from the 4th Defendant well aware of the present suit, the Plaintiff's claim and the defects in the 4th Defendant's title. That the 4th Defendant's title was tainted with fraud and illegality. The 4<sup>th</sup> Defendant could not therefore have passed a good title to the 5th Defendant.



10. The Plaintiff asserts that the 5th Defendant's title is therefore tainted with illegalities and is defective. The Plaintiff argues that the 5th Defendant cannot claim that it is an innocent purchaser for value without notice as it had notice of the Plaintiff's interest in the suit property.
11. The Plaintiff further denies the alleged payment of Kshs. 6,600,000/= by the 4th Defendant to the 2nd Defendant as consideration in the sale agreement dated 24th April, 2015 and/or compliance with the other requisite terms contained therein.
12. For the foregoing reasons, the Plaintiff states that the sale and transfer from the 1st Defendant to the 3rd Defendant and subsequent transfers were tainted with fraud and illegalities and the 2nd Defendant cannot be said to have a good title capable of being transferred to the 4th Defendant. The 4th Defendant similarly had no good title capable of being transferred to the 5th Defendant, hence the 5th Defendant's title is defective and ought to be cancelled and the 1st Defendant directed to specifically perform his contract with the Plaintiff.
13. The Plaintiff's claim is contested by the Defendants. They each filed their Defenses denying the assertions levelled up against them save for the 2nd Defendant who never entered appearance. He did not participate in the proceedings.

#### **1st Defendant's case**

14. The 1st Defendant's Statement of Defence is dated 6th May, 2022. He avers that he is the sole proprietor of the Original Land having acquired it as a beneficiary of the estate of the late Temeso Ene Obkesi. He admits executing a sale of land agreement with the Plaintiff on 26th March, 2012. He restates the terms of the said Sale Agreement and further states that the Plaintiff in compliance with the said Agreement, paid a total sum of Kshs. 2,300,000/= remaining with a balance of Kshs. 1,300,000/= as at December, 2014.
15. The 1st Defendant states that the Plaintiff being desirous of completing the transaction, exerted pressure on him to fulfil his obligations under the Contract in the year 2015. Being an illiterate person, the 1st Defendant avers that he sought the help of the 2nd Defendant, who is well known within the 6th Defendant's offices to hasten the subdivision process for eventual transfer of the 3 acres portion to the Plaintiff, which he did. In fact, the title deeds were issued in a month's time.
16. The 1<sup>st</sup> Defendant avers that instead of handing over the titles to him, the 2nd Defendant held on it and began manipulating the 1st Defendant herein. That the 2nd Defendant convinced him that he got a raw deal in the land transaction between him and the Plaintiff as the value of the Original Land had increased threefold. He could therefore make more money if the property is sold at the current market value. The 2nd Defendant was to then assist the 1st Defendant in circumventing the sale agreement with the Plaintiff.
17. The 2nd Defendant's scheme was for the 1st Defendant to acquire an alternative 3-acre piece of land within the area and present it to the Plaintiff, feigning that it is the title excised from the Original Land and collect the balance of the purchase price. The 1st Defendant would then get a trusted 3rd party to whom the Original Land would be transferred to by the help the 6th Defendant. Thereafter, the Original Land would be subdivided in two portions measuring 8 and 3 acres respectively. The 3-acre piece would then be sold at the current market value and the proceeds therefrom shared amongst themselves.
18. In actualization of the scheme, the Original Land was transferred to the 3rd Defendant to hold it in trust for the 1st Defendant on the 11th February, 2015. Subsequently, the Original Land was



eventually subdivided into two portions giving rise parcels 17187 and 17188 measuring 8 acres and 3 acres respectively.

19. In line with their scheme to defraud the Plaintiff, the 1st Defendant acquired parcel of land known as Kajiado/Onchoro- Onyore/ 17102 as the 'alternative property within the area' from the 2nd Defendant. The alternative parcel was then transferred to the 1st Defendant's names to enable him transfer it to the Plaintiff.
20. On or about the 7th March, 2015, the 1st Defendant duly presented the title of the alternative parcel to the Plaintiff together with the completion documents and the Plaintiff readily paid him the balance of the purchase price.
21. However, contrary to their initial plan that the parcel measuring 3-acres (parcel 171888) be sold and the proceeds therefrom to be shared, the 2nd Defendant caused the 3rd Defendant to execute transfer instruments transferring the parcel 17188 measuring 3 acres to himself. Subsequently, a title was issued to the 2nd Defendant by the 6th Defendant in March, 2015.
22. The 1st Defendant therefore asserts that he is equally a victim of the 2nd Defendant's con games having been duped of his property 17188. The transfer from the 3rd Defendant to the 2nd Defendant was done without his consent or approval. He states that he lost control of the parcel 17188 and has not been a party to any dealings on it whatsoever. He denies any dealings with the 4th and 5th Defendants.
23. The 1st Defendant admits that in deed the transfer to the 3rd Defendant herein was tainted with illegalities and ought to be annulled. Further, that the 2nd, 4th and 5th Defendants be stopped from any further dealings in the parcel 17188. He also affirms that he has proprietary interest in Kajiado/ Onchoro-Onyore/17102 be returned to either him or his brother Jeremiah Kanai who paid the 2nd Defendant a sum of Kshs. 1,300,000 as the purchase price.

