



**Ng'ang'a v Kariuki & 5 others (Land Case 63 of 2017)  
[2024] KEELC 4399 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4399 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
LAND CASE 63 OF 2017  
FM NJOROGE, J  
MAY 29, 2024**

**BETWEEN**

**PATRICK KAMAU NG'ANG'A ..... PLAINTIFF**

**AND**

**SIMON MWAURA KARIUKI ..... 1<sup>ST</sup> DEFENDANT**

**MPEKETONI PLANNERS ENTERPRISE ..... 2<sup>ND</sup> DEFENDANT**

**SIMON GATTY ..... 3<sup>RD</sup> DEFENDANT**

**JOSEPH MACHARIA MUGO ..... 4<sup>TH</sup> DEFENDANT**

**THE COUNTY LAND SURVEYOR - LAMU COUNTY ..... 5<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR- LAMU COUNTY ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Vide the further further amended plaint dated 9<sup>th</sup> August 2019, the Plaintiff moved the court seeking the following reliefs:
  - a. A permanent injunction restraining the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants by themselves, their agents, servants, representatives or any other person claiming under them from ferrying materials to the disputed portion to the 0.304 hectares portion comprised of Land Portion. Lamu/Lake Kenyatta 1/3884 from commencing or continuing with the construction of temporary or permanent structures, from interfering or disposing of the disputed portion measuring three quarter (0.84 acres and from adversely dealing with the disputed portion of 0.304 Acres located on Lamu/Lake Kenyatta 1/3885 which belonged to the Plaintiff
  - b. A declaration that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants fraudulently and illegally acquired a portion of 0.304 hectares from the Plaintiff, a declaration that the aforesaid second and third survey



and beaconing of land portion no. Lamu/Lake Kenyatta 1/3884 by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and subsequent of sale and or surrender of possession, ownership, use and or occupation of portion of the same to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were fraudulent, unlawful and irregular hence the same be deemed to be null and void and an order for the rectification and cancellation of the same from the Registry Index Map (R.I.M ) sheet and the Land Register to indicate Two and Half (2 ½ ) to be the correct measurement of parcel land number Lamu/ Lake Kenyatta 1/3884 instead of 3.34 Acres.

- c. A declaration that the fraudulently acquired portion of 0.84 Acres by the 1<sup>st</sup> Defendant is the property of the plaintiff and an alternative order compelling the 1<sup>st</sup> Defendant to pay or compensate the Plaintiff for the illegally acquired ¾ of an acre 0.304 at the current land rate value.
  - d. An order compelling the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to demolish any temporary or permanent structures or buildings erected on the disputed portion measuring 0.304 acres and vacant possession.
  - e. Costs of the suit
  - f. Any other relief that the court shall deem fit and just to grant.
2. The Plaintiff's case as contained in the further further amended plaint is that at all material times he was the registered owner of property known as Lamu/Lake Kenyatta Settlement Scheme/ 780 measuring 4.10 Hectares. Through a sale agreement dated 30<sup>th</sup> June 2010, he sold and vested various portions of the suit property all consolidated into two and a half acres to the 1<sup>st</sup> Defendant at a price of Kshs. 900,000 and he mandated the 1<sup>st</sup> Defendant to undertake the subdivision to carve out the 2 ½ acres. It was averred that the 1<sup>st</sup> defendant contacted the 2<sup>nd</sup> Defendant to undertake the survey and mutation of the suit property and the suit property was subdivided into four portions subsequently registered and known as Lamu/Lake Kenyatta Settlement Scheme/ 3883, 3884, 3885 and 3886 consisting approximately 0.93 Hectares, 0.94 Hectares, 1.01 Hectares and 1.00 Hectares and parcel number 3885 was transferred to the 1<sup>st</sup> defendant to conclude the transaction with finality while parcel no 3884 registered in the name of the plaintiff. It was further averred that despite the sale to the 1<sup>st</sup> Defendant having been completed, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants subsequently fraudulently and unlawfully caused subdivision of Parcel No 3884 on 15<sup>th</sup> August 2011 into 2 portions to wit, 3925 and 3926 complete with a 6-metre-wide road created to serve them. Plot no 3926 was then transferred to the 1<sup>st</sup> defendant who soon thereafter subdivided it into 2 portions, 5664 and 5665 and sold them to the 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively. The plaintiff averred that the second and third subdivisions did not have the consent of the land control board and the amendment of the Registry Index Map to reflect them by the 5<sup>th</sup> and 6<sup>th</sup> defendants was irregular and fraudulent. The plaintiff further asserts that the sale of plot numbers 5664 and 5665 was calculated at concealing the fraudulent subdivisions.
3. In the year 2016 the plaintiff went to fence his land and he was shocked to learn that part of it measuring half 0.5 acres had been grabbed and added to the 2.5 acres that he had sold the 1<sup>st</sup> defendant. In addition, 0.34 acres more had been taken by the 1<sup>st</sup> defendant. These appropriations made the land with the defendants to be 3.34 acres instead of 2.5 acres contracted for. The plaintiff avers from those premises that the 1<sup>st</sup> defendant has illegally benefited from 0.84 acres of land from his land. the 1<sup>st</sup> defendant then barred the plaintiff from fencing as intended. The plaintiff engaged the services of a qualified surveyor to ascertain the exact measurement of the portion sold the 1<sup>st</sup> defendant. The surveyor found that the 1<sup>st</sup> defendant had benefited from a portion measuring 0.304 acres or three quarters of an acre more than what he had purchased. The plaintiff's case is that the 1<sup>st</sup> defendant took advantage of the



