



Catholic Diocese of Nakuru (Trustee Registered) v Kahiga & 3 others (Environment & Land Case 227 of 2014) [2024] KEELC 5644 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5644 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 227 OF 2014**

**A OMBWAYO, J
JULY 31, 2024**

BETWEEN

CATHOLIC DIOCESE OF NAKURU (TRUSTEE REGISTERED) PLAINTIFF

AND

HANNAH WAIRIMU KAHIGA 1ST DEFENDANT

**ELIZABETH THIMBA A.K.A ELIZABETH WAIRIMU THIMBA 2ND
DEFENDANT**

KENNETH THIMBA 3RD DEFENDANT

THE DISTRICT LAND REGISTRAR 4TH DEFENDANT

JUDGMENT

1. In, ELC CASE NO 227 OF 2014, the Plaintiff filed a plaint dated 4th August, 2014, subsequently amended on 12th November, 2014 further amended on 31st March, 2021 and further amended on 7th May, 2024. The Plaintiff prayed for Judgment against the Defendants jointly and or severally for:
 - a. A declaration that the Plaintiff is the rightful owner of all that parcel of land known as Kiambogo/Kiambogo Block 2/263 (Mwariki) (the suit property).
 - b. A permanent injunction restraining the Defendants either by themselves, their servants or agents from in any manner whatsoever dealing in all that parcel of land known as Kiambogo/Kiambogo Block 2/263 (Mwariki) (the suit property) to the detriment of the Plaintiff.
 - c. Lifting of all the restrictions and or cautions registered against all that parcel of Land known as Kiambogo/Kiambogo Block 2/263 (Mwariki).
 - d. Cancellation of Title Deed dated 11th October, 1989 bearing the name of Teresia Wanjiru Wangeru purported to be in respect to the property.



- e. In the alternative payment by the 1st Defendant of a total sum of Ksh 23,760,000/= (being the purchase price in the sum of Kshs 19,800,000/= and the default damages in the sum of Ksh 3,96,000 (sic) being the 20% of the purchase price envisaged by the agreement. (sic)
 - f. Costs of the suit.
 - g. Interest on (e) above at court rates from 9th July, 2014 until payment in full.
 - h. Interest on (f) above at court rates from the date of judgment until payment in full.
 - i. Any other and or further relief this Honourable court deems fit and just to grant in the circumstances.
2. On the court record is an Amended Statement of Defence filed by the 1st Defendant on 10th May, 2022. The 1st Defendant states that she is not the registered and beneficial owner of KIAMBOGO/ KIAMBOGO BLOCK 2/263 (Mwariki). She states that the 2nd and 3rd Defendants are strangers to her and that she legally and lawfully sold the suit land and transferred the land which is currently registered in the name of the Plaintiff after following the proper established procedures. She states that it is the 2nd and 3rd Defendants who are intent at fraudulently wanting to enter the Plaintiff's land.
 3. In ELC Case No 369 of 2013, the Plaintiff therein (2nd Defendant herein) filed a plaint dated 16th December, 2011 and prayed for judgment against the Defendant (1st Defendant herein) for:
 - a. A declaration that the purported title deed issued in the name of the Plaintiff was fraudulently obtained and that the property belongs to or forms part of the estate of the deceased.
 - b. A cancellation of the said title deed issued to the Defendant.
 - c. A permanent injunction restraining the Defendant by herself, her servants, agents and/or employees from entering, remaining on or in any other manner dealing with or interfering with the quiet possession or enjoyment of KIAMBOGO/KIAMBOGO BLOCK 2/263 (Mwariki) by the beneficiaries of the estate of the deceased.
 - d. Costs of this suit and;
 - e. Any other relief this Honourable Court may deem just, expedient and fit to grant.
 4. In ELC CASE NO 287 OF 2014, the Plaintiff therein (the 1st Defendant herein) in a Plaint dated 2nd October, 2014 prayed for judgment against the Defendants (the 2nd Defendant and the 4th Defendant herein):
 - a. An order directing the Defendants to remove the restriction placed on the parcel of land known as KIAMBOGO/KIAMBOGO BLOCK 2/263 (MWARIKI).
 - b. Costs and interest of the suit.
 - c. Any other relief this honourable court deems fit to grant.
 5. The matter proceeded for interparties hearing via viva voce evidence wherein the parties herein gave evidence for themselves and cross-examinations and re-examinations were done.