#### **1st Defendant's cross-claim against the 2nd, 3rd, 4th, 5th and 6th Defendants**

24. The 1st Defendant raised a cross-claim against the other Defendants herein. He restates that he transferred the original land to the 3rd Defendant at the instigation of the 2nd Defendant to hold it in trust for him. The 3rd Defendant did not by any means acquire any proprietary rights to deal with the suit property in any other way other than as directed by the 1st Defendant. He denies consent or approving the transfer of the suit property to the 2nd Defendant.
25. The 1st Defendant further accuses the 3rd Defendant of breaching the trust in executing the transfer of the suit property to the 2nd Defendant. He particularizes the breach therein. He also accuses the 2nd and 3rd Defendant of fraud and sets out the particulars.
26. As a result of the illegalities and the acts of fraud, the 1st Defendant avers that the 2nd Defendant lacked a proper title hence could not purport to pass the title to the 4th Defendant and subsequently to the 5th Defendant. As such the 4th and 5th Defendant's claim on the suit property is untenable and anchored on illegalities.
27. The 1st Defendant blames the 6th Defendant for the fraud and illegalities. He therefore prays that the Plaintiff's claim be allowed and further that an order for nullification of the transfer of the Original Land from the 1st Defendant to the 3rd Defendant and all subsequent transfers of the Suit Property to the 4th and 5th Defendants. He also prays for costs of the cross- claim.



### 3rd Defendant's case

28. The 3rd Defendant's Statement of Defence is dated 23rd May, 2022 denying all the allegations levelled against him. In response to the Further Amended Complaint, the 3rd Defendant avers that he was approached by the 1st Defendant in February 2015 with a request of transferring to him the Original Land measuring 11 acres to avoid transferring a portion of the said parcel to a buyer (Plaintiff) with whom he had signed a Sale Agreement on the basis that the price agreed upon in 2012 was too low.
29. The 3rd Defendant avers that upon execution of the transfer documents in the presence of the 2nd Defendant, the 1st Defendant took the document for processing of the new title at the Land Registry in Ngong. He confirmed that he did not pay the 1st Defendant any money for the said title since he was to hold it in his trust.
30. The 3rd Defendant alleges that after the transfer of the title to his name, the new title was kept by the 1st Defendant. Later on, in the very month of February, the 1st Defendant directed him to execute documents for sub-division of the initial title into two portions measuring 3 acres and 8 acres respectively. That the 1st Defendant was in charge of the sub-division as he is the one who sourced for a surveyor and paid him.
31. The 3rd Defendant states that subsequently two Titles; No. Kjd/Olchoro Onyore/17187 and Title No. Kjd/Olchoro Onyore/ 17188 measuring 8 acres and 3 acres respectively were issued in his name. The two titles were however kept by the 1st Defendant. That around March 2015, the 1st Defendant instructed him to sign transfer documents, which he did, to transfer Title No. Kjd/ Olchoro Onyore/ 17188 measuring 3 acres to the 2nd Defendant. He confirms that the 2nd Defendant did not pay him any money for the said transfer.
32. In response to the 2nd Defendant's allegation that he (3rd Defendant) sold him the Suit Property, he avers that he never entered into any written or oral agreement with the 2nd Defendant for the sale or transfer of the suit property and that the purported sale agreement for a sum of Kshs. 5.4 Million is a forgery. He denies signing the said Agreement or receiving the alleged deposit of Kshs. 900,000/= stated in the Agreement.
33. The 3rd Defendant further avers that the consideration in kind for the exchange of Title No. Kjd/Olchoro Onyore/ 17102 did not happen. The recipient of Kjd/Olchoro Onyore/ 17102 measuring as identified by the 1st Defendant is evident on the copy of the Green Card. He thereafter reiterates his assertions regarding the Suit Property to the 2nd Defendant on instructions of the 1st Defendant.
34. He further asserts that the 1st Defendant's intention was to perpetuate fraud and deny the Plaintiff his rights under their 2012 Agreement. Thus the transfer of the Original Title and the resultant titles from the subsequent subdivisions shows a grand scheme aimed at profiting the 1st and 2nd Defendants. He avers that he is not aware that the 1st Defendant was using him as a conduit to deprive the Plaintiff of the land he had legally purchased.
35. He insists that the 1st Defendant has custody of Title No Kjd/Olchoro Onyore/17187 measuring 8 acres as well as the necessary transfer documents to transfer the said title back to his name from the 3rd Defendant. He avers that the 1st Defendant reside on the said property and is currently erecting a residential house thereon. He prays that the court grants the orders sought in the Further Amended Complaint.



#### **4th Defendant's case**

36. The 4th Defendant filed his Statement of Defence dated 4th August, 2015 denying any dealings with the Plaintiff. He argues that he bought the suit property from the 2nd Defendant on 24th April, 2015 and paid the full purchase price and obtained a title for the same. He denies the allegation that he holds the property in trust for anyone as the same is not indicated in the Register.
37. However, and on a without prejudice basis, the 4th Defendant states that as a matter of right, he has already disposed the property to a 3rd Party and therefore holds no legal status over the said parcel of land. He maintains that the Plaintiff received the property he purchased for and the suit herein is an afterthought aimed at embarrassing the 4th Defendant.
38. The 4th Defendant avers that having dealt with the 1st Defendant, he is a stranger to the particulars of fraud levelled against him. He therefore prays that the Plaintiff's suit be dismissed with costs.

#### **5th Defendant's case**

39. The 5th Defendant on its part filed a Statement of Defence dated 22nd June, 2019 in which it is averred that the 5th Defendant entered into a Sale Agreement with the 4th Defendant on the 19th June, 2015 for the purchase of the Suit Property.
40. The 5th Defendant avers that it carried out due diligence and complied with the legal requirements before being issued with a title on the 22nd July, 2015 thus currently registered as the legal proprietor of the said property. It therefore denies the allegations of fraud levelled against it.
41. On a without prejudice basis, the 5th Defendant avers that it procured a clean and valid title for the transaction herein. It states that the Plaintiff's allegations are unfounded as it has never at any given point dealt with him. Therefore, without any contractual nexus, the Plaintiff is estopped from making such allegations. It maintains that it purchased the parcel of land for its members and has no intentions of disposing it.
42. It further accuses the Plaintiff of instituting this suit purposely to deny it from getting a property it lawfully acquired and owns. The 5th Defendant prays that the Plaintiff's suit be dismissed with costs.

