



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwaura (Suing as the legal representative of the Estate of Peninah Wanjiru Mwaura - Deceased) v Thimba & another (Environment & Land Case 1013 of 2014) [2024] KEELC 4313 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4313 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1013 OF 2014**

**OA ANGOTE, J  
MAY 23, 2024**

**BETWEEN**

**JACKSON GITAU MWAURA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PENINAH WANJIRU MWAURA - DECEASED) .... PLAINTIFF**

**AND**

**SIMON KARANJA THIMBA ..... 1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Complaint dated 30<sup>th</sup> July, 2014, the Plaintiff seeks as against the Defendants the following reliefs;
  - i. An injunction restraining the 1<sup>st</sup> Defendant from transferring, entering, developing, trespassing or in any other way from dealing in the Land Title No Dagoretti/Uthiru/T36.
  - ii. An Order declaring the registration of David Mwaura Karanja as the registered proprietor of Land Title No. Dagoretti/Uthiru/T36 as illegal and fraudulent.
  - iii. An order of cancellation of the Certificate of Title issued to the 1<sup>st</sup> Defendant over Land Title No Dagoretti/Uthiru/T36.
  - iv. Registration of the Land Title No Dagoretti/Uthiru/T36 in the name of the Plaintiff for and on behalf of the Estate of Peninah Wanjiru Mwaura(Deceased).
  - v. General Damages for destruction of property and illegal eviction.
  - vi. Costs of the suit.
  - vii. Interest at the Court rates.



2. It is the Plaintiff's case that on 22<sup>nd</sup> March, 1958, his mother, Peninah Wanjiru Mwaura(deceased) purchased a parcel of land comprised in Title known as Dagoretti/Uthiru/T36 (hereinafter the suit property) from the late Kanyiri Kioi; that he passed away before transferring the property to her; that as a result thereof, she instituted a claim at the Land Disputes Tribunal Kikuyu and that by a decision of the elders at the Chiefs Camp Kinoo, it was determined that the property should be transferred into her names.
3. The Plaintiff states that his mother, himself and his siblings have occupied the land since April, 1959; that his mother stayed on the property till her death in July, 2004 and that one of his siblings, Samuel Mute Mwaura, is living on the property to date.
4. According to the Plaintiff, sometime in 1995, one David Mwaura Karanja, an individual unknown to him, presented himself at the Land Registrar's office and had himself registered as the proprietor of the suit property; that the 2<sup>nd</sup> Defendant without due inquiry acceded to the same and that the registration was a fraudulent scheme by the Defendants.
5. The particulars of fraud, it was averred, include the illegal removal of the cautions lodged by the deceased on 29<sup>th</sup> October, 1981 and 22<sup>nd</sup> December, 1981, and by Edward Kioi on 12<sup>th</sup> November, 1981; colluding to register David Mwaura as the proprietor of the suit property; effecting the transfer of the suit property in 2006 and backdating the same to 25<sup>th</sup> July, 1995. The other particular of fraud was set out as failure by the Defendants to apply for Land Control Board Consent to transfer the property.
6. The Plaintiff asserts that the transfer of the suit property to the 1<sup>st</sup> Defendant was illegal, as the said David Mwaura lacked any proprietary rights thereof; that the 1<sup>st</sup> Defendant, relying on an unlawful right of title obtained eviction orders from the Magistrates Court at Kikuyu and demolished their houses on the property and that they are the legitimate owners of the suit property.
7. The 1<sup>st</sup> Defendant filed a Defence and Counterclaim in which he averred that he is a stranger to the Plaintiff and his mother; that he approached one David Mwaura Karanja to sell him the suit property and that before he purchased the suit property, he conducted a search on the copy of the title given to him by David Mwaura Karanja which affirmed that he was the registered proprietor of the land.
8. According to the 1<sup>st</sup> Defendant, upon affirming Mr Mwaura's proprietorship, he entered into a Sale Agreement with him on 17<sup>th</sup> May, 2006 and the Kikuyu Land Control Board issued its consent on 6<sup>th</sup> April, 2006 for the transfer of the same and that the 2<sup>nd</sup> Defendant thereafter proceeded to register the transfer in his favour whereupon he was issued with a title on 12<sup>th</sup> April, 2006.
9. The 1<sup>st</sup> Defendant maintained that he was not privy to any fraud as alleged by the Plaintiff; that he is a bonafide purchaser for value without notice of any third party interests, encumbrances or defects; that he legally, through Court process obtained eviction orders against one Samuel Mute who had trespassed over the suit property and that the Plaintiff's rights to the suit property, if any, have been overtaken by events and the suit property changed hands to him as a bona fide purchaser.
10. Vide the Counterclaim, the 1<sup>st</sup> Defendant sought for the following orders:
  - i. That the Plaintiff's suit be dismissed with costs as the Plaintiff has no cause of action against the 1<sup>st</sup> Defendant.
  - ii. A declaration that the 1<sup>st</sup> Defendant is the bonafide absolute proprietor for value without any third party notice, encumbrances or defects over the said property having lawfully been registered as such and a title deed having been legally issued.



