



**Kombo & 2 others v Uhutta Properties Limited & another; Rahasi & 4 others (Interested Parties)
(Environment & Land Case 89 of 2021) [2024] KEELC 4899 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4899 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 89 OF 2021**

**AE DENA, J
JUNE 24, 2024**

BETWEEN

**SOMBO K KOMBO 1ST PLAINTIFF
DZOMBO M KOMBO 2ND PLAINTIFF
KOMBO W MWAMUMBO 3RD PLAINTIFF**

AND

**UHUTTA PROPERTIES LIMITED 1ST DEFENDANT
THE LAND REGISTRAR KWALE 2ND DEFENDANT**

AND

**MDOE TUNGWA RAHASI INTERESTED PARTY
JUSTUS MANGALE MUDZOMBA INTERESTED PARTY
LUBANDO BAHASI NGWAYA INTERESTED PARTY
JIRA KARUNGWA NJONGOLI INTERESTED PARTY
EINSTEIN CHARON GAZA INTERESTED PARTY**

JUDGMENT

Brief Facts

1. The plaint instituting this suit was filed on 9/6/2021. It is the Plaintiffs case that at all material times to the suit they are the appointed representatives and beneficial owners of land owned by the Mwanyota/ Bekalimbo Clan which is comprised of and under the custody of the Samburu South Group Ranch. That vide agreements dated 29/6/2018 and 5/7/2018 the 1st Defendant purchased 2 portions of the land measuring 80 and 85 acres respectively located at Gora area in Samburu within Kwale County.



2. The purchase price for the 80 acres was Kshs 24,000,000/- [read twenty-four million] and which the 1st Defendant paid a deposit of Kshs 7,200,000/= [read Seven Million Two Hundred Thousand] leaving a balance of 16,800,000/=. The second portion measuring 84 acres was to cost Kshs 25,200,000/= [read Twenty-Five Million Two Hundred Thousand] of which a total of Kshs 6,000,000/= [read six million] was paid leaving a balance of Kshs 19,200,000/= [read Nineteen Million Two Hundred Thousand only]. That before this balance was paid, the 1st Defendant proceeded to transfer the respective parcels and obtained titles over the same. The particulars of this alleged fraud are captured under paragraph 10 of the plaint.

Plaint

3. The Plaintiffs pray for judgement against the Defendants jointly and severally for; -
 - a. Payment of the purchase price balance of Kshs 36,000,000/= [read thirty-six million] together with interest at commercial rates from the date of filing of this suit to the date of payment in full.
 - b. In the alternative recession of both agreements and issuance by the purchaser of vacant possession of the 2 plots illegally registered in the names of the 1st Defendant and or its agents and or assigns.
 - c. Revocation and issuance of new title deeds to the Plaintiffs as representatives of the Mwanyota/ Bekalimbo Clans.
 - d. Costs of this suit and interest thereon.
 - e. Any other or further relief this honourable court may deem fit and just to grant.

Defence

4. The 1st Defendant filed its amended defence before court on 17/3/2023. The 1st Defendant denies the averments raised in the plaint and the Defendants are put into strict proof of the same. The 1st Defendant states that the Plaintiff misled them into believing that the two portions being the suit property herein belonged to them. It is averred that the land belongs to a separate clan altogether. That the Plaintiffs fraudulently received part of the purchase price being Kshs 13,200,000/=. The particulars of fraud alluded to by the Plaintiffs are denied and the court urged to dismiss the suit.
5. The 2nd Defendant filed their Defence on 8/12/2021. The 2nd Defendant deny most of the averments in the Plaint and specifically the particulars of fraud in paragraph 10 (1) - (3) of the Plaint. That they were not involved in any collusion to hoodwink the Plaintiff of their property. The Plaintiff was put to strict proof.
6. The Interested Parties statement of defence was filed on 5/10/2022 following an application for joinder by the 1st Defendant which I allowed. They specifically deny that the Plaintiffs are the owners of the land under the custody of Samburu South Group Ranch and term the sale of the suit properties illegal. They claim they are the owners of the suit properties having been confirmed as such by the District Commissioner. They pray that the Plaintiffs suit be dismissed.

Evidence

7. The suit was heard on 30/5/23 and 17/10/23. The Plaintiff was represented by Mr. Ondabu of the firm of Ondabu & Company Advocates. The 1st Defendant was represented by Mr. Shimaka of Marende



Necheza & Company Advocates and the Land Registrar by Mr. Mwanjeje. The Interested Parties did not attend court.