original title to plot no 780 which he had been entrusted with by the plaintiff and misrepresented himself as a surveyor to illegally acquire the extra land and fraudulently sold it without seeking LCB consent. The 2<sup>nd</sup> defendant is blamed for failing to exercise his professional duty to ascertain the true acreage purchased from the plaintiff, and intentionally colluding with the 1<sup>st</sup> defendant in portraying the measurement of the parcel as 2.5 acres while he knew that the measurements exceeded the 2.5 acres. In much simplified terms, the plaintiff seeks the following orders:

- a. A permanent injunction to restrain the defendants from developing plot no 3884 or disposing of the disputed portion measuring three quarters of an acre located within that parcel;
- b. A declaration that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants fraudulently acquired 0.304 Ha from the plaintiff;
- c. A declaration that the second and third survey and beaconing of plot no 3884 and subsequent disposal of the same to the 3<sup>rd</sup> and 4<sup>th</sup> defendants were fraudulent and subject to an order of rectification of the RIM by this court to have parcel no 3884 be reflected as measuring 2.5 acres rather 0.84 acres belongs to the plaintiff for the illegally acquired land;
- d. An order compelling the defendants to demolish any structures erected on the disputed portion;
- e. An alternative order to the effect that the 1<sup>st</sup> defendant should compensate the plaintiff for the illegally acquired three quarters of an acre portion at the current land value rates;
- f. Costs of the suit.

#### **Defence of The 1<sup>st</sup> -4<sup>th</sup> Defendants**

4. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a reply to the further further amended plaint denying the averments set out therein. They reiterated paragraphs 1-17 of their defences dated 31<sup>st</sup> March 2017 and added that the further further amended plaint is incompetent and incurably defective as it changes the cause of action. In the defence dated 31/3/2017, the defendants denied the claim. The defendants admitted the sale transaction conducted by a written agreement made on 30/6/2010 but asserted that contrary to the plaint the land sold was 2.5 acres and the consideration of Kshs 800,000/= was remitted to the plaintiff on the same day; they denied that the 1<sup>st</sup> defendant was to assist the plaintiff with or conduct the subdivision, but admitted the subdivision exercise to create 4 portions whereby 3 of them were to measure 2.5 acres each and the 4<sup>th</sup> portion was to measure 2 acres only. It is denied that the plaintiff handed over the title to the suit plot to the 1<sup>st</sup> defendant before the subdivision. Later on, there was a second transaction for sale of 0.5 acres between the plaintiff and the 1<sup>st</sup> defendant on 3/6/2011 for the consideration of Kshs 260,000/= which was fully paid. Fraud and negligence are denied. Gatome & Associates were the surveyors involved during the transactions and the 2<sup>nd</sup> defendant did not carry out the survey leading to the subdivision of Plot No 780 or any other related further subdivision and thus the plaint does not disclose any cause of action against the 2<sup>nd</sup> defendant.