#### **6th Defendant's case**

43. The 6th Defendant's Defence is dated 17th August, 2022 denying the Plaintiff's assertions arguing that it was never privy to the agreement between the Plaintiff and any other party herein. The 6th Defendant avers that it cannot be faulted based on possession and occupation of the suit property.
44. The 6th Defendant further avers that if at all there was any transfer that was effected on the properties mentioned herein, then the same was carried out procedurally and in accordance with the law. It argues that the procedure on registering restrictions is laid out in law and if there were any transfers that were effected, then the same were done with the consent of the registered owner of the properties.
45. The 6th Defendant therefore prays that the Plaintiff's suit be dismissed with costs to the Defendants.

#### **Evidence adduced by the Plaintiff**

46. The Plaintiff, Francis Mwaura Njiru, testified as PW1 in support of his case. He adopted his Witness Statement dated 6th April, 2022 as his evidence in chief. He further adduced the documents on the Plaintiff's List of Witness dated 6th April, 2022 as PE 1-32 in the order therein. He prayed that the orders sought in his Further Amended Plaint amended on the 23rd March, 2022 be granted as prayed.



47. In cross-examination by Counsel for the 4th and 5th Defendants, the Plaintiff stated that he only dealt with the 1st Defendant-Paul Odupoy Orkesi. He denied dealing with the 4th and 5th Defendants at any given time. In reference to the Sale Agreement between him and the 1st Defendant (PE 1), he confirmed that the cover reads Timeso Ene Obkesi (Paul Odupoy Orkesi). That in the Agreement the Vendor at Paragraph A is referred to as a beneficial owner of all that property known as Kjd/Olchorro-Onyore/6835.
48. He stated that the bigger title was in the name of Temeso Ene Obkesi , who was not alive at the time the agreement was being made. He confirmed not attaching a grant enabling Paul Odupoy Orkesi to sell the land to him. Although he has a copy of the same, he had not produced it in court. He further confirmed that he had not attached the survey sheet showing the parcels of land he was buying.
49. In reference to the transfer document for parcel No. 17102 adduced as PE 12, the Witness averred that he did not sign the transfer for Kjd/Olchorro- Onyore/ 17188.
50. In re-examination, PW 1 stated that in their Agreement of 26th March, 2012, he was the buyer and the 1st Defendant was the Seller. He reiterated that Temeso Ene Obkesi was not present. She had sub-divided the land but had not transferred to the sons.
51. He averred that Paul agreed to sell to him his portion measuring 3 Acres. The 1st Defendant had already earmarked the portion he wished to sell. He further stated that the ownership of the property was not in contest. That sub-division had already been undertaken. The one resultant sub division, which PW 1 was interest in measured 3 acres, the parcel was Kjd/Olchoro-Onyore/17188 which is now registered in the name of the Defendant.
52. PW 1 argued that the transfer he had been shown by the Advocate for the 4th & 5th Defendants is in respect of parcel No. 17102. He averred that he was not able to take possession of the land. It was his evidence that at the time of signing the transfer, he did not know that it was not the land he had had intended to buy from the 1st Defendant. The parcel No. 17102 on the map was different in acreage. The parcels 17102 & 17188 are far apart – about 20 Kilometers apart.
53. He stated that he was not able to enter into parcel 17102. The Interested Party denied him possession on the basis that he had not been paid. He stated that he intended to buy parcel 17188 from the 1st Defendant. He averred that he had no interests in parcel No. 17102. He denied having any contact with the 5th Defendant. He only contacted them because he had been informed that the property parcel 17188 was being marked for a Sacco. He stated that he cautioned them not to buy it since he had already bought it.
54. Further, that the 4th Defendant’s name was appearing on the green card. He averred that he wanted to know how he had acquired the suit property. He averred that he traced him to Kiserian. The Plaintiff alleged that the 4th Defendant informed him that he had bought his property having purchased it from the 2nd Defendant.
55. It was his evidence that he placed a caution on the suit property, thereafter proceeded to file the instant suit. Counsel for the Plaintiff then closed his case.

## **Evidence adduced by the Defendants**

### **1st Defendant’s Evidence**

56. Mr. Paul Odupoy Orkesi, the 1st Defendant herein testified as DW 1. He stated that he lives in Olchoro Onyore in Kajiado County. He adopted his witness statement dated 6th May, 2022 as his evidence in-