- iii. Any other relief that the Court deems fit to grant.
11. The 2<sup>nd</sup> Defendant did not file a Defence.

### **Hearing and Evidence**

12. The matter proceeded for hearing on 28<sup>th</sup> March, 2022. The Plaintiff testified as PW1. He adopted his witness statement dated 18<sup>th</sup> July, 2014 and produced the documents of an even date as PEXHB1. He produced the supplementary bundle dated 7<sup>th</sup> June, 2018 as PEXHB2.
13. It was his evidence that before her demise, his mother had purchased the parcel of land comprised in Title No Dagoretti/Uthiru T.36 from the late Kanyiri Kio on 22<sup>nd</sup> March, 1958; that Mr Kanyiri passed away before transferring the property to the deceased leading her to lodge a claim for the transfer of the suit property at the Chiefs' Camp Kinoo on the 2<sup>nd</sup> March, 1982 and that it was determined that the suit property should be transferred to her.
14. PW1 stated that upon purchase, the deceased took possession of the suit property and lived there until her demise in 2004 and that even after her demise, they remained on the suit property and that his brother Samuel Mute Mwaura was on the suit property until his eviction.
15. According to PW1, despite the foregoing, one David Karanja Mwaura, an individual unknown to him, had himself irregularly and fraudulently registered as the proprietor of the suit property; that the registration was illegal having been undertaken despite the existence of cautions removed illegally and that further, the purported registration did not indicate its basis or from whom the suit property originated.
16. PW1 testified that similarly, no Land Control Board consents were applied for, for the transfer of the suit property to David Mwaura and subsequently to the 1<sup>st</sup> Defendant and that relying on a fraudulent title, the 1<sup>st</sup> Defendant obtained illegal eviction orders against them, evicting them from the suit property and destroying their structures on the suit property.
17. It was his evidence on cross-examination that the agreement was done in 1958 before demarcation of the land; that the same was not done before an Advocate; that he was 10 years old at the time; that his mother was known as Mrs. David Mwaura; that at the time, women were not allowed to own ID's and that three cautions were placed on the suit property, two by them and another by the son of Kio Kanyiri who claimed to be a trustee of the property.
18. It was his further evidence on cross that they only became aware of the transfer when his brother was given a notice to vacate; that Mr Kanyiri Kio died in 1985 and at the time, he had not yet transferred the land; that the deceased appeared before the land tribunal; that he does not have the land tribunal proceedings and that the demolition of their house was by an auctioneer.
19. The Defendant, DW1, adopted his witness statement dated 5<sup>th</sup> June, 2017 as his evidence in chief and produced the documents of an even date as 1DEXHB1-6. It was his testimony that one David Mwaura approached him and informed him that he had bought a parcel of land and wanted to sell the same; that he asked for a copy of the title which he was given and that he thereafter carried out a search after which they went to his Advocate who drafted a Sale Agreement.
20. According to DW1, he paid the sum of Kshs 700,000 after which he was given a title deed; that the land was transferred into his name at Kiambu Lands Registry; that he has his title deed and carried out a search after his registration; that he received court papers after developing the property and that he has never met the Plaintiff.