#### **Evidence At Trial**

##### **Plaintiff's Evidence**

5. PW1, John Guchu Wainaina adopted his witness statement dated 18/5/2018 as his evidence-in-chief. He told the court that he knew the plaintiff and he also knew the 1<sup>st</sup> defendant who bought 2 ½ acres and he was approached by the plaintiff to be, and he became, a witness to the sale agreement dated 30/6/2010. He was present when the parties visited the site and the 1<sup>st</sup> defendant and his surveyor were



shown the position of the plot he was purchasing. The plaintiff's wife also witnessed the agreement. It was his evidence that originally the land to be sold was to be two acres but since that would have entailed consumption of land by creation of an access road the half acre abutting the tarmac road was added and the whole plot became accessible from the main road. According to his evidence also the 1<sup>st</sup> defendant was tasked with seeking a surveyor to excise the 2.5 acres.

6. PW2 Patrick Kamau Ng'ang'a Plaintiff adopted his witness statement filed 21/5/2018 as his evidence-in-chief. He produced as P. Exh. 1-39 a bundle of documents as per the list of documents dated 16/11/2018. His evidence is that he had financial difficulties during the year 2010. The 1<sup>st</sup> defendant approached him with an offer to purchase land. their negotiations resulted in the agreement signed on 30/6/2010 in the presence of his wife and PW1 for 2.5 acres for the total sum of Kshs 900,000/= and the 1<sup>st</sup> defendant was shown his portion in the presence of the witnesses. His evidence regarding the access road issue and the task of seeking a surveyor mirrored that of PW1. He added that the surveyor would be paid by the 1<sup>st</sup> defendant. a portion of 2.5 acres was to be transferred to the 1<sup>st</sup> defendant at the end of the subdivision. The 1<sup>st</sup> defendant engaged the 2<sup>nd</sup> defendant for the survey. The plaintiff agreed and collaborated with the 1<sup>st</sup> defendant to have the suit land subdivided which subdivision resulted to plot numbers 3883, 3884, 3845 and 3886. Plot No 3884 was the plaintiff's. Plot 3883 and 3885 were registered in the 1<sup>st</sup> defendant's name. Plot no 3886 was transferred to the plaintiff's wife's name.
7. PW2 stated that he later found out that plot number 3884 which had been registered in his name had been subdivided into two portions, that is, Plot no 3925 registered in his name and plot number 3926 in the 1<sup>st</sup> defendant's name yet he was not involved in that subsequent subdivision. He further stated that he had sold only 2 ½ acres to the 1<sup>st</sup> defendant and he did not sell another ¾ acres to him. Later plot no 3926 was subdivided into two portions of which portion no 5665 was sold to the 3<sup>rd</sup> and 4<sup>th</sup> defendants who took possession thereof. He termed the latter subdivision and transfer of a resultant plot as unlawful and fraudulent and denied ever having attended the land control board for a consent thereof. He stated that the 1<sup>st</sup> defendant was not entitled to land other than 2.5 acres out of the original property and had taken advantage of the trust that the plaintiff had bestowed upon him by allowing him to handle the original title deed. The 5<sup>th</sup> and 6<sup>th</sup> defendants knew of the fraud and failed to exercise diligence and ensure all relevant documents had been availed thus breaching their duty as public officers in abetting the fraud and illegality.
8. PW3, Lucia Njoki Kamau the Plaintiff's wife adopted her witness statement dated 18/5/2018 as her evidence-in-chief. She testified that they sold to the 1<sup>st</sup> defendant 2 ½ acres and not 3 ¼ acres. She told the court they sold the 2 ½ acres for Kshs. 900,000.