- chief. He also adduced that documents listed on the 1st Defendant's List of Documents dated 6th May, 2022 and marked them as DW 1 E 1(a)-(c) & 2. DW 1 E 1 (a)-(c) being Green cards for LR 6835, 17187 & 17188 whereas DW 1 E 2 was the Bank Statement.
57. In cross-examination by Counsel for the Plaintiff, DW 1 confirmed that he knows the Plaintiff. That Kajiado/ Olchoro Onyore/6835 was his land measuring 11 acres in size. He averred that he was to sell to the Plaintiff 3 acres out of this land. He confirmed that the Plaintiff paid him Kshs. 2.3 Million which was the agreed purchase price. The Plaintiff paid a deposit of Kshs. 1 Million, thereafter Kshs. 1 Million leaving a balance of Kshs. 1.3 Million. Subsequently, the Plaintiff paid him the entire purchase price of Kshs. 3.3 Million. However, he was yet to give the Plaintiff the 3 acres he was purchasing from him.
  58. It was his evidence that he gave the Plaintiff a different title, LR No. Kjd/Olchoro-onyore/17102 which was also 3 acres. The title 17102 is not a subdivision from 6835. He confirmed that he signed the transfer in favour of the Plaintiff. However, he did not tell him that he was transferring a separate title.
  59. DW 1 informed court that after the subdivisions of LR 6835, he requested the 2nd Defendant to help him with the follow up of the titles. It is then that the 2nd Defendant herein informed him that he been cheated and that he should have sold the land for a higher price. The 2nd Defendant then advised him to get another parcel to transfer to the Plaintiff instead of what he was selling him.
  60. The 2nd Defendant then directed him to another parcel of land about 9 Kilometers and measuring 3 acres. They then bought it and transferred it to himself then to the Plaintiff.
  61. It was his testimony that the land he was to originally sell to the Plaintiff was all transferred to the 3rd Defendant. That the 3rd Defendant was to hold the land in trust. It was subsequently sub-divided and transferred to the 3rd Defendant. He averred that he later learnt that the land was later transferred to other persons. He denied previously knowing the 4th and 5th Defendants herein. He confirmed his concession to the Plaintiff's case.
  62. Counsel for the 3rd Defendant opted not to cross-examine the Witness.
  63. During cross-examination by counsel for the 4th and 5th Defendants, DW 1 stated that LR 6835 was previously owned by his deceased mother who gave it to them. He averred that at the time of her demise, the land was in her name. He however could not adduce the grant of administration for his mother's estate.
  64. It was DW 1's testimony that his mother's land had already been informally sub-divided. Each of the beneficiary of their deceased mother knew their respective portions on the land. The Green card for LR 6835 shows that it was transferred to Eric Lemeloi & Rebecca Paanoi on 4th January, 2015. Yet, on the said date, the land was transferred to him and later, to the 1st Defendant to hold in trust for him. They however had no written agreement.
  65. He further stated that he signed a transfer in favour of the Plaintiff for LR 17102 before an advocate. The title was issued to the Plaintiff. He denied ever dealing with the 4th and 5th Defendants.
  66. In re-examination, DW stated that Eric Lomoloi and Rebecca Paanoi are his siblings. They were administrators in their deceased mother's estate pursuant to Nairobi Succession Cause No. 735 of 2013. Number 3 on the Green Card of LR 6835 confirms registration to the administrators who later transferred the land to him. He stated that their deceased mother had shown them their respective portions before her demise.
  67. It was his testimony that he transferred the 3 acres to the 3rd Defendant to hold it in his trust. He did not sell it to the 3rd Defendant. The 3rd Defendant did not however inform him while transferring LR 17188, measuring 3 acres to Peter Gitonga Wanjohi, the 2nd Defendant herein. It was his evidence



that he intended to transfer 3 acres to the Plaintiff as initially agreed but the 2nd Defendant advised otherwise. He denied ever transacting with the other Defendants.

68. Jeremiah Kanai Orkesi, brother to the 1st Defendant, testified as DW 2. It was his testimony that his brother borrowed a sum of Kshs. 1,200,000/= from him. He adduced a Bank Statement marked as DW 1 E 2 confirming the withdrawal of the said Kshs. 1,200,000/=.
69. In cross-examination by the Plaintiff's Counsel, DW 2 stated that his brother was in the process of selling land to the Plaintiff. That he gave his brother a sum of Kshs. 1.2 Million for purposes of his business. He denied giving the money to the 2nd Defendant as stated in his statement.
70. Counsel for the 3rd Defendant did not cross-examine the witness, DW 2.
71. In cross-examination by Counsel for the 4th and 5th Defendants, the witness stated that he could not remember when he wrote his witness statement. He denied giving the 2nd Defendant the sum of Kshs. 1.2 Million. He averred that he does not know anything about the Land LR 17102. He denied that the signature on the Witness Statement was his.
72. There was no re-examination.

### **3rd Defendant's Evidence**

73. The 3rd Defendant, Solomon Yankaso Meitutuo testified as DW 3 in support of his case. He adopted his Witness Statement dated 2nd May, 2018 as his evidence in-chief. He further produced the documents on the 3rd Defendant's List of Documents dated 2nd May, 2018 and marked them as DW 3 E 1-6.
74. In cross-examination by the 1st Defendant's Counsel, DW 3 Stated that the 1st Defendant gave him the Land LR 6835 to hold in trust for him. It was his evidence that the 2nd Defendant was helping them with the transaction. That after the sub-division, the 2nd Defendant informed him that the 1st Defendant had authorized the transfer of the 3 acres to him.
75. He asserted that the 2nd Defendant did not pay him any money neither did they execute any agreement between them. He stated that the 2nd Defendant was familiar with the Government procedures that is why he managed to transfer the 3 acres to his name.
76. DW 3 further argued that he never took the 2nd Defendant to the Land Control Board. He does not know how he managed to transfer the land to his name. He confirmed that LR 17187, the 8 acres, was still in his name and that he is more than ready to return the 8 acres to the 1st Defendant.
77. When cross-examined by Counsel for the Plaintiff, DW 3 denied selling land for a sum of Kshs. 5.4 Million to Peter Gitonga Wanjohi, the 2nd Defendant herein. He remembered signing some documents before a Lawyer although he did not know the nature of the documents. He only signed the documents on the pretext that the 1st Defendant had authorized him to do so. Further he too never went to the Land Control Board. He could not remember paying any stamp duty. He stated that he wishes to retransfer the land to the Plaintiff for justice to be served.
78. During cross-examination by the 4th and 5th Defendant's counsel, DW 3 stated that the 1st Defendant requested him to hold the title in trust for him. However, he did not give him the reason for that. He averred that the document at the Lawyer's Office was not read to him. However, he did not report to the police on the same.
79. In re-examination, DW 3 restated that he did not sell any land to Peter Gitonga, the 2nd Defendant herein. He denied receiving any money from him.