21. It was his evidence on cross-examination that he only carried out a search; that he never confirmed the details from the greencard; that the seller never informed him that the title was in the Plaintiff's father's name and that it is his Advocate who obtained the Land Control Board consent.
22. It was his further evidence on cross-examination that he is unsure of whether family members were present at the Land Control Board; that they carried out their own valuation with the seller and that he is not aware of the caution placed on the suit property because it is his Advocate who carried out the search.
23. DW2 was a Lands Registrar based in Kiambu. She adopted her witness statement dated 20<sup>th</sup> February, 2023 as her evidence in chief. She produced the documents dated 18<sup>th</sup> January, 2018 as 2DEXB1-4.
24. DW2 stated that the land was registered on 31<sup>st</sup> March, 1959 in the name of Kanyiri Kio and he was given a certificate in respect thereof on 3<sup>rd</sup> November, 1981; that on 29<sup>th</sup> October, 1981, Peninah Wanjiru David Mwaura registered a caution claiming purchasers' interest; that on 12<sup>th</sup> November, 1981, a caution was registered by Edward Kioi claiming interest as a licensee and that in December, 1981, another caution was registered by Peninah Wanjiru David Mwaura claiming interest as a purchaser.
25. She stated that on 25<sup>th</sup> June, 1995, both cautions were removed under Section 133 of Cap 300; that the property was transferred to David Mwaura on 25<sup>th</sup> July, 1995 and a title was issued on the same day; that on 12<sup>th</sup> April, 2006, the land was transferred to Simon Karanja Thumbi; that he secured a loan and a charge was registered for Kshs 260,000 and that a discharge was registered in 2009.
26. It was her testimony that a caution can be withdrawn by a person by making an application; that the person who placed the caution is notified of the application seeking to withdraw it; that they notified Peninah Wanjiru who had lodged the caution and that they examined the completion documents including the consent of the board before registering the transfers.
27. It was her further evidence that entries regarding land are always done sequentially and issues of backdating don't arise; that they don't evict people but only deal with registration; that according to their records, the land is in the name of the 1<sup>st</sup> Defendant and that the name of Peninah Wanjiru David Mwaura appears in their documents.
28. It was her evidence on cross that they have not received any complaints regarding fraud on the property; that the property was transferred from Kanyiri Kio to David Mwaura Njoroge; that the transfer document is not in their records; that she does not have any other documents apart from the green card; that they have the parcel file but she did not bring it; that the caution was removed as per Section 133 of the Registered *Land Act* and that the cautioners are informed before the caution is removed, which information should be in the parcel file which she has not adduced.
29. She noted that the name Peninah includes the name David Mwaura, and it makes reference to one person; that the name David Mwaura Karanja is different; that Peninah could not have transferred the land as it was not in her name and that if as at 1995 the registered owner was deceased, the registration/transfer to David Mwaura Karanja was not proper.
30. She stated that the transfer to David was not a transmission because the succession cause number has not been indicated in the document; that the parcel file would have other details including the names of the people in the entries and that her not carrying the parcel file was an oversight.
31. She stated during re-examination that the greencard is a reflection of all the documents received and registered; that previously, women were associated with their husbands and sons; that she has seen such



names; that the notice to Peninah is indicated to have been on 14<sup>th</sup> April, 1976; and that the date of 1976 is an error, it should read 1986