8. PW1 is Dzombo Kanga Kombo. He adopted his statement dated 9/6/2021 as his evidence in chief. He further produced the documents in the Plaintiffs bundle dated 9/6/2021 - PEX 1-13. He reiterated the averments in the Plaint. That he had sued the Land Registrar for registering the transfer in favour of the 1st Defendant without his knowledge. That the land belonged to PW1s grandfather Kombo Watu (clan land) and not to Walaire clan. He admitted to having been paid Ksh. 13 million and asked that he be paid the remainder being Kshs. 34 Million failure to which the land be reverted to him and he refunds the already paid purchase price.
9. On cross-examination by Mr. Shimaka PW1 testified that he is a representative of his clan Mwanyota. That the land was sold by 5 of the (elders) Dzombo Kombo, Mwero, Kalimbo and Kanga. He confirmed that the agreement has three (3) vendors. They did not have title at the time of sale. He admitted to receiving the money. He denied signing the transfer but states that they were called to the chief's office to receive money and sign for the same. His clan was not in occupation of the suit property. The land is fenced by the 1st Defendant. That the interested parties were from the Walaire Clan.
10. On cross-examination by Mr. Mwanjeje PW1 admitted that the suit properties were sold to the 1st Defendant through one Ebrahim. PW1 insisted that he was not aware that the properties had been transferred and termed the transactions as an attempt by the 1st Defendant to defraud him. On being shown the letter dated 15/3/23 (sic 2020) (PEX12) the witness stated investigations were still ongoing but clarified in re-examination that it was the Walaire clan that reported the matter. The witness testified further in re-examination that there existed clan wrangles over the land as the Walaire clan were also claiming ownership though there were no wrangles among the Mwanyota clan. That the Walaire had sold their portion of the land and were now coming for his land. He reiterated he wanted the balance paid and if the 1st Defendant failed he would refund the deposits received.
11. With the above the Plaintiffs case was closed.
12. DW1 was Zablon Otieno Awino a Manager at the 1st Defendant company. He adopted his statement filed on 16/3/2023 as his evidence in chief but had to be stepped down following objection to production of some of the exhibits in his bundle. He later by consent of the parties produced the documents in the 1st Defendant's list of documents DEX 2, 3, 4. He stated that the Company bought the suit parcels from Mulaire Clan however when they visited site a dispute emerged where Mwambeja clan were also claiming ownership of the land. That the purchase price was paid to the Mwambeja clan through their representatives in two phases of Kshs 7 million and Kshs. 6.3 million. He admitted that they had failed to pay the balance because of the fierce dispute between the two clans. That they were summoned at the DO's office in Samburu for a meeting on 7/01/2023 (sic 2021). They received the letter dated 19/01/2021 confirming that the land belonged to the Mulaire Clan which was the reason they did not pay the balance. That they were instructed to pay Mulaire and recover their money back. The witness referred the court to paragraph 8 of the defence seeking a refund of Ksh. 13,200,000/= which they had not yet recovered. He stated that at the time of purchase the land was under Samburu group ranch. That they had acquired the titles to the land through the right procedure. That the National Land Commission had confirmed the 1st Defendant as the owner. That the 1st defendant did not owe Mulaire clan anything.
13. On cross-examination by Mr. Ondabu DW1 and being referred to the agreement dated 5/7/2018 he agreed that the agreements covered 164 acres. On being shown titles for plot 90 and 88 the witness admitted the measurements were in Hactares and not acres. That they paid Ksh. 13.3million and the balance was about Kshs. 35 million. That they were willing to pay the balance depending with the



findings. He testified that the Plaintiffs were not involved during the titling. When referred to the agreement dated 11/7/2016 the witness stated that the seller was Mdoe Tungwa while the purchaser was the 1st Defendant and the acreage was 68.7 HA and the vendor was described as the beneficial owner. On intense cross examination the witness conceded the agreement did not indicate the vendor was representing any clan though he insisted they availed the agreement in court because he was representing the Mulaire Clan. He stated that the 1st Defendant had not taken any land more than what had been sold to them. DW2 admitted paragraph 8 of the 1st Defendants Defence did not refer to a counterclaim. On the fierce fight he admitted it is not mentioned in his witness statement and had not produced evidence to prove the fighting. He conceded that the meeting referred to in the letter dated 19/01/21 was between Mulaire clan and Uhutta that Mwanyota were not represented. He admitted the 1st Defendant spent money on both clans. He denied the 1st Defendant stole over 600 acres to the 80 and 84 acres stated in the 2018 agreement.