80. The 3rd Defendant's Counsel then closed his case.

#### **Evidence by the 4th Defendant**

81. Mr. James Kioi Ng'ang'a, the 4th Defendant herein testified as DW 4. He adopted his Witness Statement dated 14th December, 2021 as his evidence in-chief.
82. In cross-examination by the Plaintiff's Counsel, DW 4 stated that the Plaintiff was not known to him before the instant suit. The 2nd Defendant was however, well known to him. He confirmed that it is the 2nd Defendant who sold him the land. He stated that they signed an Agreement witnessed by one Daniel Kulenda. He averred that he conducted a Search on the title of the land before buying it. The land was next to a land he previously owned.
83. DW 4 asserted that he bought the land at a sum of Kshs. 6.6 Million and sold it at the same amount. He did not make any profit. He maintained that he is the one who paid stamp duty for the transfer. However, he could not exhibit evidence of the payment of stamp duty in court. He acknowledged that for a title to be transferred, there must be a transfer form.
84. It was his evidence that he paid balance of the purchase price after the transfer. He already had a buyer with whom he had negotiated a price. The 2nd Defendant knew that he had a buyer, the 5th Defendant herein, who had instructed him (DW 4) to get land for them. He could not prove that he effected payment to the 2nd Defendant.
85. He confirmed to court that he can see a caution lodged by the 2nd Defendant. He also confirmed to court that he had not paid the balance of the purchase price by the time of lodging the caution. Which fact is further stated in the 2nd Defendant's Affidavit in support of the Caution.
86. In reference to his Agreement with the 5th Defendant, DW 4 stated that the purchase price was Kshs. 6.6 Million. The agreement was made barely two months after his agreement with the 2nd Defendant. He stated that he was paid Kshs. 3.3 Million first, which amount was deposited in his KCB Bank account. However, he had no proof of the said deposit.
87. DW 4 denied the allegation that he was holding the land in trust for anyone. He stated that there was a special sitting by the board but he never saw a copy of the consent. He averred that he was never informed that the Plaintiff had bought the land.
88. When cross-examined by the 1st Defendant's Counsel, DW 4 confirmed that he knows the 1st Defendant. He denied any involvement in the 1st Defendant's transaction with the 2nd Defendant.
89. In re-examination, DW 4 stated that he had never met the Plaintiff prior to his case. He averred that the 2nd Defendant has never had any complaint against him. That no one has ever demanded payment of stamp duty from him.

#### **Evidence adduced on behalf of the 5th Defendant**

90. On behalf of the 5th Defendant, its Chairman, Mr. Paul- John Mbau Gakinya testified as DW 5. He averred that they were not able to get his predecessor to come and testify. He adopted the Witness Statement made by Martin dated the 22nd September, 2019 as evidence in-chief for the 5th Defendant. Counsel for the other parties had no objection to the said adoption of the statement.
91. In cross-examination by Counsel for the Plaintiff, DW 5 stated that at the time of the transaction, he was the vice chair of the Society. He stated that he was not aware that the Plaintiff had registered a caution for the 5th Defendant not to purchase it. He averred that a one Mr. Joshua Nyangweso, a



former Manager with the 5th Defendant, whose duty was to manage the day to day running of the cooperative, never informed them about the Caution.

92. He denied knowledge of any meeting between the Plaintiff and his predecessor, one Martin Mwoka. He informed court that he has all the records confirming payment of Kshs. 6.6 Million as well as the transfer documents but he had not availed them in court.
93. He further stated that the 5th Defendant used an agent to transfer. He could not tell whether or not stamp duty was paid. He clarified that the Kshs. 6.6 Million was inclusive of stamp duty. He stated that the 4th Defendant was supposed to transfer and pay stamp duty on their behalf.
94. He further testified that when the title was submitted, they were made to believe that everything had been cleared. He however stated that they never asked for the transfer forms or payment of stamp duty. He alleged that all their documents were with their Lawyer. The witness further stated that they believed that the Land Control Board consent was obtained. The 4th Defendant, who was the Vendor, was the one who was supposed to procure the Land Control Board Consent.
95. In reference to the sale agreement with the 4th Defendant, he stated that they paid a deposit of Kshs. 3.3 Million. That the balance of the purchase price was to be paid upon the 4th Defendant presenting a title in their name. He stated that the documents were not shown to them. That they assumed everything had been done procedurally once the title was shown to them.
96. In cross-examination by the Plaintiff's Counsel, DW 5 stated that Mr. Nyangweso no longer works with them. He stated that the 1st Defendant was not known to him as they never transacted with him. He alleged that it was the 4th Defendant who was supposed to deal with everything. He was not sure if Stamp Duty was paid. Although they have minutes of the meeting of the transaction, he confirmed that they had not exhibited the same in court.
97. While referring to Paragraph 13 of their Agreement with the 4th Defendant, the witness stated that it was the purchaser who was provide stamp duty. He confirmed that they conducted their due diligence before undertaking the transaction. There was a search in the Seller's name. However, a copy of the search had not been adduced in court. Although they had a Surveyor for the transaction, the Surveyor had not presented a Witness Statement to that effect.
98. In re-examination, DW 5 stated that at no given time did he ever deal with the Plaintiff and the 1st Defendant. He only came to know of them through this suit. He stated that once they obtained a title in their favour, they had no other issue. It was his evidence that no government agency has ever complained about the transaction herein.
99. In response to questions from the Court, DW 5 stated that the 4th Defendant was to register the transfer to them.
100. There was no appearance for the 6th Defendant on the hearing date. The assertions in its Defence were not proved. The allegations therein remain as mere assertions for failure of being proved.

### **Court's directions**

101. At close of the hearing, the court directed parties to file their respective written submissions. Parties complied. The Court has had a chance to read the submissions and considered them in its determination.



## Issues for Determination

102. Having have considered the pleadings, the evidence and submissions by counsel for the parties, I am of the view that the issues for determination that arise are as follows:
- a. Whether there is a valid agreement of sale between the Plaintiff and the 1st Defendant.
  - b. If so was there a breach of the terms by either party therein?
  - c. Whether the Original Land was lawfully and procedurally transferred from the 1st Defendant to the 3rd Defendant
  - d. Whether the subsequent transfer of Title No. Kjd/olchoro Onyore/ 17188 to the 2nd Defendant then to the 4th Defendant and subsequently to the 5th Defendant was lawful.
  - e. Whether the 5th Defendant's title should be revoked
  - f. Whether the Plaintiff is entitled to the prayers sought
  - g. Who should bear the costs of the suit?

