



REPUBLIC OF KENYA



**Bhanji v Chelagat & 3 others (Environment & Land Case
E004 of 2021) [2024] KEELC 4542 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4542 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E004 OF 2021**

LA OMOLLO, J

JUNE 6, 2024

BETWEEN

ZAINUL HASSANALI ESMAIL BHANJI PLAINTIFF

AND

ISAAC CHELAGAT 1ST DEFENDANT

HASSAN ALIOW ROBA 2ND DEFENDANT

WILSON NDUNGU K 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide the Plaintiff dated 13th January, 2021.
2. The Plaintiff avers that she was the registered owner of land parcel No. Gilgil/Gilgil Block 1/13171 (Kikopey) measuring 8.13 hectares having purchased it for value and issued with a title deed on 12th April, 2012.
3. The Plaintiff also avers that soon after she acquired the suit property, she took possession of it even though there are no development or agricultural activities on the land.
4. The Plaintiff further avers that sometime between 5th and 6th January, 2021, while she was away in Nairobi, a neighbor called her and informed her that there were three gentlemen on the suit property who were inspecting it with the intention of disposing it off.
5. It is her averment that she had not instructed anyone to deal with the suit property on her behalf and so on 7th January, 2021 she lodged a criminal complaint for trespass and criminal detainer with the Directorate of Criminal Investigations at Gilgil Police Station.



6. It is also her averment that on the same day she conducted a search and requested for a copy of the green card of the suit property from the Land Registry.
7. It is further her averment that she was shocked to learn that on 18th April, 2013 the 4th Defendant transferred the suit property to the 1st Defendant without her consent.
8. The Plaintiff avers that subsequently on 16th June, 2016, the suit property was transferred to the 2nd Defendant and on 22nd December 2020, the suit property was transferred to the 3rd Defendant.
9. The Plaintiff also avers that she has never had any dealings with the Defendants over the suit property and had never applied for any Land Control Board Consent.
10. The Plaintiff further avers that the Defendants' claim to the suit property is impeachable as the land was acquired without her consent and were therefore obtained fraudulently and illegally.
11. The Plaintiff set out particulars of fraud, illegalities, misrepresentation and corrupt scheme against the Defendants and avers that she still has in her possession the original title deed and has never at any point surrendered it to the 4th Defendant.
12. The Plaintiff avers that the transfers to the 1st to 3rd Defendants are irregular, illegal and unlawful.
13. The Plaintiff prays for judgement against the Defendants for;

- i. A declaration that the transfers, registration of thereof and consequential Title Deeds issued to the 1st, 2nd and 3rd Defendants and any documents obtained to procure such registration of title to the Plaintiffs suit property known as Gilgil/Gilgil Block 1/13171 (Kikopey) measuring 8.13 hectares situate in Elementaita within Naivasha sub county in the names of the 1st, 2nd and 3rd Defendants without the consent of and or payment of due compensation to the Plaintiff were obtained fraudulently, unprocedurally, illegally and unlawfully through corrupt scheme hence unlawful, null and void ab initio.

- ii. An order of rectification of the land register to cancel entries No. 5-10 in the land register relating to the property known as Gilgil/Gilgil Block 1/13171 (Kikopey) measuring 8.13 hectares situate in Elementaita within Naivasha Sub-county in Nakuru County and or all entries relating to registration of a transfer and issuance of title deeds in the names of the 1st, 2nd and 3rd Defendants or any other person thereafter and restoration of the Plaintiff as the sole registered owner of the said property.

- iii. An order of permanent injunction to restrain the Defendants, their servant's agents, employees, proxies or anyone

claiming under them and any other person from trespassing, entering upon, occupying, constructing on, developing, selling, transferring, leasing, charging, encumbering and or in any other manner dealing or interfering with the Plaintiffs ownership, possession or use of the property known as Gilgil/Gilgil Block 1/13171 (Kikopey) measuring 8.13 hectares situate in Elementaita within Naivasha Sub-County in Nakuru County.

- iv. Costs of the suit.



- v. Any other relief that the court may deem just and fit to grant.
14. The 4th Defendant filed its Statement of Defence on 5th July, 2021 dated the same date.
 15. The 4th Defendant denies the averments in the Plaint and sets out particulars of fraud against the 1st, 2nd and 3rd Defendants together with particulars of statutory duties of the 4th **Defendant**.
 16. The 3rd Defendant filed his Statement of Defence on 5th August 2021. He denies the averments in the Plaint and seeks that the suit be dismissed with costs.
 17. The 1st Defendant filed his Statement of Defence on 8th September, 2021. He denies the averments in the Plaint and states that vide the sale agreement dated 17th January, 2013 the Plaintiff sold to him the suit property for Kshs. 28,000,000/=.
 18. The 1st Defendant states that the suit property was lawfully transferred and registered in his name on 18th April, 2013. He also states that he sold the suit property to the 2nd Defendant vide the land sale agreement dated 10th August, 2015 for a consideration of Kshs. 28,000,000/=.
 19. The 1st Defendant further states that he transferred the suit property to the 2nd Defendant and he was issued with a title deed on 16th June, 2016.
 20. The 1st Defendant states that the 2nd Defendant sold the suit property to the 3rd Defendant vide the land sale agreement dated 9th December, 2020 for a sum of Kshs. 35,000,000/=.
 21. The 1st Defendant denies all the other averments in the Plaint and states that the Plaintiff's suit is incompetent, bad in law, an abuse of the court process and should be struck out.
 22. The 2nd Defendant filed his Statement of Defence on 8th September, 2021. He denies the averments in the Plaint and reiterates that the Plaintiff sold the suit property to the 1st Defendant who sold the suit property to him before he sold it to the 3rd Defendant.
 23. The 2nd Defendant states that he sold the suit property to the 3rd Defendant vide the land sale agreement dated 9th December, 2020 for a consideration of Kshs. 35,000,000/= which the 3rd Defendant is yet to pay in full.
 24. The 2nd Defendant's averments in his Statement of Defence are similar to the 1st Defendant's averments in his Statement of Defence and he seeks that the suit be dismissed with costs.

PLAINTIFF'S EVIDENCE.

25. Zainul Hassnali Esmail Bhanji testified as PW1. She produced the following documents as part of her evidence;
 - a. Copy of Identity Card No. 1239100 as Exhibit P1.
 - b. Copy of Title Deed dated 12th April, 2012 as Exhibit P2.
 - c. Copy of Green Card for the suit property as Exhibit P3.
 - d. Copy of a letter dated 7th January, 2021 written by the Plaintiff's advocate to the Directorate of Criminal Investigations Gilgil and a copy of a Letter dated 13th January, 2021 as Exhibits P4 (a) and (b).