14. On cross-examination by Mwandeje the witness denied that the 1st Defendant was involved in any forgery. He admitted the agreement was between the 1st Defendant and individuals and the Land Registrar was never involved in the same. It was willing buyer willing. He stated the 1st Defendant went to the group ranch because there was no title also presented their documents which were acted upon. He was not aware of any report made to the police by the Plaintiffs against the 1st Defendant on the sale.
15. On re-examination he testified that the land was bought from the Mulaire clan but the Mwanyota Clan also owed them money being the Kshs 13 Million. The acreage increased because they consolidated additional land they had bought from other groups/Mulaire though the agreements were not presented in court. The group ranch kept the mother title and it was mandatory to see them in the presence of the vendors. He conceded they bought land from Mdoe Tungwe and paid money in the presence of 4 witnesses.
16. DW2 Peter Ndungu Gichaha a Deputy County Commissioner formerly stationed at Kinango Sub county Kwale County testified that he is aware of the dispute before court. That several matters had been brought to the DCC attention over clan wrangles revolving around land ownership. He stated that he had been approached by a group namely Mwabeja Mulaire, Mwazara Muthandi and Mwanyota. The members of the same were involved in the dispute though he could not point out specific persons. That he held several meetings with members of the clan. That later he realised the dispute was between Mwanyota and Mulaire. He also established that Mwanyota didn't have land. That he invited the parties for resolution of the dispute but they did not turn up. He later wrote a letter to the 1st Defendant asking them to pay the remainder of the purchase price. He identified the letter dated 19/01/21 and produced the same as D. EX – 1.
17. On cross-examination by Mr. Ondabu DW2 testified that the letter dated 19/01/23 (sic 2021) was pursuant to his investigations and the contents were correct. The conclusion was based on the visit he had made on the land. That he declared ownership after listening to both parties though he confirmed that the Mwanyota elders refused to attend the meeting. he stood by his decision that the land belongs to the Mulaire clan. That he was not aware that the 1st Defendant had acquired title in 2017. That his role was to prevent any situation that would threaten peace and security.
18. Cross-examined by Mwandeje DW2 testified that he did not involve the Land Registrar as the dispute was resolved through arbitration. That That his key mandate was to prevent breach of peace and security and any case that could present this involved him and therefore he had capacity to intervene in the dispute that had been escalated to him after there had been previous attempts to resolve the matter by way of arbitration.



19. On re-examination he testified that his involvement was because there was a complaint and it was necessary for him to take action. He admitted to asking the 1st defendant to pay the balance and further advised them to seek legal redress for the other alleged payments they had indicated they paid to another party details of which he did not inquire of.
20. With the above the defence case was marked as closed.