## Analysis and determination

### A. Whether there is a valid agreement of sale between the Plaintiff and the 1st Defendant

103. There is no doubt that there was a sale agreement entered between the Plaintiff and the 1st Defendant herein as vendor dated 26th March, 2012. The sale agreement was for the purchase of a portion of land measuring 3 acres that was to be excised from the Original Land at a consideration of Kshs. 3,300,000/=.
104. Section (3) of the [Law of Contract Act](#), provides that:
- “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 incorporates all the terms which the parties have expressly agreed in one document; and
    - (iv) the signatures of each party signing has been attested by a witness who is present when the contract was signed by such party”.

105. In the case of *Nelson Kivuvani – v- Yuda Komora & Another* Nairobi HCCC No.956 of 1991, the Court held that: -

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

106. In the instant suit, the Sale Agreement between the Plaintiff and the 1st Defendant is in writing and is signed by the parties and therefore, it is valid and enforceable. Having found that the Agreement for Sale is valid, the Plaintiff and the 1st Defendant herein are bound by the terms of the said Sale



agreement. The Sale Agreement dated 26th March, 2012 is not only valid but also binding upon the parties therein.

**b. If so, was there a breach of the terms by either party?**

107. Clause 1 of the Agreement for Sale between the Plaintiff and 1st Defendant provided that the Vendor shall sell and the Purchaser shall purchase 3 Acres of the property marked in the survey sheet as B for a sum of Kshs. 3,300,000/= The deposit of Kshs. 1,000,000/= was paid at the time of execution of the Agreement. The balance of the purchase price was to be paid at the completion of the succession process. Clause 3 on the other hand provides for the completion date which was set at 90 days from the date of execution of the Agreement.
108. It is evident from the pleadings and the evidence adduced in court that LR. Number Kjd/Olchorro-Onyore/6835 was in deed sub-divided into two portions giving rise to LR. Number Kjd/ Olchorro-Onyore 17187 and LR. Number Kjd/Olchorro- Onyore/17188 measuring 8 and 3 acres respectively. However, the 1<sup>st</sup> Defendant did not transfer the LR. Number Kjd/Olchorro- Onyore/17188 measuring 3 acres to the Plaintiff as agreed. The 1st Defendant admitted that the 2nd Defendant convinced him that he got a raw deal in the land transaction between him and the Plaintiff as the value of the original Land had increased threefold hence he could make more money if the property was sold at the current market value then.
109. To actualize their fraudulent scheme, the original parcel LR. Number Kjd/Olchorro-Onyore/ 6835 was transferred to the 3rd Defendant. Upon subdivision the resulting LR. Number Kjd/ Olchorro-Onyore/17188 measuring 3 acres was transferred to the 2nd Defendant instead of the Plaintiff.
110. The contractual effect of representations of fact in contracts for the sale of land is explained in Halsbury's Laws of England, Fourth Edition, Volume 42 at paragraph 57 as follows:
- “The vendor is bound to deliver to the purchaser property corresponding in extent and quality to the property which, either by the description in the contract (including any particulars of sale), or by representations of fact made by the vendor, the purchaser expected to get.... ”
111. The Plaintiff expected a 3- acres land excised from LR. Number Kjd/Olchorro-Onyore/6835, and nothing else. Evidently, the Plaintiff was shortchanged by the 1<sup>st</sup> Defendant on the advice of the 2<sup>nd</sup> Defendant. The 1st Defendant delivered to the Plaintiff a Title Deed and the Transfer forms for a parcel of land known as LR. Number KJJD/Olchorro-Onyore/17102; which parcel is different from the one excised from LR. Number Kjd/Olchorro-Onyore/ 6835 as agreed in the agreement between them. The parcel LR. Number Kjd/Olchorro-Onyore/17102 had been acquired by the 2nd Defendant from the Interested Party purposely to defraud the Plaintiff.
112. Clearly the 1st Defendant breached the contract between himself and the Plaintiff.

**c . Whether the Original Land was lawfully and procedurally transferred from the 1st Defendant to the 3rd Defendant**

113. Like all contracts, contracts for disposal of interest in land must contain: -
- a. The names of the contracting parties,
  - b. the description of the land,
  - c. the consideration,



- d. the mode of payment,
  - e. the completion date,
  - f. whether possession/occupation is given upon execution or the completion date,
  - g. default clauses,
  - h. whether the sale is inclusive of any developments, etc.
114. It was the 3rd Defendant's evidence that the 1st Defendant approached him with a request of transferring to him his property known as Title No. Kjd/Olchoro Onyore/6835 measuring 11 acres to avoid transferring a portion of the said parcel to a buyer (Plaintiff) with whom he had signed a Sale Agreement. The 3rd Defendant further averred that upon execution of the transfer documents in the presence of the 2nd Defendant, the 1st Defendant took the document for processing of the new title at the Land Registry at Ngong. He confirmed that he did not pay the 1st Defendant any money for the said title since he was to hold it in his trust.
115. It is evident that there was no written sale agreement between the Plaintiff and the 1st Defendant. The Plaintiff's position was that the transfer of the title to the 3rd Defendant was not lawfully obtained. The Plaintiff avers that there was no sale agreement, no land control board consent, no consideration or payment of stamp duty.
116. In the absence of a valid written contract for sale between the 1st Defendant and the 3<sup>rd</sup> Defendant and the lack of payment of consideration as admitted by the 3rd Defendant, there was no valid transfer of the property to the 3rd Defendant.
117. In the Case of *Lucy Wangui Mwaura – v- Linet Achieng Amala* [2019] eKLR, & in the case of *Moses Njaramba Kamau – v – Mary Muthoni Njaramba* (2017) eKLR, it was held that a valid transfer of land must be preceded by a Sale agreement and a transfer document duly executed by the parties. In the latter case, the court was emphatic that Section 3(3) of the *Law of Contract Act* sets out the requirements for a valid contract for sale of Land. Being a prerequisite anchored under the Law, nothing valid can come out of an invalid contract.
118. In addition, it is clear that the transaction subject of this suit required the consent of the Land Control Board being agricultural land. Section 6 (1) of the *Land Control Act* which provides as follows:
- “ Each of the following transactions that is to say –
- a. the sale, transfer, lease, mortgage, exchange, partition or other disposal or dealing with any agricultural land which is situated within a land control area;
  - b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area less than twenty acres into plots in an area to which the Development and use of Land (Planning) Regulations, 1901 (L.N 5.6 (1961) for the time being apply;
  - c. the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private Company or Co-operative Society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”. Emphasis added