- e. Copy of a letter dated 9th September, 2021 written by the Plaintiff's Advocate to Emmanuel Kaya and a Report as Exhibits P5 (a) and (b).
 - f. Copy of a letter dated 8th September, 2021 by the Plaintiff's Advocate to Damaris W. Gitonga & Co. Advocates and another letter dated 10th September, 2021 as Exhibit P6 (a) and (b).
 - g. Copy of a letter dated 8th September, 2021 written by the Plaintiff's Advocate to the Directorate of Criminal Investigations as Exhibit P7.
26. She testified that she works as an accountant at Rajni Shah & Co. It was her evidence that the suit property is land parcel No. Gilgil/Gilgil Block 1/13171 (Kikohey). She stated that she had filed two witness statements, one dated 13th June, 2021 and another dated 16th September, 2021. She prayed that the court adopts the said statements as part of her evidence in chief which prayer the court acceded to.
27. It was also her evidence that she had the original title to the suit property, she had carried it to court and stated that it was issued to her on 12th April, 2012.
28. It was further her evidence that she had never taken a loan or given her title deed as security for a loan.
29. She denied selling the suit property to Isaac Chalagat as alleged and testified that one of their neighbors called her husband in the year 2021 to inform him that some people were claiming their land.
30. She also testified that they conducted a search through their lawyer and obtained a copy of the Green Card which she had produced as Exhibit P3.
31. She further testified that in the green card, her name appeared at entry No. 3 while at entry No. 5 the name of Isaac Chelagat Kimuge was entered.
32. It was her evidence that Isaac Chelagat Kimuge acquired title to the suit property on 18th April, 2013.
33. It was also her evidence that the 1st Defendant alleged that he had purchased the suit property from her. The Plaintiff was referred to a land sale agreement dated 17th January, 2013 and confirmed that the said agreement was drawn as being between her and Isaac Chelagat Kimuge but stated that the signature on the land sale agreement dated 17th January, 2013 did not belong to her.
34. **PWI denied having any knowledge of Damaris W, Gitonga & Co.** Advocates or receiving any money from the 1st Defendant.
35. When referred to Document No. 3 on the 1st Defendant's list of documents, which was a consent dated 5th March, 2013, she denied having any knowledge of the said consent and stated that she did not apply for it and neither did she ever receive it.
36. PW1 was also referred to document No. 4 on the 1st Defendant's list of documents, which was a transfer form, she confirmed that it referred to the suit property but added that the photograph on the transfer form and the signature did not belong to her.
37. It was also her evidence that after she received the 1st Defendant's documents, she sought the services of a document examiner.



38. It was further her evidence that she gave the document examiner a copy of her identity card and a specimen signature and he prepared a report.
39. PW1 testified that the document examiner was a witness and she would be calling him to give evidence.
40. She reiterated that she had never sold the suit property to anyone and also reiterated that she had in her possession the original title deed to the suit property that she had never surrendered. She ended by praying that the orders sought in the Plaint be granted.
41. In her witness statement dated 13th January, 2021, PW1 reiterates her averments in the Plaint while in her witness statement dated 16th September, 2021 she denies the statements of the 1st and 2nd Defendants as are contained in their written Statement of Defence.
42. More specifically, PW1 in her witness statement dated 16th September, 2021 states that the 1st Defendant did not produce any evidence to show the purported payment of the purchase price and therefore the sale agreement and transfer were a forgery.
43. She also states that the 2nd and 3rd Defendants were authors of their own misfortune as they had transacted with the 1st Defendant who had acquired his interest fraudulently and illegally.
44. She also stated that the signatures in the land sale agreement and the transfer did not belong to her and that the image attached to the transfer form did not also belong to her.
45. Upon cross examination by counsel for the 1st and 2nd Defendants, she admitted that upon receipt of the 1st Defendant's documents, she looked for a document examiner and gave him her Identity Card, passport and a specimen signature.
46. She also admitted that her identity card was issued on 24th June, 2016. She confirmed that the sale agreement dated 17th January, 2013 appeared as No. 2 on the 1st Defendant's list of documents while the transfer form dated 11th April, 2013 appeared as No. 4 on the 1st Defendant's list of documents.
47. She further admitted that she only gave the document examiner the sale agreement dated 17th January, 2013 and the transfer dated 11th April, 2013.
48. She confirmed that she did not have her passport with her and denied knowing if she was issued with one. She however stated that if there was one, then it would be the New East African one.
49. She reiterated that she gave original documents to the
document examiner who made copies.
50. She also confirmed that her case is that the suit property was fraudulently transferred to the 1st to 3rd Defendants. She further confirmed that she made a report to the police but admitted that she did not have the OB number.
51. PW1 also admitted that she was not aware if anyone had been arrested and stated that apart from the present suit, she had never been called to give evidence in any other matter.
52. She further admitted that she had a copy of the green card. She confirmed that entry No. 5 is dated 18th February, 2013 and showed that Isaac Chelagat Kimuge had been registered as an owner of the suit property.



53. She also confirmed that entry No. 6 is dated 18th April, 2013 which showed that a title deed had been issued to the 1st **Defendant**.
54. PW1 stated that she purchased the suit property from the previous owner who was Mandhani Investments Limited and added that after purchase, she took possession of the land and admitted that there were no developments on it.
55. She further confirmed that after purchase, she only visited the land once which was a couple of years ago which could have been in the 2000's.
56. She admitted that she resides within the county and does not travel and also admitted that a neighbor had called her husband.
57. She further admitted that she did not know the name of the said neighbor but her husband knew her name. She however stated that she could identify the said neighbor physically.
58. She confirmed that she had been an accountant for a period of thirty years and that her ID no. is 1239100 which number appeared on both the agreement and the transfer forms.
59. Upon further cross examination by counsel for the 3rd Defendant, PW1 admitted that she obtained the green card from the Land Registry in Naivasha.
60. She confirmed that the custodian of the said documents was the Land Registry. She also confirmed that entry No. 9 was dated 22nd December, 2020 and it had the name of Wilson Ndung'u Kamomoe ID No. 22247780 who was the 3rd Defendant.
61. She further confirmed that before entry No. 9, there was an entry in favour of Hassan Ali Roba dated 16th June, 2016.
62. She again reiterated that she had not developed the suit property and that she heard about the trespass in the year 2021.
63. PW1 again confirmed that she purchased the suit property from Mandhani Investments Limited and admitted that she did not investigate the previous owner of the suit property.
64. PW1 stated that she did not know Hassan Ali Roba or whether the 3rd Defendant bought the suit property from the 2nd Defendant.
65. She also stated that she did not know Isaac or if the 3rd Defendant ever conducted a search on the property.
66. PW1 admitted that she had seen the defence that had been filed by the 3rd Defendant. She denied ever meeting the 1st and 2nd Defendants and stated that even though the green card had **their names, she had the original title deed to the suit property**.
67. She admitted that the Defendants may have been guided by the green card but it was her evidence that she did not know them. She also admitted that even though the Identity Card Number on the agreement belonged to her, the signature was not hers.
68. She denied having any knowledge of Damaris and stated that she instructed her lawyer to find out about the said firm of advocates and that her advocate did not find any lawyer or law firm by that name.



69. She also stated that she had Exhibit 6 (a) and (b) which showed that there was no lawyer with such a name. She further stated that Damaris had written to state that the law firm was not in existence as at the date of the said agreement.
70. Upon further cross examination by counsel for the 4th Defendant, PW1 confirmed she knew about Mandhani Investments Limited from a mutual friend. She confirmed that the said company was not a land buying company.
71. When she was referred to the bundle of documents filed by the 1st and 2nd Defendants, PW1 admitted there was no evidence of payment of stamp duty.
72. She also admitted there was no receipt issued on the consent form from the Land Control Board.
73. She stated that when she purchased the suit property she gave her Identity card, passport photo, pin certificate and also executed the transfer forms.
74. PW1 confirmed that she never met the Land Registrar when she was purchasing the suit property and did everything through her lawyer.
75. PW1 also confirmed that the Land Registrar acted fraudulently in the subsequent transfers and admitted that she had not taken any action on the allegation of fraud.
76. She further confirmed that when she got her title deed, she did a search that confirmed that she was an owner. She then admitted that the title deed she was given is the only one she had held to date.
77. Upon re-examination, PW1 stated that the 4th Defendant was the Chief Land Registrar and added that she did not consent to Isaac or Hassan selling her land.
78. She also stated that before she purchased the land no one was claiming the land and that as at the time she was testifying, the 1st to 3rd Defendants were laying claim to the suit land.
79. PW1 reiterated that in the year 2013, she did not meet the lawyer known as Damaris and neither did she sign the land sale agreement.
80. She also stated that before the year 2016, she had the second-generation Identity Card.
81. When referred to Exhibit P4(a) and (b), PW1 stated that the letter was addressed to the Directorate of Criminal Investigations and was received on 11th January, 2021.
82. PW1 also stated that she wrote to the Directorate of Criminal Investigations at Gilgil and visited their offices on 7th January, 2021.
83. When referred to Exhibit P6(a) and (b), PW1 explained that the letter dated 10th September, 2021 was addressed to her advocates and denied the existence of the law firm belonging to Damaris and also denied drawing of the agreement relating to the sale of the suit property to Isaac.
84. Emmanuel Karisa Kenya testified as PW2. It was his evidence that he was a forensic document examiner of over thirty years' experience.
85. He testified that he was trained at the Criminal Investigations Department in Nairobi and also in France and Jerusalem adding that he retired from the police service in the year 2015