Submissions

21. The Plaintiffs filed their submissions on 6/12/2023 and further submissions 2/2/2014. They identified three main issues for determination. Whether the transfer and registration of Kwale/South Samburu/90 and 112 effected on 8/7/2017 is null and void and therefore to be cancelled; Whether the 1st Defendant is entitled to a refund of Kshs. 13,200,000/=; whether the third parties are the owners of the suit property and costs.
22. It is contended that the Plaintiffs are beneficial owners of the suit properties owned by the Mwanyota/Bekalimbo clan. Enumerating the terms of the agreements entered between the Plaintiffs and referring to the cheques produced as PEX 6-8 it is submitted that no further payments were ever received from the 1st Defendant. That the 1st Defendant proceeded to register the titles without the consent of the Plaintiffs. The titles issued on 8/6/2017 predate the sale agreements dated 29/6/2018 and 5/07/2018 and which DW1 was unable to explain. Further that the titles reveal more acreage than what is reflected in the sale agreements. That all this pointed to theft as well as fraud and collusion with the 2nd Defendant. The court was referred to *Elijah Makeri v. Stephen Mungai Njuguna & Another*. [2013] eKLR.
23. On refund of the Kshs. 13,200,000/- it is submitted that no counterclaim was filed consequently the claim cannot be sustained.
24. It is submitted that the 3rd parties have not produced proof of ownership of the suit properties and failed to prosecute their claim. The court was invited to disregard the evidence of DW2 as the DCC mandate is limited to security management, coordinating national government functions, conflict management and peace building and not to resolve land disputes which is termed the preserve of the Environment and Land Court. It is further submitted that due to the fraud the two titles should be cancelled and revert to the Plaintiffs. Reliance is placed on the case of *Alice Chemutai Too v. Nickson Kipkurui Korir & 2 Others* [2015] eKLR.
25. In their further submissions filed in response to the Defendants submissions the Plaintiffs urged that the Defendants did not controvert the Plaintiffs case that there was fraud in the transfer of the land to the 1st Defendant. That the defendant admitted that the acreage in the title was 1064 as opposed to the 164 acres in the agreements which is a clear case of fraud. No competition documents were prepared and sent to the 1st Defendant by the Plaintiffs. That issuing titles without supporting document on the part of the Land Registrar was fraud.
26. The 1st Defendant's submissions highlight one issue for determination, whether the Plaintiffs are the legal owners of the suit properties and whether they are entitled to the reliefs sought. It is submitted that the Plaintiffs being members of the Mwanyota Clan entered into an agreement with the 1st Defendant for purchase of the suit properties. However, the suit properties had a dispute between two clans being the Mwanyota clan and the Mulaire clan who are the third parties herein. That the dispute was resolved at the Deputy County Commissioner's office who made a finding that the suit properties belonged to the Mulaire clan. For that reason, the Plaintiffs fraudulently acquired money from the 1st Defendant



- on the pretext that they could sell them land. The 1st Defendant seeks for a refund of the said purchase price.
27. On the prayer to revoke the titles held by the 1st Defendant it is submitted that the 1st Defendant is protected by Section 26 of the Land Registration Act as the titles were acquired procedurally and lawfully. That the Plaintiffs had not given any proof of ownership of the suit properties and of the fraud alluded to on the part of the 1st Defendant. The 1st Defendant prays for a refund of the Kshs 13,200,000/- being part of the purchase price paid. Reliance is placed on the holding in Margaret Njeri Wachira V Eliud Njenga [2018] eKLR.
28. The 2nd Defendant filed their submissions on 20/12/23. Citing the case of Margaret Wanjiru & 4 Others v the Attorney General Civil Appeal No. 305 of 2016 it is submitted that the respondents were not bound to call any evidence as long as they did not admit the claim. That the Plaintiff was bound to prove fraud against the Land Registrar to the required standard. The court was referred to the case of R. G. Patel v. Lalji Makani cited in Glady's Wanjiru Ngacha v. Theresa Chepsat & Others [2013] eKLR where the Court of Appeal held that the standard of proof to be on slightly higher threshold. That Sombo K. Sombo the Plaintiff was not a party to the agreements and by dint of the doctrine of privity of contract he has no rights to enforce the agreement. That the contract having been on a willing buyer willing seller and if the parties were not in agreement it is incumbent upon the Plaintiff to rescind the agreement. It is proposed that if there is any balance pending it is just that the same is paid.

Analysis and Determination

29. I have carefully considered the pleadings by the parties, the evidence presented as well as the rival submissions. The following issues commend determination;
- a. Who between the Plaintiffs and third parties is the owner of the suit properties.
 - b. Whether the Plaintiffs are entitled to the reliefs sought.
 - c. Who should meet the costs of this suit.
30. The Plaintiffs case is that they have brought the proceedings as appointed representatives of the Mwanyota Bekalimbo the beneficial/legal owners of land held under the Samburu South Group. It is not in dispute that the said group ranch holds land comprised in ranches in trust for various clans. Two properties are the center of this dispute, one measuring 80 acres and the other 85 acres located at Gora Village Samburu in Kwale County. At first, I found it difficult to specifically point to the suit properties subject of this dispute. However, after interacting with the evidence placed before court, the parties seem to agree that these plots are Kwale / South Samburu Group Range/90 and 112. This identity has not been disputed by the 1st Defendant. It is also buttressed by the subsequent registration in the names of the 1st Defendant. According to the Plaintiff two agreements were entered between them and the 1st Defendants for the sale of the two parcels. It is their evidence that they received part payment of the purchase price leaving a balance of about Kshs. 36 million unpaid. That despite this the 1st Defendants proceeded to fraudulently acquire registration of the properties in their name. The 1st Defendant case is that the Plaintiffs obtained the purchase price fraudulently when they were aware they did not have rights over the subject property to pass to the 1st Defendant as the same belonged to another clan.
31. It is trite that the burden of proof was on the Plaintiff to prove that the above facts exist in accordance to the provisions of section 107 of the Evidence Act Chapter 80 of the laws of Kenya. The standard of proof is on a balance of probabilities. Firstly, it was incumbent upon the Plaintiff to prove their claim that suit property belonged to the Mwanyota Bekalimbo clan amidst the 1st Defendants allegations that the parcel belonged to the Mulaire clan. The 1st Defendants later made an application for joinder