### **Defendants' Evidence**

9. DW1, Florence Morara Nyangau the Deputy County Land Registrar Lamu. He told the court that the documents in the supplementary list of documents emanated from their office which documents are Land Control Board Minutes, transfer documents, Consent to transfer, a mutation form. The highlight of her evidence was that Parcel No 3926 was born out of the subdivision of Parcel No 780. Parcel No 3926 was also subdivided into Parcel Nos 5664 and 5665. She testified that all due process had been followed.
10. However, upon cross-examination she admitted as follows: that plot no 780 bore 4 parcels; that plot no 3885 was transferred to the 1<sup>st</sup> defendant while plot no 3884 remained with the plaintiff. She admitted that plot no 3884 was later subdivided. The land control board consent was issued on 29/6/11. The transfer of plot no. 3926 has a presentation book number and an LCB consent dated 14/9/2011 but



the information was inserted in the green card by hand before 23/8/2011. She could not tell who signed the application for the LCB consent.

11. DW2 Joseph, Macharia Mugo, the 4<sup>th</sup> defendant, adopted his witness statement dated 23/7/2019 as his evidence-in-chief. His evidence is that he cultivated the whole of plot no. 3926 and 3885 prior to his purchase of the former plot and the plaintiff had personally shown him the boundaries and the beacons and informed him that the land belonged to the 1<sup>st</sup> defendant. Later the 1<sup>st</sup> defendant sold him a part of plot number 3926 and he built a permanent house thereon and occupied it in 2014 without any demur on the part of the plaintiff. Later on in 2016 the plaintiff fenced off part of plot no 3885 claiming it to be his and DW2 reported that event to the 1<sup>st</sup> defendant and litigation then followed at the plaintiff's instance. In his oral evidence he stated the plot no. 3885 which he had cultivated had earlier on belonged to Simon Mwaura, the 1<sup>st</sup> defendant.
12. DW3 Simon Gatiy adopted his witness statement dated 23/7/2019 as his evidence-in-chief. His evidence is that he purchased his portion of land from the 1<sup>st</sup> defendant in 2015. The plaintiff was present when the land was being excised and he never objected. Later in 2016 the plaintiff unsuccessfully attempted to take away part of plot number 3885.
13. DW4 Simon Mwaura Kariuki adopted his witness statement dated 21/5/2018 as his evidence-in-chief. His evidence closely followed the contents of the defence he has filed in this suit and whose contents were earlier on analyzed herein. He stated that after subdivision of plot no 780 he was allocated plot no 3885 measuring 2.5 acres and that mutation forms were created by Gatome & Associates Surveyors with the authority of the plaintiff. He subsequently entered into an oral sale agreement with the plaintiff on 3/6/2011 for the sale of 0.75 acres for Kshs 260,000/=. The purchase price was paid by way of the plaintiff collecting goods from the 1<sup>st</sup> defendant's shop and by direct money transfers, whereupon the plaintiff had plot no 3885 subdivided into two portions one of which, being plot no 3926, was transferred into the 1<sup>st</sup> defendant's name. DW3 maintained that the two transactions were quite distinct and free from fraud. He subsequently subdivided plot no 3926 and sold the two resultant parcels to the 4<sup>th</sup> defendant.
14. DW5, Peter Mwangi, a surveyor, told the court that the plaintiff had tasked him with subdividing his Plot No. 780 into four parcels; that the plaintiff gave him the consent of the Land Board. He testified that they subdivided the land into four portions; 2.3 acres, 2.32 acres, 2.5 acres and 2.47 acres leaving an access road of ½ an acre. He added that the plaintiff later obtained a Land Control Board consent and instructed him to subdivide Plot No. 3884.
15. On cross-examination he stated that subdivision of both plot no 780 and plot no 3926 occurred in 2011 and that he received his fees from the 1<sup>st</sup> defendant.

### **Analysis and Determination**

16. I have considered the pleadings herein, the evidence produced and the submissions relied on by the parties. The issues for determination are as follows:
  - a. Whether the plaintiff sold any land from plot no 780 other than the 2.5 acres that was contracted for in the agreement dated 30/6/2010;
  - b. Whether the transfer of any extra land beyond the 2.5 acres to the 1<sup>st</sup> Defendant was illegal and fraudulent and thus subject to nullification by this
  - c. Whether the transfer of plot numbers 5664 and 5665 by the 1<sup>st</sup> defendant to the 3<sup>rd</sup> and 4<sup>th</sup> defendants was valid to confer any legal interest to the said purchasers;



d. Who ought to pay the costs of the suit.