and was as at the time of his testimony working privately under Smart Eye Technologies and Consultancy.

86. He also testified that he had a document dated 10th September, 2021 and when he was referred to MFI P5(a) and (b), he testified that he received instructions from the firm of Litoro & Omwebu Advocates through the letter dated 9th September, 2021.
87. He further testified that the letter requested him to do an analysis on the following documents;
 - a. A1- Land sale agreement dated 17th January, 2013 that was between Zainul Hassnali Esmail Bhanji and Isaac Chelagat Kemunge.
 - b. A2- transfer forms between the same parties that was dated 11th April, 2013.
 - c. B1- Specimen signature for Zainul.
 - d. C1 and C2- Known signature for Zainul. C1- was the passport while C2 was the Identity Card.
 - e. D- the photograph of Zainul Hassnali Esmail Bhanji.
88. It was his evidence that his mandate was to do an analysis on the signatures on the disputed documents which were A1 and A2 with the specimen signatures which were on B1 together with the provided known signatures on C1 and C2.
89. It was also his evidence that he was to compare the photograph appearing on A2 with the provided photograph of Zainul and the photograph on the passport.
90. It was further his evidence that he did the analysis and his finding was on page two of his report. His findings were as follows;
 - a. There were no similarities on the signature to indicate that they had a common origin as they were made by different authors.
 - b. The photograph from A2 was from a different person as the facial appearance was different as well as the hairstyle.
 - c. The pictures on C, C2 and D1 were from the same person.
91. He testified that the methodology of peculiar individual characteristics was in his report which he produced this report as Exhibit P5(a) and (b).
92. Upon cross-examination by counsel for the 1st and 2nd Defendants, PW2 confirmed that he had thirty years' experience and had been trained in Nairobi, Israel, France and Tanzania.
93. He also confirmed that he was a retired police officer and had a license but stated that he did not attach them to his report. He admitted that he had a license which he renews annually.
94. He also admitted that he had the said documents in his possession but they were not attached to his report.
95. He confirmed that he received the instructions on email but picked the documents from the counsel's office. He also confirmed that the documents in dispute were photocopies that were clear and legible and he found them suitable for comparison purposes.



96. When referred to A2, PW2 admitted that it was a black and white photocopy. The sample of known signatures were on the Identity Card and the passport.
97. He confirmed that the date of issue of the Identity Card was 24th June, 2016 while the date of issue of the passport was 30th September, 2016.
98. He also confirmed that A1 was dated 17th January, 2013 while A2 was dated 11th April, 2013. He admitted that he did not look at the known signature before the year 2013.
99. He also admitted that at page two of his report he set out the reasons with regard to the photographs which examinations he did in the absence of the Plaintiff.
100. He further admitted that the report was dated 10th September, 2021 while A2 was dated 2013. He confirmed that the photograph was eight years old and that photographs change on account of age but the appearance would be the same apart from wrinkles.
101. He confirmed that the hairstyle appearing on the two photographs was different and clarified that he did not mean that the hairstyle should be the same because the hairstyle can change with time.
102. Upon cross-examination by counsel for the 3rd Defendant, PW2 admitted that he is still a document examiner and even though he was gazetted in the police force, he could not remember the year.
103. Upon re-examination, PW2 he stated that his report was filed on 20th September, 2021 and that he was not informed that the defence lawyers were asking for his credentials.
104. He also stated that the defence have not objected to the production of the documents. On A2 (the transfer forms) PW2 reiterated that though appearance changes as people grow older physical appearance such as the shape of the nose, shape of the face remains the same while the hairstyle may change.
105. PW2 also reiterated that his observation is that the photographs that he was given belong to two different people.
106. The Plaintiff's case was closed.
107. In support of the 3rd Defendant's case, one Wilson Ndungu Kamomoe testified as DW1. He prayed that his witness statement dated 28th July, 2021 be adopted as part of his evidence, which prayer the court acceded to.
108. DW1 also produced documents in his list of documents dated 28th July, 2021 as exhibits. The first was a copy of a title deed issued on 22nd December, 2020 and it was produced and marked as Exhibit D1. His testimony is that before the suit property was registered in his name, it had been registered in the name of Hassan Aliow Roba from whom he purchased the suit property.
109. He also testified that before he purchased the suit property, he applied for an official search and was issued with one dated 6th December, 2020. He produced a copy of the official search as Exhibit D2.



110. He further testified that he was issued with a green card on 8th December, 2020 which confirmed that the suit property was registered in the name of Hassan Aliow Roba at entry No. 7. A copy of the green card was marked and produced as Exhibit D3.
111. It was his evidence that the land sale agreement is dated 9th December, 2020 and the purchase price s Kshs. 40,000,000/= and added that on 10th December, 2020 he transferred Kshs. 4,800,000/=. He produced the said transfer as Exhibit D4.
112. It was also his evidence he had another transfer dated 12th April, 2021 for Kshs. 1,000,000/= which he produced as Exhibit D5 and the land sale agreement dated 9th December, 2020 which he produced as Exhibit D6.
113. It was further his evidence that he had the spousal consent of Suleika Hussein Hassan where she described herself as Hassan Aliow Roba's wife. It was marked and produced as Exhibit D7. Suleika Hussein Hassan's Identity Card was marked and produced as Exhibit D8.
114. He produced as Exhibit D9 a letter of consent from the Land Control Board that gave consent to Hussein Aliow Roba to transfer the suit property to him.
115. He testified that he was not aware that the suit property did not belong to Hassan Aliow Roba and denied that he conspired with the other Defendants to defraud the Plaintiff.
116. He also denied that he obtained the title fraudulently.
117. In his witness statement, he denies being aware of any claims with regard to the suit property.
118. Upon cross-examination by counsel for the Plaintiff, DW1 confirmed that he got to know of Aliow Roba through a land agent known as Ng'ang'a. He added that Ng'ang'a took him to the suit property where he met with him.
119. He also confirmed that the land sale agreement was drawn by a lawyer and that it is at the lawyer's office that they agreed on the purchase price.
120. He stated that even though he met with Hassan on the suit parcel in December 2020, he did not take his phone number.
121. He admitted that he was forty-two years old and had been doing business for a period of fifteen years. He acknowledged that ordinarily, he would take personal details of his clients when they did purchases in large quantities.
122. He explained that he did not take Hassan's details because he had not seriously thought about purchasing the suit property. He admitted that the land agent known as Ng'ang'a was not a witness in this case and conceded that he would have been an important witness.
123. He confirmed that he chose the law firm that prepared the sale agreement which was Sheth and Wathigo Advocates. He stated that Hassan wanted to take them to a lawyer known as Ogolla but he insisted that they use his Advocates.
124. He reiterated that the purchase price of the suit property was Kshs. 40,000,000/= and according to the agreement the deposit was kshs. 5,000,000/=.
125. He stated that the agreement was executed the day it was drafted and on 10th December, 2020 he paid Kshs. 4,800,000/=.