## Submissions

32. The Plaintiff's Counsel submitted that the Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* [2013]eKLR was categorical that where the registered proprietor's root title is under challenge, he must establish the root thereof and that in this case, the root of the 1<sup>st</sup> Defendant's title has not been established.
33. Counsel submitted that notwithstanding the 1<sup>st</sup> Defendant's assertion that he was not a party to any fraud, his title was irregularly acquired and as such, it is defeasible pursuant to the provisions of Section 26(1)(b) of the *Land Registration Act*. Reliance in this respect was placed on the cases of *Elijah Makeri Nyangwra vs Stephen Mungai Njuguna & Another* [2013] eKLR, *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR; *Joseph Kibet Tuwei vs LJT & Another* [2014]eKLR and *Daudi Kiptugen vs Commissioner of Lands Nairobi & 4 Others* [2015]eKLR.
34. It was submitted that in light of the fact that the 1<sup>st</sup> Defendant's title has been demonstrated to be fraudulent, the recourse open to the Court is to nullify the transaction and that as aptly expressed by the Supreme Court in *Dina Management Limited vs County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), the title or lease is an end product of a process, and if the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible.
35. According to Counsel, the Court in *Lagat vs Kebut (Environment and Land Appeal E021 of 2022)* [2023] KEELC 18432 (KLR) (26 June 2023) (Judgment), affirmed the Court's powers to order for rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
36. It was submitted that the Court in *Park Towers Limited vs Moses Chege & 7 others* [2014] eKLR, posited that where trespass is proved, a party need not prove that he suffered any specific damage or loss to be awarded damages. Reliance in this regard was also placed on the case of *Duncan Nderitu Ndegwa vs Kenya Pipeline Company Limited & Another* [2013] eKLR. Counsel urged that the sum of Kshs 5,000,000 is sufficient as general damages in the circumstances.
37. The 1<sup>st</sup> Defendant's Counsel submitted that the Plaintiffs have not proven fraud as alleged and that in the case of *Lucy Nchebeere vs Rose Ndululu Musee & Chief Land Registrar*[2013]eKLR, it was held that a party is bound by its pleadings with respect to allegations of fraud which must be strictly proven.
38. Counsel submitted that the 1<sup>st</sup> Defendant is a bonafide purchaser for value having proven that he purchased the property for due consideration after carrying out a search; that the Court in *Chrispinus Mangen'i vs Paul Juma Otaga & Another*[2020]eKLR, relied on the definition of bonafide purchaser as set out in *Katende vs Haridar Company Limited*[2008]2 E.A 173 which stated that for one to rely on the concept, he must prove that he holds a certificate of title, purchased the property in good faith, had no knowledge of the fraud; was not a party to the fraud and payment of consideration.
39. Counsel urged that the Plaintiff has not proven fraud by the 1<sup>st</sup> Defendant in the acquisition of the suit property; that consequently, the 1<sup>st</sup> Defendant's title is protected and he should be given an opportunity to enjoy his proprietorship rights and that the Plaintiff's claim is unmerited and should be dismissed. The 2<sup>nd</sup> Defendant did not file submissions.



## Analysis and Determination

40. Having carefully considered the pleadings, testimonies and submissions by the parties herein, the following arise as the issues for determination;
  - i. Who is the legitimate proprietor of the suit property?
  - ii. What are the appropriate orders to issue?
41. The Plaintiff instituted this suit, seeking, inter-alia, an order declaring that the registration of David Mwaura Karanja as the registered owner of the suit plot as fraudulent and seeking for the cancellation of the 1<sup>st</sup> Defendants' title. The Plaintiff also seeks registration of the suit property in his name for and on behalf of the Estate of the late Peninah Wanjiru, injunctive orders restraining the 1<sup>st</sup> Defendant from interfering in the property and general damages for destruction of property and eviction.
42. It is the Plaintiff's case that the suit property belonged to his deceased mother Peninah Wanjiru Mwaura who acquired the same by way of purchase from Kanyiri Kio; that sometime in 1995, one David Mwaura Karanja, illegally procured the registration of the title in his name and thereafter transferred the same to the 1<sup>st</sup> Defendant; and that the aforesaid transfer was fraudulent and illegal.
43. The Plaintiff adduced into evidence copies of the Letters of Administration issued to him on 3<sup>rd</sup> August, 2007; Death Certificate of his late mother, Sale Agreement, letters from Chief Kinoo location, official search and Greencard of the suit property, Court order of eviction dated 8<sup>th</sup> February, 2007 and photographs of the suit property.
44. Vide the supplementary bundle, the Plaintiff adduced into evidence copies of the cautions dated 28<sup>th</sup> October, 1981, 11<sup>th</sup> November, 1981, the chiefs' letter dated 17<sup>th</sup> October, 1986, notice of intention to remove caution dated 14<sup>th</sup> April, 1976, objection letter dated 24<sup>th</sup> April, 1986, letters dated 28<sup>th</sup> November, 1985, 5<sup>th</sup> July, 1982 and 16<sup>th</sup> June, 1982, and the Title.
45. On his part, the 1<sup>st</sup> Defendant maintains that he is the registered proprietor of the suit property having acquired it by way of purchase from one David Mwaura Karanja; that he carried out due diligence before purchasing the property which revealed that David Mwaura Karanja was its proprietor; that he was issued with an LCB consent by the Kikuyu Land Board and that he is not privy to any illegality with respect to the transfer of the suit property.
46. The 1<sup>st</sup> Defendant adduced into evidence copies of the official search dated 5<sup>th</sup> April, 2006, and 26<sup>th</sup> April, 2006, sale agreement, application for LCB consent, and letter of consent of the board dated 6<sup>th</sup> April, 2006.
47. The 2<sup>nd</sup> Defendant, through DW2, gave evidence of the history of the suit parcel as per their records. She adduced into evidence certified copies of the Green card with respect to the suit property, the Certificate of Title dated 10<sup>th</sup> January, 1959, and cautions dated 12<sup>th</sup> November, 1981 and 22<sup>nd</sup> December, 1981.
48. Considering the foregoing narration, it is apparent that both the Plaintiff and the 1<sup>st</sup> Defendant are laying claim to the suit property and as such, each is obligated to prove his case on a balance of probabilities.
49. The evidence before the Court shows that the 1<sup>st</sup> Defendant is the registered proprietor of the suit property having been so registered on 26<sup>th</sup> April, 2006 pursuant to the provisions of the retired Registered [Land Act](#), Cap 300.