17. The issues are discussed as hereunder.

**Whether the plaintiff sold any land from plot no 780 other than the 2.5 acres that was contracted for in the agreement dated 30/6/2010;**

18. Regarding the first issue, the plaintiff relies on the agreement dated 30/6/2010 and avers that save the 2.5 acres provided for therein, he sold no other land to the 1<sup>st</sup> defendant.
19. The plaintiff's witnesses were all categorical that the plaintiff only sold 2.5 acres. To this the 1<sup>st</sup> defendant responded by averring that later after the first agreement was executed, he entered into an oral agreement with the plaintiff almost one year later on 3/6/2011 for purchase of a further 0.5 acres from the plaintiff. No witnesses to that oral agreement were called to testify. Though the 1<sup>st</sup> defendant had presented evidence of a bank transfer of Kshs 790,000/= of the date 30/6/2010 in respect of the sale of 2.5 acres under the written agreement dated 30/6/2010, no evidence of payment for any extra land was presented by the 1<sup>st</sup> defendant save a handwritten schedule whose author is unknown, and on whose face the plaintiff's acknowledgement is conspicuously absent, purporting that it was for goods issued to the plaintiff, presumably from the 1<sup>st</sup> defendant's business, and direct cash payments to the plaintiff. No separate acknowledgements of payment executed by the plaintiff were produced. It is unique too that only cash was used where it was not the method of release of goods. Even mobile money transfers appear not to have been used. There having been no formal agreement between them, it would be quite strange for a person who appears as enlightened as the 1<sup>st</sup> defendant to have parted with such huge sums of money without any form of acknowledgment by the plaintiff or anything at all in written form that would have showed that the parties were engaged in land sale transaction. However, to redeem his defence, the 1<sup>st</sup> defendant produced copies of land control board consents, land transfer form and a mutation in respect of plot number 3884 to show that the plaintiff was involved in its survey and subsequent transfer of its subdivision no 3926 to the 1<sup>st</sup> defendant. The mutation reads that it is the plaintiff who asked for that subdivision of 3884. It was stamped by the firm of Gatome & Associates Licensed Land Surveyors and is dated 15/8/2011. The mutation for plot no 780 is also stamped by Gatome & Associates Licensed Land Surveyors and is dated 2/6/2011.
20. It is intriguing that the 1<sup>st</sup> defendant's evidence is to the effect that he entered into an oral agreement for the sale of a further 0.5 acres of land only one day after the mutation for plot no 780 was signed by the surveyors and that only days later on 24/6/2011 the mutation was registered to give birth to parcel no 3884. The next question that arises, and which the 1<sup>st</sup> defendant has failed to explain, is why, if the title to the 2.5 acres that he had already purchased had not issued, the acreage in the two transactions were not amalgamated and another formal written agreement executed between the parties to yield just one parcel.
21. It must be mentioned here that even though the 1<sup>st</sup> defendant has exhibited a LCB consent, it is not expressly stated in the minutes or that consent that it is the plaintiff who attended the land control board to apply for consent to subdivide plots no 780 or 3884. This court is alive to the fact that an agent may do the same, and surveyors and lawyers routinely do the same. Noting that the plaintiff claims to have given his title to the 1<sup>st</sup> defendant to facilitate the survey, the production of these documents is not therefore conclusive that the plaintiff did or did not attend the LCB meeting, or executed, or did not execute the LCB application forms.
22. The foregoing notwithstanding, it is however difficult for the plaintiff to explain the mutation and land transfer from which are said to have been executed by him. Nevertheless, the plaintiff, and not



the defendants, is the person who has come to this court to challenge the said documents, and the only thing he is expected to do is to deny them, whereupon the burden will be on the defendants to establish that the signatures thereon belong to and were affixed by the plaintiff. I have not seen any expert evidence from the defendants and the plaintiff's denial must stand until the defendants prove that he executed those documents. This court upon examining the evidence holistically finds that the defendants have failed to prove that the documents giving rise to the transfer of plot number 3926 to the 1<sup>st</sup> defendant were valid and signed by the plaintiff.