126. He admitted that on 9th December, 2021 he did not pay any instalment. He also admitted that the next instalment of the purchase price was in April and it was for Kshs. 1,000,000/=. He stated that even though he had no evidence of payment of Kshs. 35,000,000/=: it was not true that he only paid Kshs. 5,800,000/=.
127. He denied that he paid the purchase price in cash and added that he paid through RTGS. He stated that he complied with clause 5 of the land sale agreement and that he had conducted due diligence.
128. He admitted that he wrote the letter dated 6th December, 2020 to the Land Registrar but he did not have any evidence that it was received.
129. He also admitted that the application for consent of the land control board did not bear a stamp of the Land Control Board and neither did it have his signature or Aliow Roba's signature.
130. He further admitted that even though Aliow Roba's wife gave a spousal consent, he did not see a marriage certificate as he was only shown the identity card by Aliow Roba.
131. He denied that he obtained the suit parcel fraudulently and stated that Aliow Roba got the suit property from Isaac Chalagat.
132. He stated that he was not aware that the 1st and 2nd Defendants had declined to give their evidence in the matter and admitted that he had not called Hassan Aliow Roba to come to court and give evidence on his behalf.
133. Upon further cross examination by counsel for the 1st and 2nd Defendants, he reiterated that he bought the suit property for Kshs. 40,000,000/= from Hassan Aliow Roba.
134. He admitted that the evidence he had in court was for payment of Kshs. 5,800,000/=. He also admitted that balance according to clause 1.1.6 of the land sale agreement, was to be paid within thirty days from 9th December, 2020. He further admitted that he did not pay the balance within the required period.
135. He confirmed that apart from himself, the lawyer, Hassan and his wife, there were no other witnesses. He insisted that he investigated the title of the suit property by conducting a search **and that he saw the green card.**
136. He also confirmed that he spoke to the neighbors and one of them identified himself as Bute. He stated that the said Bute informed him that the suit property belonged to Hassan and also admitted that he did not call Bute as a witness. DW1 stated that for him, that was enough investigation of title.
137. He admitted that the RTGS showed his intention to transfer and that he had no evidence of the actual transfer.
138. Upon cross examination by counsel for the 3rd Defendant, he admitted that he had the title of the suit property and that he had not paid the entire Kshs. 40,000,000/= as at the time of the transfer.
139. He admitted that he did not have any evidence of payment of stamp duty and when he was referred to the spousal consent that had been produced as Exhibit D7, he conceded that there was no evidence that it was received at the Land Registry.



140. He confirmed that the Plaintiff alleged fraud and admitted that there was a criminal case filed against him in Nakuru Law Courts though he could not remember the case number. He confirmed that the said criminal matter is still pending in court.
141. Upon re-examination, he stated that he only took Aliow Hassan's phone number after the negotiations to purchase were concluded.
142. He also stated that he took the said phone number in December but could not remember the year. On the marriage certificate, he stated that Hassan's wife signed the spousal consent before the lawyer and he had no reason to doubt that she was his wife.
143. He further stated that he was to complete the agreement within thirty days and when he did not, Hassan did not write to demand that he completes the agreement.
144. He stated that to date he had not received a letter to pay the balance of the purchase price and he would not have paid it because of this suit that is pending determination.
145. He also stated that Hassan had not complained that the purchase price was not paid to his bank account and clarified that when he stated that there was a pending suit where he had been charged together with the land registrar for fraud, he meant the present suit. He then reiterated that there was no other case pending.
146. The 3rd Defendant's case was then closed.
147. In support of the 4th Defendant's case one Roussos Ritho Mwangi testified as DW3. He stated that he was the Land Registrar based in Naivasha.
148. It was his evidence that he was aware of the present case and that he had a copy of the green card for land parcel No. Gilgil/Gilgil Block 1 (Kikopey) which shows the history of the said parcel of land.
149. It was also his evidence that the parcel file of the suit property was opened on 26th March, 2012, that the suit property measures 8.13 Ha and that it is on Registry Map Sheet No. 12 and 14.
150. It was further his evidence that the suit property came about after the subdivision of land parcel No. 2857 and the entries were as follows;
 - a. Entry No. 1 is dated 26th March, 2012 and it shows that Mandhani Investments Limited had been registered as the owner of the suit property.
 - b. Entry No. 2 shows that a title deed was issued.
 - c. Entries No. 3 and 4 are dated 12th April, 2012 which show that Zainul Hassanal Esmail Bhanji was registered as the owner and a title deed issued.
 - d. Entries No. 5 and 6 are dated 18th April, 2013 and they show that Isaac Chelagat Kemunge was registered as the owner of the suit property and a title deed issued.
 - e. Entries No. 7 and 8 are dated 16th June, 2016 when Hassan Aliow Roba was registered as an owner of the suit property and a title deed issued.



- f. Entries No. 9 and 10 are dated 22nd December, 2020 when Wilson Nd'ungu Kamumue was registered as an owner and a title deed issued.
 - g. Entry No. 12 is an inhibition entered on 25th January, 2021 pursuant to Section 68 of the [Land Registration Act](#) until the present suit is heard and determined.
1. He produced the green card as Exhibit D10. When referred to Exhibit D1 and Exhibit P2, he admitted that he had seen the two titles.
 152. He testified that both titles are in respect of the suit property and admitted that a parcel of land can only have one title.
 153. It was his evidence that a document examiner should examine the two titles and state which of the two is genuine. He testified that the first title was issued to the Plaintiff on 12th April, 2012 and when he was referred to the certificate of official search that was produced as Exhibit D2, he stated that he had no doubts that it was genuine.
 154. He testified that he had seen the documents that were produced by the 3rd Defendant which included the official search, the sale agreement, the spousal consent, the application for the land control board consent and the letter of consent.
 155. He also testified that the consent from the Land Control Board was necessary and there needs to be payment for stamp duty. He further testified that without payment of stamp duty, there cannot be a transfer.
 156. It was his evidence that there must also be proof of payment for obtaining consent and transfer together with stamp duty but none was produced by the 3rd Defendant.
 157. He acknowledged that the Plaintiff alleged in her Complaint that the Land Registry colluded with the 3rd Defendant but a perusal of the parcel file showed that there was no transfer from the Plaintiff to Isaac Chelagat or from Hassan to the 3rd Defendant.
 158. It was further his evidence that the Land Registry registers land but does not draft documents for parties.
 159. He testified that the Plaintiff sought for cancellation of title and that they would not object because it would be a court order. He also testified that he could not tell the value of the land.
 160. He also testified that from the documents produced by both parties, he did not have any documents to support entry No's 5 to 10.
 161. He further testified that the parties making the application for transfer should have copies of all the documents lodged at the Lands Registry.
 162. Upon cross-examination by counsel for the Plaintiff, he confirmed that he had been a Land Registrar for a period of four years and was familiar with the registration process.
 163. He also confirmed that a person registering himself as an owner of the suit property should have the following documents;
 - a. Transfer Form.
 - b. Photographs.