50. By dint of the provisions of Section 107 of the *Land Registration Act*, 2012, the law applicable to the title held by the Plaintiff is the Registered *Land Act*, Cap 300 Laws of Kenya (now repealed). Section 107(1) of the *Land Registration Act* provides as follows;

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

51. Section 162(1) of the *Land Act* similarly provides;

“Unless the contrary is specifically provided in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

52. The rights of a registered proprietor of land were set out in Sections 27(a) and (b) of the Registered *Land Act* (repealed) as follows;

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

53. Whereas Section 28 thereof provided as follows:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

54. The rectification of a title was also provided in Section 143 of the Registered *Land Act* which stated thus;

- (1) Subject to sub-section (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

55. The Court of Appeal, in *Denis Noel Mukhulo Ochwada & Another vs Elizabeth Murungari Njoroge & Another* [2018] eKLR discussing the above provision stated thus;

“The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party.”



56. The registration seeking to be impugned was not a first registration. The Court will consider whether the Plaintiff has established fraud at the behest of the 1<sup>st</sup> Defendant as alleged. Black's Law Dictionary 9th Edition at Page 731 defines 'fraud' as;

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

57. It is trite that fraud must be specifically pleaded and proven. This position was affirmed by the former Court of Appeal of Eastern Africa in the case of R. G. Patel vs Lalji Makanji (1957) E.A. 314, where the Court stated as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

58. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. This position was reiterated by the Court of Appeal in the case of Demutila Nanyama Pururmu vs Salim Mohamed Salim [2021] eKLR relying on its earlier decision of Kinyanjui Kamau vs George Kamau [2015] eKLR where it had expressed itself as follows;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

59. According to the Plaintiff, the registration of the suit parcel in the 1<sup>st</sup> Defendant's name was actuated by fraud, the particulars of which included the removal of the cautions lodged on the suit property without notice; collusion to register David Mwaura as the proprietor of the suit land; transferring the property in the absence of an LCB Consent; failure to keep records for the registration of 25<sup>th</sup> July, 1995; and backdating the transfer to David Mwaura from 2006 to 2005.

60. Considering the evidence, the Court notes that it is undisputed that the first registered owner of the suit property was Kanyiri Kioi. This is evident in the Green Card excerpt adduced by the Plaintiff. This position was affirmed by DW2.

61. According to the Plaintiff, the deceased, Peninah Wanjiru, purchased the suit property from Kanyiri Kio but he did not transfer the property to her leading to her filing a matter at the Lands Disputes Tribunal at Kikuyu. The Plaintiff has adduced a Sale Agreement in respect of the suit property as well as a decision of the Elders dated 2<sup>nd</sup> March, 1982. The decision states as follows:

“Plot Dagoretti/Uthiru T.36 was bought on the 22<sup>nd</sup> March, 1958 by Mrs David Mwaura and Kanyiri Kioi agreed that he sold...Kanyiri Kioi the seller should transfer the plot to Mrs Peninah David Mwaura..”

62. Various correspondence from the Chief Kinoo have also been adduced reiterating this position. The Plaintiff maintains that his mother did not cede possession of the suit property. In any event, as affirmed



by the Land Registrar, DW2, she (deceased) could not have caused the transfer of the property not having been registered as proprietor herself.