23. The above gaps in the 1<sup>st</sup> defendant's evidence do not augur well for his case. Most inexplicable is why, if he had the presence of mind sufficient to make him insist on a written agreement in respect of the first 2.5 acres of land to be carved out of plot no 780 on 30/6/2010, he would later on enter into an oral agreement for the sale of 0.5 acres more than a year later on 3/11/2011. Parties' conduct in a transaction should be consistent such that when the expected path is not followed and one of the party happens to raise a complaint, the deviating party needs to demonstrate that there is a reasonable explanation for any inconsistency. And that was all this court expected the 1<sup>st</sup> defendant to provide: a reasonable explanation for his deviation from the written to the oral type of agreement or simply in other words why, if there was a second transaction that took place, did he not insist on a written agreement? In this case it was for the 1<sup>st</sup> defendant, if he was to convince the court that there was an oral agreement as he states in his defence, to explain not only why parties chose an oral agreement but also bring witnesses to that agreement. He failed to do so and this court can not hold that there was any such oral agreement.
24. Perchance the conclusion herein above was that there was an oral agreement, such agreement is frowned upon by the provisions in Section 3 of the Law of Contract Act which states as follows:
- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
- Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”
25. The provisions of the foregoing section are to be construed conjunctively. The agreement must be in writing and it must be signed by each party and the signatures must all be attested to by a witness who is present at the execution thereof. In the above circumstances any reliance by the defendant on an oral agreement is misplaced. Such an agreement if any can not be enforced contrary to the very categorical provisions of Section 3 of the Act. The claim of the alleged oral sale therefore fails for both want of compliance with Section 3 of the Act and for want of proof of payment of valuable consideration.

**Whether the transfer of any extra land beyond the 2.5 acres to the 1<sup>st</sup> Defendant was illegal and fraudulent and thus subject to nullification by this court;**

26. Regarding the second issue, this court has already found that there was no oral contract for the sale of land between the parties. It should not therefore be the case that the 1<sup>st</sup> defendant has any land beyond the 2.5 acres in the written agreement.



27. Should the 1<sup>st</sup> defendant's acquisition of extra land be nullified for irregularity, illegality and fraud?
28. Basically, when the plaintiff avers that he did not sell or authorize the transfer of extra land, by that negation he is calling upon the defendant to prove that his acquisition was legal and free from fraud. Noteworthy is the allegation by the plaintiff that he entrusted the title deed for plot number 780 to the 1<sup>st</sup> defendant for procession of subdivision and title in the latter's name. As per the agreement dated 30/6/2010, which is a common document in both parties' bundles, the plaintiff agreed to meet the cost of the survey and processing of title deed. However, Clause No 6 stated that he would give all legal documents of ownership to the 1<sup>st</sup> defendant within 8 months of the date of the agreement, and it is to be believed that this included his original title. Under Clause 7 of the agreement the 1<sup>st</sup> defendant was allowed to take possession of the land sold to him before title issued in his name.
29. On 5/11/2016, more than 5 years after the execution of the agreement, the plaintiff wrote to a firm of surveyors stating as follows:

“At the time I was to fence my land I suspected that the beaconed area appeared bigger by the general assessment.”
30. He thus requested them to verify the status of parcels nos 3885 and 3926.
31. The surveyors wrote an undated report of their findings thereafter. It indicated as follows:

“On (sic) of above observation the total area of parcel number 3885 and (5664, 5665) (original 3926) as per land registry records, RIM and ground measurements it all confirms that the total area is 1.2 ha (3.11 acs)”
32. The surveyors therefore found that the total acreage of the two parcels that the 1<sup>st</sup> defendant ended up with exceeded the 2.5 acres that the plaintiff had sold him. It is conclusion of this court then that though registration issued in his name, the title deed for the plot number 3884 was not immediately physically issued to the plaintiff if his evidence in this case is anything to go by; neither is it also likely to have ever been issued at all to him physically at all, for he says that when he was following up on it at the land registry, he was given the title for plot no 3925 instead.
33. It appears that while the 1<sup>st</sup> defendant obtained his title to plot 3885 in 2011, the plaintiff delayed considerably before going to the Lands office for other titles arising out of the subdivision of plot no 780. If the certificate of official search and the certified copy of green card for plot number 3886 are considered the plaintiff followed up on his titles in at 2016, for the title to that plot was, despite the transfer having been executed in 2011, issued on 9/11/2016. The presentation book number on the transfer to Lucia Njoki Kamau was issued on 9/11/2016 when the transfer form was presented at the land registry. This is despite the fact that the consent for the transaction was obtained in 2011.
34. The title to plot number 3925 issued on 27/1/2016 while title to plot number 3926 was closed on subdivision on 27/1/2016 and subtitles to 5664 and 5665 issued quickly thereafter on the same day.
35. Plot no 3926 was registered in the name of the 1<sup>st</sup> defendant. Plot no 3925 and 3926 are subdivisions of 3884. According to the plaintiff, it was upon being given the title deed for plot no 3925 that he discovered that plot no 3884 had been subdivided without his knowledge and the two titles issued; the 1<sup>st</sup> defendant soon thereafter subdivided plot no 3926 and sold the subdivisions to the 3<sup>rd</sup> and 4<sup>th</sup> defendants. The plaintiff denied having signed any transfer document or even selling the land parcel to the 1<sup>st</sup> Defendant.