- c. For freehold property, the Land Control Board Consent.
 - d. Proof of payment
 - e. Receipts for stamp duty.
 - f. Spousal consent or an affidavit to show that the person is not married.
1. He confirmed that the original title deed needed to be surrendered and that it was not possible for Isaac to be given a title before Zainul surrendered her title.
165. He conceded that he was not aware how Isaac got registered as the owner of the suit property. He stated that if an original title is lost, there was a procedure for reissuance of the said title. It included issuing an advertisement in two major newspapers, getting a Chief's letter, an affidavit, an abstract and payment for the rates.
 166. He confirmed that once those documents are received, they are taken to the Kenya Gazette before the title is re-issued. He also confirmed that a new title could not be issued without the previous title being cancelled.
 167. He reiterated that he had seen the title deeds in possession of both the Plaintiff and the 3rd Defendant and recommended that a document examiner looks at both titles in order to determine the genuine one.
 168. He confirmed that the Plaintiff's title was issued first and admitted that they usually retain a copy of the transfer documents which are kept in the parcel file.
 169. He admitted that verification entails looking at the parcel file and that in the year 2012, a photograph was required in the registration process.
 170. He also admitted that on the consideration and remarks, sometimes the consideration was shown but it depended on the Land Registrar.
 171. When he was referred to Exhibit D3 which was the green card, he admitted that it was certified but the date was not very clear and reiterated that he had perused all the documents that had been produced in court.
 172. Upon further cross examination by counsel for the 1st and 2nd Defendants, he confirmed that Exhibit D10 originated from their office and it showed the ownership history of the suit property.
 173. He also admitted that the face of the green card reflected the transfer of the records that they had kept. He further admitted that all the entries had been signed by the Land Registrar.
 174. He confirmed that before he registers a transfer, the documents that he had earlier listed had to be availed and if any of the documents were missing, the transfer would be rejected.
 175. He also confirmed that if the entries were registered, it was possible that the documents were presented. He further confirmed that for the suit property, there was no parcel file.
 176. He disclosed that the green card was in the binder which was different from a parcel file.
 177. He reiterated that he had been a registrar since the year 2020, that Naivasha was his second station and added that Naivasha had four land registrars.



178. He stated that he was an Advocate of the High Court of Kenya who had been admitted to the bar in the year 2016 and reiterated that the parcel file in respect of the suit parcel was missing.
179. Upon cross-examination by counsel for the 3rd Defendant, he admitted that he discovered that the parcel file was missing when he received the summons to give evidence in this suit.
180. He confirmed that he reported that the parcel file was missing and admitted that he was not aware if an OB number had been registered in respect of the missing parcel file.
181. He confirmed that the green card was a summary of the parcel file and that there are documents that should have been in the parcel file.
182. He admitted that in his evidence in chief, he had testified that the documents for entry No's 5 to 10 were missing but it was not true as he did not have the parcel file.
183. He confirmed he was not in Naivasha as at December 2020. He disclosed that there is a presentation book where all information is entered.
184. He admitted that the presentation book would have all the information in the parcel file but he did not bring it to court and neither did he have the presentation book number.
185. He also admitted that from the green card, the registered owner of the suit property was Wilson Ndungu Kamumue. He further admitted that he knew that the parcel file was necessary and that he had communicated the fact that it was missing to the Attorney General.
186. He confirmed that he did not know if the Attorney General communicated it to the other counsels.
187. Upon re-examination, he reiterated that if the documents in the parcel file were missing, then the parties must have copies which they should produce.
188. He stated that the parcel file may be lost or misplaced and that his duty entailed correcting entries made incorrectly or fraudulently.
189. The 4th Defendant's case was then closed.
190. The 1st and 2nd Defendant did not call any witnesses and their case was also closed.

ISSUES FOR DETERMINATION.

191. The Plaintiff filed her submissions on 18th December, 2023, the 3rd Defendant filed his submissions on 5th February, 2024 and the 1st and 2nd Defendants also filed their submissions on 5th February, 2024.
192. On 8th February, the Plaintiff filed further submissions in response to the 1st and 2nd and 3rd Defendants' submissions.
193. The Plaintiff in her submissions gives a summary of the facts of the case and identifies the following issues for determination;
 - a. Whether the Plaintiff is the bonafide owner of the suit property.
 - b. Whether the Plaintiff is entitled to the reliefs sought.
194. On the first issue, the Plaintiff relies on the decisions in Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR, Munyu Maina v Hiram Gathiha Maina [2013]



eKLR and submits that each party is under an obligation to demonstrate that their title has a good foundation.

195. The Plaintiff relies on *Samuel Kamwere vs Land Registrar, Kajiado* [2015] eKLR and submits that even though the root of her title had not been challenged, she has demonstrated how she acquired the suit property.
196. The Plaintiff while relying on *Ali Wanje Ziro v Abdulbasit Abeid Said & another* [2022] eKLR submits that she has demonstrated to this court that the transfer of the suit property from her name to that of the 1st Defendant was fraudulent and was marred with irregularities.
197. It is the Plaintiff's submissions that she never sold the suit property to the 1st Defendant or to anyone and it therefore beats logic how the 1st Defendant obtained transfer of the suit property.
198. It is also the Plaintiff's submissions that even though the 1st Defendant alleged that there was a land sale agreement between himself and the Plaintiff, no evidence was adduced to show that the consideration and stamp duty was paid.
199. It is further the Plaintiff's submissions that neither the 1st nor the 2nd Defendants proved how they acquired the suit property and the Land Registrar in his evidence confirmed that there were no documents that supported the transfer of the suit property to the 1st Defendant.
200. The Plaintiff relies on *Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others* (citation not given) and submits that even though the 1st and 2nd Defendants entered appearance, they failed to call any evidence and therefore they did not rebut her evidence.
201. The Plaintiff submits that since the 1st Defendant never possessed a good title, he could not transfer a good title to the 1st and 2nd Defendants. She relies on *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* [2015], *Daudi Kiptugen v Commissioner of Lands Nairobi Lands & 4 others* [2015] eKLR, *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR among other judicial authorities in support of this point.
202. The Plaintiff also submits that the 3rd Defendant acquired the suit property unprocedurally as he admitted that he did not pay the entire purchase price for the suit property and neither did he produce evidence that he had paid stamp duty.
203. The Plaintiff relies on Section 37(2) of the [Land Registration Act](#) and submits that the 3rd Defendant also failed to produce the transfer document for the suit property.
204. The Plaintiff also relies on the judicial decisions in *Samuel Kamere v Land Registrar Kajiado, Nairobi Court of Appeal, Civil Appeal No. 28 of 2005* [2015]eKLR, *Munyu Maina v Hiram Gathiha Maina, Court of Appeal Civil Appeal No. 239 of 2009* as was cited in *Don-woods Company Limited vs Eric Mumo Mutisya & 3 Others* [2021] eKLR and reiterates that the 3rd Defendant failed to show the acquisition of the property was done legally and all legal formalities adhered to.
205. The Plaintiff relies on *Julius Kariuki Muiruri v Smart Top Media Limited & another* [2018] eKLR, *Albert Mae Gacie v Attorney General & 4 Others* [2006] eKLR and seeks that the orders sought in the Plaintiff be granted.
206. The 3rd Defendant in his submissions relies on the Ugandan judicial decision of *Katende v Haridar & Company Limited* [2008] 2 E.A 173 and submits that he is a bona fide purchaser for value of the suit property.