63. On his part, the 1<sup>st</sup> Defendant traces the root of his title to David Mwaura who he states sold it to him. He adduced into evidence the Sale Agreement[undated]witnessed on 17<sup>th</sup> May, 2005. He also adduced a search dated 5<sup>th</sup> April, 2006 indicating that David Karanja Mwaura was the proprietor of the suit property as well as the application to and consent of the LCB Board.
64. So how then did David Mwaura come about this property. The Green card extract produced by the parties indicates a transfer to David Mwaura on 25<sup>th</sup> April, 1995 from Kanyiri Kio. However, apart from this entry, no other evidence exists in this regard. The nature of David Mwaura’s acquisition of the suit property is unclear. DW2 admitted on cross-examination that she did not have a copy of the alleged transfer from Kanyiri to David in their records.
65. Further still, while stating that the cautions placed on the suit property on 29<sup>th</sup> October, 1981 and 12<sup>th</sup> November, 1981 were removed and procedurally so, the same has not been evinced. As regards the caution registered on 22<sup>nd</sup> December, 1981 by Peninah Wanjiru, DW2 did not allude to it having been removed. This is also not evident in the green card extract. Having not been removed, no legitimate transfer of the property could occur.
66. Section 132(2) of the Registered *Land Act* (repealed) was instructive in this respect and provides thus;

“So long as a caution remains registered, no disposition which is inconsistent with it shall be registered except with the consent of the cautioner or by order of the court.”
67. In view of the foregoing circumstances, the Court harbours no doubts that the title acquired by David Mwaura was procured through a fraudulent and/or irregular scheme.
68. The above notwithstanding, the Court finds that the Plaintiff has not demonstrated that the 1<sup>st</sup> Defendant was party to such fraud and the question that arises herein is whether the plea for bonafide purchaser is available to the 1<sup>st</sup> Defendant.
69. However, it is apparent that David Mwaura did not have any title to begin with and as such, could not have passed any to the 1<sup>st</sup> Defendant. This is encompassed in the principle *nemo dat quod non habet* which is a general principle that one cannot pass a better title than one has.
70. Whereas the principle was initially with respect to sale of goods, the same has been given recognition in property law. The Court of Appeal in the case of *Arthi Highway Developers Ltd vs West End Butchery & 6 Others* [2015] eKLR expressed it best when, in dealing with a fraudulent title which had been subdivided and sold off to unsuspecting purchasers stated as follows;

“It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”



71. As aforesaid, both the Plaintiff and the 1<sup>st</sup> Defendant lay claim to the suit property. The Court has found that the 1<sup>st</sup> Defendant's title is liable to be impeached as per Section 143 of the Registered [Land Act](#) (repealed) which provides as follows:

“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.”

72. In the same vein, having established legitimate rights to the property, the prayer seeking registration thereof as well as injunctive orders restraining interference with the suit property are merited.

73. The Plaintiff also seeks general damages for destruction of property and illegal eviction. In this respect, it is noted that the Plaintiff's removal from the suit property was pursuant to orders of the Magistrates Court at Kikuyu. The Court is not privy to the proceedings before the Court leading to the issuance of the eviction orders. It has not been stated that the orders were set aside.

74. That being so, whereas the Court has found that the 1<sup>st</sup> Defendant's title is liable to be cancelled, this was not the prevailing situation at the time of the issuance of the eviction orders, and the Court cannot find that actions undertaken pursuant to the Court orders were illegal. This claim is unmerited.

75. In conclusion, the Court is satisfied that the Plaintiff has proved his case on a balance of probabilities and enters judgment in the following terms;

- i. The 1st Defendant's Counterclaim be and is hereby dismissed.
- ii. An order does hereby issue directing the Chief Land Registrar, to cancel the registration of the Land Title No Dagoretti/Uthiru/T36 in the name of Simon Karanja Thimba and register the same in the name of Jackson Gitau Mwaura, for and on behalf of the Estate of Peninah Wanjiru Mwaura (Deceased).
- iii. Permanent Injunctive orders do hereby issue restraining the 1st Defendant from transferring, entering, developing, trespassing or in any other way from dealing in the Land Title No Dagoretti/Uthiru/T36.
- iv. The 1st Defendant shall bear the costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23<sup>RD</sup> DAY OF MAY, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Kinyanjui for 1<sup>st</sup> Defendant

Mr. Ambani for Plaintiff

Court Assistant: Tracy