36. The 1<sup>st</sup> defendant on the other hand produced a consent for Lamu/Lake Kenyatta 3926 measuring 0.34 Ha approved on 14<sup>th</sup> September 2011. He also produced a transfer dated 7<sup>th</sup> November 2011 for the transfer of the portion.
37. The parties in this case agree that Plot No 780 was subdivided to issue 4 subplots and that there is only one written sale agreement in this dispute. The creation of the 4 plots and the transfer of one of them to the 1<sup>st</sup> defendant is uncontroverted.
38. As was stated before while addressing the previous issue, the conduct of parties in a transaction is deemed to be consistent and when a deviation occurs, that needs be explained.
39. The 1<sup>st</sup> defendant strikes one as a very careful person. From the start he ensured that his interests were secure by causing the subdivision scheme prepared for plot no 780 to be made and parcel he was buying allocated a letter “B” which was expressly mentioned in the agreement dated 30/6/2010. The actual mutation is dated 2/6/2011. From the first page of the document the parties were to meet the surveyor at the site on 23/5/2011, almost one year after the execution of the agreement.
40. It is noteworthy that the same surveyor (DW5), a self-declared director of the 2<sup>nd</sup> defendant who admits to have subdivided plot no 780 and purports to have subdivided 3884 at the instance of the plaintiff is the same person who was instructed to subdivide plot no 3926 at the behest of the 1<sup>st</sup> defendant. The plaintiff avers that he allowed the 1<sup>st</sup> defendant to handle the survey work through his choice of surveyors, which the 1<sup>st</sup> defendant denies.
41. It is quite perplexing that the plaintiff disowns the consent to subdivide plot number 3884 yet that consent was issued on the same day as the consents to transfer plot no 3883 to his wife and Plot No 3885 to the 1<sup>st</sup> defendant the latter two which he does not dispute. It is either that the plaintiff is economical with the truth or that he entrusted the entire process to the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant completely took advantage and sneaked in a selfish agenda into the minutes of the Land Control Board and thereby obtained a consent to subdivide plot No 3884 while he was engaged in the real business the agreement between him and the plaintiff entailed.
42. Section 107(i) of the [Evidence Act](#) provides that: -

“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.”
43. In the case of Susan Mumbi Versus Kefala Grebedhin; (Nairobi HCC NO. 332 OF 1993) Justice Juma it was held that:

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”
44. Again the heavy burden fell on the 1<sup>st</sup> defendant to establish that the subdivision was carried out by the plaintiff. In this court’s view, the plaintiff merely appended his signature to the documents that the 1<sup>st</sup> defendant took to various offices for processing of subdivision and title.
45. Having in mind the evident long delay that occurred between the subdivision of plot 780 (2011) and the transfer of plot no 3883 to the plaintiff’s wife (2016), I am inclined to believe the plaintiff’s statement that he entrusted the 1<sup>st</sup> defendant with the title documents and let him be in charge of the



subdivision and that the 1<sup>st</sup> defendant took advantage of that to obtain all necessary LCB consents to subdivide plot no 3884 and transfer one of the resultant subdivisions to himself. I find that the subdivision of plot no 3884 and the issuance of one of the subtitles to with no 3926 to the 1<sup>st</sup> defendant was not authorized by the plaintiff, is illegal and fraudulent and that it is therefore subject to an order of nullification by this court.