207. The 3rd Defendant also relies on the decision in Bishopgate Motor Finance Corporation Ltd vs Transport Brakes Ltd (1949) 1KB 322 as was cited in Katana Kalume & another vs Municipal Council of Mombasa & another [2019]eKLR, Republic vs The Registrar of Titles, Mombasa & 2 Others ex parte Emfill Limited [2012] eKLR, Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina [2019] eKLR and submits that the 1st and 2nd Defendants failure to call evidence is an indicator that they might have colluded to defraud him.
208. It is the 3rd Defendant's submissions that the court should find and hold that if there was any fraud, then it was committed by the 1st and 2nd Defendants and not by the 3rd Defendant.
209. The 1st and 2nd Defendants in their submissions rely on the judicial decisions of Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR and Kinyanjui Kamau vs George Kamau [2015] eKLR and submit that where fraud is alleged, it is not enough to simply infer fraud from the facts.
210. It is also the 1st and 2nd Defendants submissions that since they were both issued with Certificates of Title by the Land Registrar and later transferred the property to the 3rd Defendant, the same should be taken as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner of the suit property.
211. It is further the 1st and 2nd Defendants submissions that the evidence of the document examiner was challenged as he did not have a gazette notice recognizing him as a document examiner and neither did he meet the Plaintiff in person before making his report.
212. The 1st and 2nd Defendants submit that the Land Registrar admitted that the parcel file could not be traced and yet he is the custodian of all land documents in Naivasha Land Registry. They submit that the Land Registrar's evidence failed to show that entries No. 5 to 10 on the green card were not supported by any documents.
213. The 1st and 2nd Defendants rely on the decisions in John Mbogua Getao vs Simon Parkoyiet Mokare & 4 others [2017] eKLR, Evans Otieno Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR, Tum & 2 Others vs Towett & 5 Others (citation not given) and submit that the Plaintiff did not adduce any evidence that the Defendants were investigated or charged in court for fraud and adds that even though the Plaintiff wrote letters to the Directorate of Criminal Investigations, there is no evidence that they elicited any responses.
214. The 1st and 2nd Defendants submit that the Plaintiff failed to call Ms. Damaris Gitonga Advocate as a witness to give evidence and deny the existence of the sale agreement and that the production of the letter dated 10th September, 2021 was not sufficient to establish fraud.
215. The 1st and 2nd Defendants rely on Sections 107 (1) and (2), 109 and 112 of the *Evidence Act* and submit that even though they did not testify, it was incumbent upon the Plaintiff to prove **that there was fraud on their part.**
216. The 1st and 2nd Defendants end their submissions by arguing that the Plaintiff has failed to prove fraud against them and her suit should therefore be dismissed.



217. The Plaintiff in her submissions filed in response to the 1st, 2nd and 3rd Defendants submissions relies on Section 26(1) of the *Land Registration Act* and reiterates that since the 1st and 2nd Defendants did not call any evidence, her evidence remains uncontroverted.
218. The Plaintiff reiterates the evidence of the document examiner and submits that his evidence was not challenged. It is the Plaintiff's submissions that even though the 1st and 2nd Defendants argue that the document examiner did not produce a certificate of recognition or a gazette notice, the said argument is an after thought as no notice to produce was made by the Defendants prior to the date of the hearing.
219. The Plaintiff relies on the judicial decision of *Hezekiah vs Mbugua (Civil Appeal E187 of 2021)* [2023] KEHC 1946 (KLR) (10 March 2023) (Judgment) and reiterates that she lodged a complaint with the Directorate of Criminal Investigations.
220. The Plaintiff argues that she can only wait for the Directorate of Criminal Investigations to conduct the investigations and cannot direct them on how they do their work.
221. With regard to the 3rd Defendant's submissions, the Plaintiff submits that the 3rd Defendant is not an innocent purchaser for value because he could not have got a better title than that of the 1st and 2nd Defendants.
222. The Plaintiff argues that the 3rd Defendant admitted to only paying Kshs. 5,800,000/= out of the purchase price of Kshs. 40,000,000/= and did not therefore comply with the requirements of the land sale agreement that he had entered into with the 2nd Defendant.
223. The Plaintiff ends by reiterating that the reliefs sought in the Plaint be allowed as prayed.

ANALYSIS AND DETERMINATION.

224. After considering the pleadings, evidence and rival submissions filed in this suit, the two issue that arises for determination are whether the Plaintiff is entitled to the orders sought in her Plaint and who should bear the costs of this suit.
 - A. Whether the Plaintiff is entitled to the orders sought in her Plaint.
225. The orders sought have been set out in the preceding paragraphs but in order to put things into perspective, I reproduce them as hereunder;
 - i. A declaration that the transfers, registration of thereof and consequential Title Deeds issued to the 1st, 2nd and 3rd Defendants and any documents obtained to procure such registration of title to the Plaintiffs suit property known as Gilgil/Gilgil Block 1/13171 (Kikopey) measuring 8.13 hectares situate in Elementaita within Naivasha sub county in the names of the 1st, 2nd and 3rd Defendants without the consent of and or payment of due compensation to the Plaintiff were obtained fraudulently, unprocedurally, illegally and unlawfully through corrupt scheme hence unlawful, null and void ab initio.
 - ii. An order of rectification of the land register to cancel entries No. 5-10 in the land register relating to the property known as Gilgil/Gilgil Block 1/13171



(Kikopey) measuring 8.13 hectares situate in Elementaita within Naivasha Sub-county in Nakuru County and or all entries relating to registration of a transfer and issuance of title deeds in the names of the 1st, 2nd and 3rd Defendants or any other person thereafter and restoration of the Plaintiff as the sole registered owner of the said property.

- iii. An order of permanent injunction to restrain the Defendants, their servants agents, employees, proxies or anyone claiming under them and any other person from trespassing, entering upon, occupying, constructing on, developing, selling, transferring, leasing, charging, encumbering and or in any other manner dealing or interfering with the Plaintiffs ownership, possession or use of the property known as Gilgil/Gilgil Block 1/13171 (Kikopey) measuring 8.13 hectares situate in Elementaita within Naivasha Sub-County in Nakuru County.
- iv. Costs of the suit.
- v. Any other relief that the court may deem just and fit to grant.

226. I shall analyse and determine (i) (ii) and (iii) together.
227. The Plaintiff's case is that she was the registered owner of land parcel No. Gilgil/Gilgil Block 1/13171 (Kikopey) after purchasing it from Mandhani Investment Limited.
228. It is also her case that she has been in peaceful occupation of the suit property until the year 2021 when a neighbor called her and her husband informing them that a group of men had entered the suit property with the intention of selling it.
229. It is further her case that after she was informed of the trespassers, she made reports at the Directorate of Criminal Investigations.
230. It is her case that she also went to the Lands Registry Naivasha where she requested for a copy of the green card which showed that on various dates, the suit property had been transferred and registered in the names of the 1st, 2nd and 3rd Defendants.
231. She denies ever selling the suit property and states that she has in her possession the original title deed of the suit property which was issued to her.
232. In support of her case, the Plaintiff produced a copy of her identity card number 1239100 that was issued on 24th June, 2016 (Exhibit P1).
233. A copy of title deed for Gilgil/Gilgil Block 1/13171 (Kekopey) measuring 8.13 Ha issued to the Plaintiff Zainul Hassanali Esmail Bhanji on 12th April, 2012. It was produced as Exhibit P2. The Plaintiff showed the court the original title deed.
234. A copy of the green card for land parcel No. Gilgil/Gilgil Block 1/13171 (Kekopey) measuring 8.13 Ha was produced. (Exhibit P3). Its entries were set out in great detail by the Land Registrar who testified as DW3.
235. A copy of a letter dated 7th January, 2021 was produced. It was written by the firm of Litoro & Omwebu Advocates to the Director, Criminal Investigations DCI - Gilgil registering a complaint of trespass and forceful detainer on land parcel No. Gilgil/Gilgil Block 1/13171 (Kikopey).(Exhibit P4(a))
236. A copy of a letter dated 13th January, 2021 was produced. It was written by the firm of Litoro & Omwebu Advocates to the Director, Directorate of Criminal Investigations Department registering a