- and the court allowed the Mulaire clan representatives to be joined to these proceedings as 3rd parties. The 3rd parties also referred to as Interested Parties responded to the suit but failed to prosecute their claim before court.
32. PW1 told the court that the land belonged to his grandfather Kombo Watu as clan land and not to Walaire clan. He however clarified in re-examination that there existed clan wrangles over the land as the Walaire clan were also claiming ownership. That the Walaire had sold their portion of the land and were now coming for his land. He produced in evidence a letter dated 13/11/2018 (PEX3). The letter is addressed to Uhutta Properties Ltd through the Assistant County Commissioner Samburu Division. The subject is 'Re: Land Ownership Confirmation At Gora Matope Samburu (164 ACRES).' the letter confirms the land belongs to the Mwanyota clan and names the clans representatives as Sombo Kanga Kombo, Dzombo Mwandegwa Kombo and Kombo Wato Mwamumbo. It also confirms there is no dispute. The letter is signed by Snr. Chief Mundu Samburu location.
33. On the other hand the 1st Defendant produced in evidence a letter from the Deputy County Commissioner dated 19/1/2021. It was DW1 testimony that it is on the basis of this letter that the 1st Defendant did not complete the payment of the balance of the purchase price. The maker of the letter P.N. Gicheha attended court and testified as DW2. The court notes that the Mwanyota clan complained about the non-payment of the balance of the purchase price herein to the office of the Deputy County Commissioner (DCC). The DCC states that following investigations by his office it had been established that the ongoing dispute between Mwanyota and Mulaire clans had been several arbitrated in favour of Mulaire clan'. The letter also states that the Mwanyota clan failed to consistently attend the meetings. I considered this letter vis a vis the oral testimony in court and I noted that DW2 conceded in cross examination that he reached his decision after listening to the two clans though he confirmed that the Mwanyota elders refused to attend the meeting. The letter also reveals the meeting he had in his office was between the 1st Defendant and Mulaire. DW2 also admitted in cross examination that he was not aware that the 1st Defendant had acquired title in 2017 which in my view meant he was not fully seized of the issue. Additionally, I had nothing placed before me showing minutes of any mediation proceedings that took place where the dispute on the ownership between the Mulaire and Mwanyota clans was resolved in favour of the Mulaire clan. I had no report of the investigation conducted by the office of the DCC. The court noted a further contradiction when in re-examination DW2 admitted to asking the 1st Defendant to pay the balance and further advised them to seek legal redress for the other alleged payments they had indicated they paid to another party details of which he did not inquire of. It is strange that DW2 would not get into details of the issues in question when he had a meeting with the 1st Defendant and the purported investigations his office conducted. I did not place much weight on the evidence of P.N. Gicheha.
34. PW1 also produced a letter dated 28/6/2018 (PEX5) confirming the correct land ownership and describes the location of the 80 acre and communicating their no objection as group ranch officials to the owner's desire to dispose of the land to any interested developers. Again, the letter recognizes Sombo Kanga Kombo, Dzombo Mwandegwa Kombo and Kombo Wato Mwamumbo.
35. On a balance of probabilities, it is my view that the Plaintiffs have proved that they are the beneficial owners of the suit property on behalf of the Mwanyota Bekalimbo clan. This takes me to the reliefs sought.

Whether the reliefs sought by the Plaintiffs should issue.