**Whether the transfer of plot numbers 5664 and 5665 by the 1<sup>st</sup> defendant to the 3<sup>rd</sup> and 4<sup>th</sup> defendants was valid to confer any legal interest to the said purchasers;**

46. Section 26 of the *Land Registration Act* provides as follows:

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

47. The real import of the above provisions of the Act is that one needs not have personally participated in a fraud, illegality, irregularity or and illegal scheme for their title to be rendered invalid. Where such nefarious occurrences have been perpetrated by his predecessor in title, and they have been verified by the court to have been done, the predecessor ceases to have had any good title to pass on to a transferee. As I have found the subdivision of plot no 3884 to have been fraudulently carried out, the titles that emanated from that subdivision are invalid and subject to cancellation as pursuant to the rule nemo dat quod non habet, the 1<sup>st</sup> defendant could not transfer better title than he had, and it is the case that he did not have good title. Consequently, the transfer of plot numbers 5664 and 5665 by the 1<sup>st</sup> defendant to the 3<sup>rd</sup> and 4<sup>th</sup> defendants was valid to confer any legal interest to the said purchasers. The consequence is that the titles to plots numbers 5664 and 5665 are also illegal and ought to be cancelled and the land comprising them be consolidated and plot reverted back to its original state as plot no 3884 to be registered in the plaintiff's name.

**Who ought to pay the costs of the suit.**

48. The plaintiff has established his case against the 1<sup>st</sup> defendant. The rest of the defendants wandered into the crosswinds of the present conflict by virtue of the 1<sup>st</sup> defendant's conduct and I find them innocent of wrongdoing that would compel the court to condemn them to costs. This court has considered in entirety the facts of this case and come to the conclusion that each party must bear their own costs of the suit.

49. In the end I enter judgment in favour of the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and I order as follows:



- a. A declaration is hereby issued declaring that the second survey exercise and the excision of plot no Lamu/Lake Kenyatta 1/3926 from plot no Lamu/Lake Kenyatta 1/3884 and registration of that excised plot no Lamu/Lake Kenyatta 1/3926 in the 1<sup>st</sup> defendant's name is illegal, null and void;
- b. A declaration is hereby issued declaring the third survey exercise and subdivision of plot no Lamu/Lake Kenyatta 1/3926 and the subsequent disposal of the resultant portions known as plot nos Lamu/Lake Kenyatta 1/5664 and Lamu/Lake Kenyatta 1/5665 the 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively was fraudulent;
- c. A declaration is hereby issued declaring that the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants fraudulently and illegally acquired plot nos Lamu/Lake Kenyatta 1/3926 and later plots nos Lamu/Lake Kenyatta 1/5664 and Lamu/Lake Kenyatta 1/5665 from the plaintiff;
- d. A permanent injunction is hereby issued to restrain the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants from developing plot nos Lamu/Lake Kenyatta 1/5664 and Lamu/Lake Kenyatta 1/5665 which are subdivisions of plot no Lamu/Lake Kenyatta 1/3926 or disposing of the disputed portions;
- e. The Land Registrar and the County Surveyor shall collaborate in so far as the exercise involves their jurisdictions, and shall rectify of the Registry Index Map to have parcels nos Lamu/Lake Kenyatta 1/3926 and Lamu/Lake Kenyatta 1/3925 consolidated on the registry index map in order to reinstate parcel no Lamu/Lake Kenyatta 1/3884 on the Registry Index Map and in the land register upon which the said parcel no Lamu/Lake Kenyatta 1/3884 shall also be reinstated into the name of the plaintiff as the registered proprietor;
- f. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants shall demolish all structures erected on the reinstated portion known as Lamu/Lake Kenyatta 1/3884 and remove themselves therefrom in default of which they shall be forcibly evicted at the plaintiff's instance;
- g. There was no evidence led as to the current market value of the land and so no alternative order will be made to the effect that the 1<sup>st</sup> defendant should compensate the plaintiff for the illegally acquired portion at the current land value rates;
- h. Each and every party shall bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 29<sup>TH</sup> DAY OF MAY 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