- complaint of trespass and forceful detainer of land parcel No. Gilgil/Gilgil Block 1/13171(Kikopey) (Exhibit P4(b)).
237. A copy of a letter dated 9th September, 2021 was produced. It is written by the firm of Litoro & Omwebu Advocates to Emmanuel Karisa Kenga, Smart Eye Technology & Consultants instructing him to make a Document Examination Report on the Sale Agreement dated 17th January, 2013 and the transfer dated 11th April, 2013. (Exhibit P5(a)).
238. A copy of a letter dated 8th September, 2021 was produced. It was written by the Plaintiff's Advocates Litoro Omwebu and addressed to Damaris W. Gitonga & Co. Advocates. The letter requested the said Advocate to confirm if the Plaintiff was their client and whether the said firm had drafted the land sale agreement dated 17th January, 2013 and the Transfer dated 11th April, 2013. (Exhibit P 6(a)).
239. A copy of a letter dated 10th September, 2021 was produced. It was written by the firm of Damaris W. Gitonga & Co. Advocates and addressed to Litoro Omwebu & Co. Advocates. The letter stated that at the time of the drafting of the alleged land sale agreement, the firm of Damaris Gitonga & Co. Advocates was not in existence. The said firm denied that the Plaintiff was ever its client and equally denied that it prepared the alleged land sale agreement and transfer (Exhibit P6(b)).
240. A letter dated 8th September, 2021 was produced. It was written by the firm of Litoro Omwebu & Co. Advocates, the Plaintiff's Advocates and addressed to the Directorate of Criminal Investigations Nairobi. The letter was a follow up to the letter dated 8th September, 2021 previously sent to the Directorate of Criminal Investigations. It forwarded a copy of the land sale agreement and the transfer requesting for examination of signatures and passport photos on the said documents. The disparity in the pictures and signatures was brought up and the said firm requested for investigations to be done as it was a clear case of forgery (Exhibit P7).
241. A copy of a report dated 10th September, 2021 was produced by PW2. It was done by Smart Eye Technologies and Consultancy and addressed to Litoro Omwebu & Co. Advocates. In his testimony, PW2 extensively sets out his findings which in summary is that the signature appearing on the land sale agreement dated 17th January, 2013 purportedly between the Plaintiff and Isaac Chelagat Kemunge (the 1st Defendant) does not belong to the Plaintiff, the photograph attached to the transfer forms purporting to transfer the suit land to the 1st Defendant and the signature thereon are not the plaintiff and does not belong to the Plaintiff. The report is (Exhibit P5 (b)).
242. The 3rd Defendant's case is that he purchased land parcel No. Gilgil/Gilgil Block 1/13171 (Kikopey) from Hassan Aliow Roba.
243. It is also his case that he was issued with a title deed on 22nd December, 2020 and denied ever being aware of any other claims over the suit property.
244. In support of his case he produced a copy of a title deed for land parcel No. Gilgil/Gilgil Block 1/13171 (Kekopey) measuring 8.13 Ha issued to Wilson Ndungu Kamomoe on 22nd December, 2020. (Exhibit D1).
245. A copy of a Certificate of Official Search was produced dated 7th May, 2021 for land parcel No. Gilgil/Gilgil Block 1/13171 which showed that Wilson Ndungu Kamomoe had been registered as the owner of the suit property on 22nd December, 2020. (Exhibit D2)
246. A copy of the green card for land parcel No. Gilgil/Gilgil Block 1/13171 (Kekopey) was produced. (Exhibit D3) Its entries were set out in great detail by the Land Registrar who testified as DW2.



247. A copy of a land sale agreement dated 9th December, 2020 was produced. It was between Hassan Aliow Roba the vendor and Wilson Ndungu Kamomoe the purchaser. The land sale agreement was for land parcel No. Gilgil/Gilgil Block 1/13171 and it was being sold for Kshs. 40,000,000/= . (Exhibit D4)
248. A copy of a transfer dated 22nd December, 2020 was produced. It was between Hassan Aliow Roba and Wilson Ndungu Kamomoe for land parcel No. Gilgil/ Gilgil Block 1/13171 (Kekohey). (Exhibit D5).
249. A copy of a spousal consent was produced. It was sworn by Suleika Hussein Hassan on 9th December, 2020. (Exhibit D7).
250. A copy of Suleika Hussein Hassan’s Identity Card No. 34070831 was produced. (Exhibit D8). A copy of a letter of consent dated 10th December, 2020 was produced. It gave consent to Hassan Aliow Roba to transfer land parcel No. Gilgil/Gilgil Block 1/13171 (Kekohey) to Wilson Ndungu Kamomoe. (Exhibit D8).
251. The Land Registrar also produced a copy of the Green Card for the suit property as Exhibit D9. In his testimony, he set out the entries therein in great detail.
252. It is not disputed that the suit parcel was initially registered in the name of Mandhani Investments Limited before it was transferred to the Plaintiff, Zainul Hassanali Esmail Bhanji.
253. It is also not disputed that the Plaintiff still has in her possession the original title deed of the suit property that was issued to her as a registered owner of the suit parcel.
254. What is disputed is whether the Plaintiff Zainul Hassanali Esmail Bhanji sold the suit property to Isaac Chalagat the 1st Defendant who in turn sold it to Hassan Aliow Roba the 2nd Defendant who later sold it to Wilson Ndungu Kimomoe the 3rd Defendant.
255. The Plaintiff has particularized fraud on the part of the Defendants. The burden is on her to prove that the suit property was fraudulently transferred from her to Isaac Chelagat the 1st Defendant.
256. The Court of Appeal in *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR held as follows;
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 wherein the Court stated that:
- “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or
- fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
257. The particulars of fraud against the 1st Defendant are that he conspired with the 4th Defendant to obtain registration of the suit property in his name before he sold it to the 2nd Defendant who later sold it to the 3rd Defendant.
258. During the hearing, the Plaintiff testified that she had in her possession the original title deed to the suit property that had been issued to her and denied selling the suit property to the 1st Defendant.
259. The 1st and 2nd Defendants entered appearance, filed their
- Statements of Defence and their list of Documents. The 1st Defendant alleged that he had purchased the suit property from the Plaintiff and he attached to his list of documents a copy of a land sale



- agreement dated 17th January, 2013 that was purported to have been between the Plaintiff and the 1st Defendant.
260. Also attached to the said list of documents is a copy of a transfer of land parcel No. Gilgil/Gilgil Block 1/13171 (Kekopey) that was allegedly signed by the Plaintiff and the 1st Defendant.
261. The Plaintiff in her evidence denies signing both the land sale agreement dated 17th January, 2013 and the transfer dated 11th April, 2013.
262. The document examiner who testified as PW2 filed a report and gave evidence on the analysis of the signatures and photograph on the land sale agreement dated 17th January, 2013 and the

transfer dated 11th April, 2013.