36. To effectively address whether the Plaintiffs are entitled to the reliefs sought it is imperative that the court should address the legality of the transfer and registration of Kwale/South Samburu/90 and 112



effected on 8/7/2017. PW1 tendered in evidence the two agreements dated 29th June 2018 and 5th July 2018 to support the claim that the suit properties were sold to the 1st Defendant. The agreements are executed by Sombo Kanga Kombo, Dzombo Mwandegwa Kombo and Kombo Wato Mwamumbo as vendors and Uhutta Properties Limited, the 1st Defendant herein. The agreement dated 5th July 2018 reveals the Plaintiffs sold 84 acres for the consideration of Kshs. 25,200,000/-. The one dated 29th June 2018 shows 80 acres were sold at a consideration of Kshs. 24,000,000/-. Both properties make a total of 164 acres. DW1 who gave evidence on authority of the 1st Defendant confirmed in his witness statement which he adopted as part of his evidence in court that the 1st Defendant purchased property from representatives of Mwanyota clan. He confirmed in his testimony that they paid Kshs. 13,200,000/- to the Plaintiffs. PW1 presented cheques drawn in favour of the Plaintiffs from the 1st Defendants Equity Bank Account dated 2/7/2018, 12/7/2018, 17/7/2018, 10/7/2018 6/7/2018, 4/7/2018 and 20/7/2028 each for Kshs. 900,000/-. Also presented were payment vouchers issued by the firm of Apollo Muinde & Partners Advocates dated 29/6/2018 for Kshs. 900,000/-, dated 11/01/2019 for Kshs. 900,000/=, dated 2/11/2018 for Kshs. 1,000,000/=, 17/12/2018 for Kshs. 1,000,000/-. The vouchers show they are on account of the 1st Defendant. PW1 admitted to receiving the money during cross examination some in cash and some by cheque. Clearly this does not amount to the full purchase price for both parcels. In any case DW1 admitted in cross examination that they paid Kshs. 13.3million and the balance was about Kshs. 35 million.

37. PW1 evidence is that despite there having been an outstanding balance on the Purchase price the 1st Defendant went ahead to obtain titles without the consent of the Plaintiffs. He denied during his evidence knowledge of the circumstances under which the title was issued to the 1st Defendant. It is stated that the processing of the title deeds Kwale /South Samburu 90 and 112 without the Plaintiffs consent was fraudulent.
38. It is trite that fraud has to be specifically pleaded and proved at a slightly higher standard than that of a balance of probabilities see *Ratil Patel v. Lalji Makanji EA 1957*. It is averred at paragraph 10 of the plaint that the 1st Defendant colluded with the Land Registry officials to acquire title deeds without the participation or consent of the Plaintiffs and without completion of the purchase price and processing and registering a larger portion of the Plaintiffs plot than that which was sold to the Defendant. The agreement provides for the vendors to forward duly executed transfer documents, certificate of Registration of the Registered group, Copy of ID and PIN card of the officials and 3 coloured passport size photographs of the appointed officials. PW1 denied they ever presented these documents. What is clear is that titles were issued, these titles were produced by the 1st Defendants and DW1 confirmed in court that the Plaintiffs were not involved during the registration of the titles. On cross examination by Mr. Mwanjeje DW1 stated the 1st Defendant went to the group ranch to obtain the documents. Firstly the 1st Defendant knew there was a balance and proceeded to process title without the knowledge of the vendors which I find very insincere on their part. Further that even amidst a dispute on the ownership the land the 1st Defendant proceeded to take out title. It is noteworthy that the letter dated 19/1/2021 informing them of the outcome of the investigations by the DCC came way later after the titles had been processed in 2017. But the most strange thing is that the titles predate the agreements and which was not explained by DW1.
39. In addition to the above the Plaintiffs case is that the 1st Defendant went ahead to obtain registration of a larger portion than what was agreed in the agreements. The agreements show the two pieces sold measured 80 acres and 84 acres making a total of Kshs. 164 acres which DW1 confirmed on being shown the agreement in cross examination by Mr. Ondabu. DW1 on being shown the title deed for plot 90 conceded that it was in Hactares and confirmed that as per the agreements it was supposed to be acres. The witness was taken through a conversion exercise of HA into acres which clearly turned out