119. *Black's Law Dictionary* 9<sup>th</sup> Edition defines the term void as follows:

“of no legal effect; null”

120. With regard to a contract, the same Dictionary states as follows:

“A contract is void ab initio if it seriously offends law or public policy”.

121. Since the transaction between the 1st and 3rd Defendants was subject to the consent of the Land Control Board being obtained in terms of the provisions of Section 6 (1) of the *Land Control Act*, in the absence of such consent, the agreement became null and void ab initio and cannot therefore be enforced by this Court.

122. The law has long been established that the courts will not enforce illegalities.

123. In *Mistry Amar Singh – v- Kulubya* 1963 E.A. 408, the Court cited the following passage from *Scott – v- Brown, Doering, MC NAB & Co. (3), (1892) 2 QB 724*:

“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principal which is not confined to indicate offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves illegality, the Court ought not to assist him”

124. In the case of *Kenya Airways Ltd v Satwant Singh Flora* (2013) eKLR, the court stated that,

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him.”

125. As a matter of public policy, this court being a court of law will not aid any party in a claim founded on illegalities and fraud. I have said enough to show that the Original Land was unlawfully and illegally transferred from the 1st Defendant to the 3rd Defendant and this court will not sanitize their fraudulent and illegal actions.

**d. Whether the subsequent transfer of Title No. Kjd/Olchoro Onyore/ 17188 to the 2nd Defendant then to the 4th Defendant and subsequently the 5th Defendant was lawful.**

126. Having found that the transfer by the 1st Defendant to the 3rd Defendant was illegal hence null and void, the subsequent transfers to the 2nd, 4th and 5th Defendants were consequently unlawful. The 3rd Defendant did not obtain a good title that could subsequently be transferred to the other Defendants lawfully.

127. The 4th and 5th Defendants have claimed that they were each innocent purchaser for value without notice of the Plaintiff's Purchaser's beneficial interest. The evidence before the court shows otherwise.



Even if the court was to assume that in deed they were not aware of the 2nd Defendant's illegal acquisition of the title, were they bona fide purchasers for value?

128. 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."

129. In the case of Lawrence Mukiri - v- Attorney General and 4 Others [2013] as well as Katende - v- Haridar and Company Limited [2008] 2 E.A.173 the Court of Appeal in Uganda defined a bona fide purchaser as here below:

"...a bona fide for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following: -

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;
- (d) The vendors had apparent valid title;
- (e) He purchased without notice of any fraud;
- (f) He was not party to any fraud."

130. On the same issue, the Supreme Court of Kenya in the case of Dina Management Limited - v- County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] Eklr re-affirmed the Court of Appeal's decision in the case Samuel Kamere - v- Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR stated as follows:

"...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."

131. The 4th Defendant argued that he bought the suit property from the 2nd Defendant on 24th April, 2015. He stated that he paid the full purchase price and obtained a title for the same. He alleged that he conducted a Search on the title before buying it. Although he alleges to have paid the 2nd Defendant a sum of Kshs. 6.6 Million, he did not adduce any evidence to that effect. Further he did not produce any evidence confirming payment of Stamp Duty or that he obtained the Land Control Board Consent.

132. Regarding the 4th Defendant's agreement with the 5th Defendant, the 4th Defendant stated the Agreement was made barely two months after his agreement with the 2nd Defendant. He stated that he was paid Kshs. 3.3 Million first, which amount was deposited in his KCB Bank account. However, he had no proof of the said deposit. Further, although he alleges that there was a special sitting by the Land Control Board, he never saw a copy of the consent issued.

133. From his own admissions, the 4th Defendant's title was tainted with illegalities when he acquired it from the 2nd Defendant and even while transferring it to the 5th Defendant.



134. Turning to the 5th Defendant, its hands are equally not clean. DW 5 admitted that the 5th Defendant used an agent to transfer the land to its name. He could not tell whether or not stamp duty was paid. He clarified that the Kshs. 6.6 Million paid to the 4<sup>th</sup> Defendant was inclusive of stamp duty. He also stated that they never saw the consent from the land control board. That they assumed everything had been done procedurally once the title was shown to them.
135. The Sale Agreement dated 19th June, 2015 between the 4th Defendant and the 5th Defendant contradicts DW 5's assertions. Kshs. 6.6 Million was the purchase price. It does not state that the same was inclusive of stamp duty. Clause 13 (b) states that the Purchaser shall meet the cost of Stamp Duty. Clause 9 of the said Agreement is on Completion. Sub-Clause (b) provided that the balance of the Purchase Price was to be made upon receipt of the completion documents including the Land Control Board Consent in favour of the 5th Defendant.
136. Without adducing evidence proving that it paid Stamp Duty and that it received the Consent from the Land Control Board before paying the balance of the purchase, the 5th Defendant cannot claim that it was a bona fide purchaser for value. In addition, had the 5th Defendant conducted proper due diligence as alleged, it could have realized that the 4th Defendant's title was marred with illegalities.
137. It is therefore my finding that the 2nd Defendant's title having been found to be null and void, he could not pass a valid title to the 4th Defendant and subsequently to the 5th Defendant. The 4th and 5th Defendants cannot benefit from the doctrine of a bona fide purchaser as their 'hands' are equally tainted with fraud and illegalities. The transfer of Title No. Kjd/Olchoro Onyore/ 17188 to the 2nd Defendant then to the 4th Defendant and subsequently the 5th Defendant was unlawful.