263. It was the Document Examiner's findings that when he compared the signatures on the land sale agreement and transfer with the Plaintiff's sample signatures, he found that the signatures were made by different authors.
264. The document examiner also found that the photograph in the transfer form as compared to the Plaintiff's Photograph in her Identity Card and passport were different as the facial appearances were not identical.
265. Even though the Defendants took issue with the Document Examiner's report on the ground that he did not produce any evidence to show that he was gazetted, no evidence challenging his report was adduced. The forensic document examiner's evidence therefore remains uncontroverted.
266. The 1st and 2nd Defendants filed their pleadings and participated in the hearing, they opted not to call any witness or produce any documents in their defence and for that reason the evidence against them remains unchallenged.
267. In Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, the Learned Judge citing with approval the decision in Edward Muriga through Stanely Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997 held as follows:
- “In this matter, apart from filing its Statement of Defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...”
268. Also, in Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR it was held as follows:-
- “In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”
269. Section 26 of the *Land Registration Act* provides that a certificate of title held by a proprietor shall be taken as prima facie evidence that the registered proprietor was the absolute and indefeasible owner of the property and shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
270. My view is that the Plaintiff has established that she did not sign both the land sale agreement dated 17th January, 2013 and the transfer dated 11th April, 2013. The said agreement and



transfer is therefore void to the extent that the 1st Defendant relies on them to assert his erstwhile title to the suit parcel. It is evident that there was fraudulent, unprocedural and illegal dealings in respect of the Plaintiff's parcel of land.

271. The 3rd Defendant has put forth a defence of innocent purchaser for value. This is a remedy in equity.

272. It is trite law that a person cannot give what they do not have. This is expressed in the Latin maxim "Nemo Dat quod Non Habet". Based on the foregoing, it is evident that the 1st Defendant's acquisition of title to the suit parcel was fraudulent. Can we say that he had title to the land to enable him sell to the 2nd Defendant? It is alleged that the 1st Defendant entered into a contract of sale of the suit parcel with the 2nd Defendant but such contract, if at all it existed, was void ab initio on account of fraud on the part of the 1st Defendant. The 1st Defendant could thus not pass a good title to the 2nd

Defendants from whom the 3rd Defendant's interests in the suit parcel springs. This must have been the reasoning of the Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR where it was held that;

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.

273. The 4th defendant, in its statement of defence, denied the averments in the Plaintiff's statement of particulars of fraud against the 1st, 2nd and 3rd Defendants together with particulars of statutory duties of the 4th Defendant.

274. The Land Registrar in his evidence stated the following, which in my opinion are significant in making a determination of this matter:

- a. Without payment of stamp duty, there cannot be a transfer.
 - b. There must also be proof of payment for obtaining consent to transfer together with stamp duty but none was produced by the 3rd Defendant.
 - c. He did not have any documents to support entry No's 5 to 10 in the green card.
 - d. Parties making the application for transfer should have copies of all the documents lodged at the Lands Registry.
 - e. The original title deed needed to be surrendered and that it was not possible for Isaac (1st Defendant) to be given a title deed before Zainul (the Plaintiff) surrendered her title.
 - f. Upon re-examination, he reiterated that if the documents in the parcel file were missing, then the parties must have copies which they should produce.
1. In *Arthi Highway Developers (Supra)* the Court of Appeal agreed with the sentiments of the trial Court that

"As regards complicity by the Commissioner of Lands, the trial Court found the officials at the land Registry, who are the custodians and issuers of Titles to have allowed the existence of two different Titles on the same property with all endorsements made thereon, which on its own was participation in the forgery.



It observed that the Ministry of Lands kept the master record of all land and the registered owners, under a system which guarantees a land title certificate to be full, valid and indefeasible Title. The Commissioner of Lands failed to explain in this case how two land Title certificates on the same land could exist and which one was genuine. The responsibility to ensure accuracy of the register and authenticity of Titles lay with the Government, which is by law required to pay compensation for any fraud or other errors committed during registration. It was on that basis that the Commissioner of lands was found to have been privy to the forged entries during registration and issuance of the title”

276. The 4th Defendant having set out, in its written statement of defence, the particulars of fraud on the part of the 1st, 2nd and 3rd Defendant. It is evident that there were fraudulent and illegal undertakings perpetuated by the officials of the 4th Defendants. By and large, the 4th Defendants pleadings and testimony have demanded that the 1st, 2nd and 3rd Defendants produce copies of documents that they lodged with it. The 4th Defendant categorically states that they all must have copies of these documents if at all the transactions are genuine.

277. In *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR, the court while considering the provisions of Section 26(1) of the [Land Registration Act](#) held as follows;

“

“ 13. It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme...

18. . I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.” (Emphasis mine)

278. In conclusion and in determination of the first question, the evidence of PW2 proves that the transfer from the Plaintiff to the 1st Defendant was fraudulent. The 2nd and 3rd Defendant by reason of failure to tender evidence in negation of the Plaintiff’s claim are found to have conceded it. In light of the 4th Defendant’s defence of fraudulent conduct on the part of the 1st, 2nd and 3rd Defendant, it was incumbent upon the 3rd Defendant to prove that the transactions leading to acquisition and transfer of title as between him and the 2nd Defendant was not fraudulent. He failed to do so.

279. Section 80(1) of the [Land Registration Act](#) provides as follows;

“ 80.

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

280. In the circumstances, nothing is easier than this court finding that there was fraud in the transfer of the suit property from the Plaintiff’s name to the 1st Defendant’s name and that all subsequent transfers



to the 2nd and 3rd Defendant were unprocedural and illegal and further that the title(s) resulting from this fraud be cancelled.

B. Who should bear costs of the suit?

281. It is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the Civil Procedure Act. A successful party should ordinarily be awarded costs of an action unless the court, for good reason directs otherwise.

DISPOSITION.

282. In the result, the Plaintiff's suit against the Defendants succeeds and I hereby grant orders as follows:

- a. A declaration is hereby made that the transfers, registration and issuance of title deeds in respect of Gilgil/Gilgil Block 1/13171 (Kikopey) measuring 8.13 hectares situate in Elementaita within Naivasha sub county to the 1st, 2nd and 3rd Defendants and any documents obtained to procure such registration of title without the consent of and or payment of due compensation to the plaintiff were obtained fraudulently, unprocedurally, illegally, unlawfully and through a corrupt scheme hence unlawful, null and void.
- b. The 4th Defendant is hereby ordered to rectify the land register in respect of Gilgil/Gilgil Block 1/13171 (Kikopey) measuring 8.13 hectares situate in Elementaita within Naivasha Sub-county in Nakuru County by cancelling all entries relating to registration of transfers and issuance of title deeds in the names of the 1st, 2nd and 3rd Defendants or any other person thereafter and restore the Plaintiff as the sole registered owner.
- c. An order of permanent injunction is hereby issued restraining the Defendants, their servants agents, employees, proxies or anyone claiming under them and any other person from trespassing, entering upon, occupying, constructing on, developing, selling, transferring, leasing, charging, encumbering and/or in any other manner dealing or interfering with the Plaintiffs ownership, possession or use of the property known as Gilgil/Gilgil Block 1/13171 (Kikopey) measuring 8.13 hectares situate in Elementaita within Naivasha Sub-County in Nakuru County.
- d. The Plaintiff shall have costs of this suit

283. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 6TH DAY OF JUNE, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Langat for the 1st and 2nd Defendant.



Mr. Langat holding brief for Tombe for the 3rd Defendant.

No appearance for the Plaintiff.

No appearance for the 4th Defendant.

Court Assistant; Mr. Joseph Makori.

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CASE NO. E004 OF 2021 [NAKURU] Page 34 of 34