- to be more than twice larger than what was purchased. While DW1 tried to clarify in cross examination that they bought land from various groups which they consolidated into the additional acreage, these agreements were never presented in court.
40. But what about the Land Registrar-. The documentation used to support the registration of the 1st Defendant was never produced in court. The Registrar only chose to file a report from the National Land Commission which in my view would not pass for completion documents. This raises eyebrows on the part of the office of the 2nd Defendant.
41. To me all the above pointed to fraud on the part of the Defendants and I find that the titles were obtained fraudulently and unprocedurally . What then is the fate of these titles? The Plaintiffs acknowledge that the suit properties are registered in the names of the 1st Defendant. They seek that the said registration is revoked and the suit properties be registered in their names. The 1st Defendant on the other hand states that the suit properties were rightfully registered in their names and after due procedure was followed. The 1st Defendant further states that the titles to the suit properties are therefore protected under Section 26 of The [Land Registration Act](#) which upholds the sanctity of a title deed as prima facie evidence of ownership of property.
42. Section 26 (1) of the [Land Registration Act](#) states as follows:
- “The Certificate of Title issued by the Registrar upon registration ... 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.”
43. In the case of [Elijah Makeri Nyangw'ra - v- Stephen Mungai Njuguna & Another](#) (2013) eKLR the court while considering the repercussion of Section 26(1) above 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.... the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme...
44. Further, the Court of Appeal in [Joseph Arap Ngo'k v Justice Moiwo Ole Keiwua](#), Nai Civil Application No. 60 Of 1997 stated as follows:
- “Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party”.
45. I have already demonstrated in the foregoing analysis how the registration of the title was obtained by fraud and or misrepresentation perpetrated by the 1st Defendant. I have also pointed that the absence of supporting documents used by the Registrar to register the transaction leading to the issuance of title. The 1st Defendant cannot benefit from the protection of the law. I am in agreement with the Plaintiffs on one front, that this court is vested with the powers to revoke a title deed once it is established that



the same is illegal and was unlawfully registered and issued. I am guided by the dictum in Republic v Kisumu District Lands Officer & Another, Miscellaneous Application No. 80 of [2010] eKLR where the court held that:

“...it is clear that it is only the court that can cancel or amend a title where the court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration.”

46. Based on the foregoing the titles herein cannot be sustained for being tainted with fraud and illegality and should be cancelled effectively collapsing with the agreements herein.
47. I will proceed to consider the second limb of the Plaintiff sprayer that the same be registered in the name of the Plaintiffs. The pleadings clearly state that the Land is held by the Samburu South Group Ranch on trust for the various clans who are the beneficiaries thereof. This suit is also filed on behalf of the Mwanyota Bekalimbo clans. For me the right thing to do is to let the suit properties revert to the Samburu Group Ranch to be held in trust until such a time that due process shall be followed in registration of the beneficiaries interests.
48. But what in view of the foregoing findings will be the fate of the Kshs.13,200,000 which the Plaintiffs admit to have received. The 1st Defendant desires that the same is refunded to them. I resorted to the agreements and I came across a clause titled Forfeiture in Default which provides that in the event of default of payment of the purchase price the vendor is to give the purchaser 21 days’ notice specifying the default and requiring the purchaser to make good the default and failure to which the purchaser shall forfeit the deposit in respect of the purchase price in favour of the vendors as liquidated damages. PW1 presented in evidence a demand notice dated 8/12/2020 and the 1st Defendant did not comply to the notice.
49. It is submitted on behalf of the Plaintiffs that a counterclaim has not been raised in the pleadings for a refund of the amount paid to the Plaintiffs. The court agrees with this position in the absence of a counterclaim its hands are tied.
50. The upshot of the foregoing is that the court finds that on a balance of probabilities the Plaintiffs have proved their case against the Defendants and based on the analysis herein judgement is entered for the Plaintiff against the Defendants jointly and Severally in the following terms
 - a. The agreements dated 29th June 2018 and 5th July 2018 be and are hereby rescinded.
 - b. The titles issued to the 1st Defendant pursuant to the agreement dated 29th June 2018 and 5th July 2018 are hereby revoked and the 2nd Defendant shall accordingly cancel the said titles.
 - c. The 1st Defendant shall within 90 days of this judgement hand over vacant possession of the 2 plots illegally registered in the names of the 1st Defendant and or its agents and or assigns to the Plaintiffs to be held in trust for the Mwanyota Bekalimbo Clan by the Samburu Group Ranch.
 - d. Costs being the discretion of the court and considering the amount paid to the Plaintiffs let each party bear its costs.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 24TH DAY OF JUNE 2024.

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A.E DENA



JUDGE

Mr. Ondabu for the Plaintiffs

Ms. Kyallo for the 1st Defendant

Mr. Mwanje for the 2nd Defendant

Mr. Daniel Disii – Court Assistant