#### **f. Whether the 5th Defendant's title should be revoked**

138. The 5th Defendant is presently the registered proprietor of the suit property.
139. Indefeasibility of the title is provided for in Section 26 (1) (b) of the *Land Registration Act* which states:
- “The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”
140. Section 26 of the *Land Registration Act* is explicit that a title of a proprietor may be challenged where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
141. In the case of *Elijah Makeri Nyangw'ra – v- Stephen Mungai Njuguna & Another* (2013) eKLR, the court elaborating on the provisions of section 26 held that: -
- “.....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”



142. The Court of Appeal in the case of *Munyu Maina v. Hiram Gathiba Maina* (2013) eKLR pronounced itself as thus:

“we state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”

143. Further in the case of *Kassim Ahmed Omar & Another v. Anwar Ahmed Abed & Others*, Malindi ELC No. 18 of 2015 the Court held that:

“A certificate of title is an end process. If the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court.”

144. The court’s finding in this case is that the 5th Defendant’s title is not only void but was also acquired illegally, unprocedurally or through a corrupt scheme.

145. Having found and held that the Certificate of title held by the 5th Defendant was procured unprocedurally and therefore null and void, the Court must then determine whether the said title should be cancelled.

146. Section 80(1) of the *Land Registration Act* comes into play. It provides that:-

“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.”

147. This Court is satisfied that the Certificate of title held by the 5th Defendant was procured illegally and as such it is impeachable and ought to be cancelled and/or revoked.

#### **g. Whether the Plaintiff is entitled to the prayers sought**

148. From the foregoing the Court finds that the Plaintiff has proved his case on the required standard of balance of probability and that the prayers as sought in the Plaint are merited.

149. Consequently, the Court enters Judgment for the Plaintiff against the Defendants jointly and severally as prayed in the Plaint in terms of prayers No. (a), (b), (c), (d), (e), (f) and (g).

#### **h. Whether the 1st Defendant’s cross-claim against the other Defendants is merited**

150. In the case of *Royal Media Services - v- Independent Electoral and Boundaries Commission and 3 others* [2019] eKLR, the court pronounced itself in the following words: -

“Judicial tradition in this Country is to frown upon illegal contracts. Regard must be given to the doctrine of *Ex turpi causa non oritur* action, that is from a dishonorable cause an action does not arise.”

151. The 1st Defendant was a party to the fraudulent scheme from the onset. He cannot feign innocence and seek to benefit from his own illegal action thereof. The cross-claim must fail in its entirety.



**i. Who should pay costs of this suit?**

152. The Plaintiff being the successful party in this case is entitled to costs. I am inclined to condemn, the 1st, 2nd, 3rd and 6<sup>th</sup> Defendants to pay the Plaintiff the costs of the suit jointly and severally. The 6th Defendant was party to the illegalities as he allowed the illegal transfers of the Original Land and the resultant portions after the subdivisions without compliance with the Statutory requirements.

**Conclusion**

153. I therefore enter judgment in favour of the plaintiff against the Defendants jointly and severally and issue the following orders:

- a. A declaration is hereby issued declaring that the transfer of L.R Number Kjd/Olchorro-Onyore/6835 to the 3rd Defendant was illegal, fraudulent and the same is hereby cancelled.
- b. A declaration is hereby issued declaring that the sub-division of The Original Land and transfer of resultant portion L.R Number Kjd/Olchorro-Onyore/ 17188 measuring 3 acres by the 3rd Defendant to the 2nd Defendant was illegal and fraudulent.
- c. A declaration is hereby issued declaring that the transfer of LR. Number Kjd/ Olchorro-Onyore/ 17188 by the 2nd Defendant to the 4th Defendant and from the 4th Defendant to 5th Defendant were tainted with illegality and fraud.
- d. An Order is hereby issued directing that the transfer of the Original Land by the 1st Defendant to the 3rd Defendant be recalled and cancelled.
- e. An Order is hereby issued directing that all subsequent transfers of resultant sub-divisions of LR. Number Kjd/Olchorro-Onyore/6835 being LR Number Kjd/Olchorro-Onyore/17188 and 187 be recalled and cancelled.
- f. That the transfer of LR. Number Kjd/Olchorro-Onyore/ 17188 to the 5th Defendant is hereby recalled and cancelled.
- g. The 1st Defendant is hereby directed to specifically perform his contract with the Plaintiff and that the Defendants do deliver up all documents of title and those documents necessary to complete the sale and transfer of the Suit Property to the Plaintiff within 15 days failing which the Deputy Registrar to sign the Transfer over LR. Number Kjd/Olchorro-Onyore/17188 to the Plaintiff.
- h. Costs of this suit as against the 1st, 2nd, 3rd and 6th Defendants jointly and severally.
- i. The 1st Defendant's cross-claim is dismissed in its entirety.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**

**M.D. MWANGI**

**JUDGE.**

**In the virtual presence of:**

Mr. Thiongo for the 4<sup>th</sup> and 5<sup>th</sup> Defendants

Mr. Nakhone for the 1<sup>st</sup> Defendant



C.K. Chege for the 3<sup>rd</sup> Defendant

Mr. Nyboma holding brief for Ojiambo for the Plaintiff

No appearance for the 2<sup>nd</sup> and 6<sup>th</sup> Defendants.

Court Assistant: Yvette

**M.D. MWANGI**

**JUDGE.**