Plaintiff's Evidence

6. Samuel Kimotho Waweru testified as PW1. He testified that he lives in Catholic Diocese of Nakuru and he stays next to green stead International school. He adopted his witness statement as part of his



- evidence. PW1 further produced the following documents as exhibits: a sale agreement as PEX1, the title deed in the name of the 1st Defendant as PEX 2 and a copy of transfer as PEX3.
7. PW1 testified that the 1st Defendant was transferring the property to the Plaintiff and they produced the consent as PEX4. He testified that the 1st Defendant received the money and gave them three passport photos which he produced as PEX 3. He further produced a copy of an identity card as PEX 6 and a Personal Identification Number as PEX 7. He further testified that payment was made and he produced as PEX 8. PW1 testified that after paying for the land, they took possession.
 8. PW1 testified that there was nobody in the land and there were no structures. He testified that they went to the land and subdivided it into plots. He testified that they wanted to erect a beacon and they got a letter from a person by the name Mukite Musangi stating that the land had a dispute. He testified that there were other pending cases in court and he produced PEX9.
 9. PW1 testified that there was a High Court matter number 370 of 2011 and Suit no 55 of 2014. He testified that they were unable to transfer because of a restriction and he produced PEX 10. He testified that in CMCC No. 35 of 2014, the 1st Defendant was the plaintiff and the District Land Registrar was the defendant. He testified that the 1st Defendant did not inform him that there was a case in court and he was not aware of any third parties. He further testified that he did not know that the title deed for Teresia Wanjiru Wangui existed.
 10. PW1 testified that the Registrar map sheet number is 1(119/3/8/3/18) (PEX 10) and it shows that the registrar map sheet number in 3 and 4. PW1 testified that the title deed of page 19 shows the map sheet number is 3 and 4. PW1 prayed for judgment in their favour and testified that they bought the land innocently. He testified that they were on the land for one month. He testified that they were trying to come up with a subdivision scheme. PW1 prayed that the restriction be removed.
 11. Upon cross-examination by Counsel Mongeri, PW1 stated that they did a search on 3rd July, 2014 and they purchased the land on 4th July, 2014. PW1 was shown PEX 10 and he stated that on 5th October, 1989 Teresia Wanjiru Wangui was the registered owner. He stated that on 15th January, 2001, the land was transferred to the 1st Defendant and her title aligns itself with the green card. He further stated that there is no name Teresia in the green card. PW1 informed the court that the name in the title deed is different from the name in the green card. He stated that the case against the 3rd defendant is against Teresia and not Teresa. He stated that the people representing Teresia have not even come to them. He stated that they went to court, did a search and the registry confirmed that the 1st Defendant is the owner.
 12. Upon cross examination by Counsel Opondo, PW1 stated that the Plaintiff is a registered trustee and the current officials are Maurice Muhatia, Archbishop Kisumu, father Lawrence Mbogo and father Simon Kamau. He stated that they bought the land and the trustees were father Lawrence Mbogo, Maurice Muhatia and Bernard Ngaruya. He stated that he does not have the authority to act on behalf of the Plaintiff. He stated that the trustee is a registered Corporation and it is registered under the law. PW1 confirmed that he is the manager of Makao Project. PW1 informed the court that the land was being registered by the Plaintiff on behalf of Makau. He stated that the search was conducted on 3rd July, 2014 and it does not show by whom. He stated that they entered into agreement on 4th July, 2014 and no other due diligence was done but they went on the land and found it vacant. PW1 was shown the sale agreement and stated that the postal address for the vendor was 1228 Malindi. He stated that the address on the title deed was 160 Naivasha. He stated that they inquired on the different addresses and initially the 1st Defendant was living in Nakuru but when she relocated to Malindi she got a new address of Malindi. PW1 stated that they were not aware of any case filed by the 1st Defendant.



13. PW1 informed the court that when he received the letter of Mukite Musangi, they went to their advocate. PW1 was shown the green card by the 4th Defendant and he stated that he does not know how many amendments have been done since 1988. He stated that the transfer forms have not been duly executed by the advocate. He stated that they had not applied for consent for the Land Control Board and there was no seal of the registered trustee. He stated that he does not remember whether the 1st Defendant was represented by advocates. He further stated that they were not advised on the issue of the seller and they were not given any rates clearance certificates. He stated that he has not attended any Land Control Board sitting.
14. Upon re-examination, PW1 testified that the rates and rent are not applicable. He testified that the money was paid directly to the seller. He testified that when he received a letter from Musangi, they stopped the transaction. He testified that he has a supporting affidavit of Father Ngaruiya sworn on 4th August, 2014 and two certificate of incorporation of Catholic Diocese of Nakuru.
15. Bernard Ngaruiya testified as PW2 and he stated that he stays at the Catholic dioceses in Nakuru. He testified that he is the priest and he has the certificate of theology. He testified that he has the authority to swear an affidavit and give evidence. PW2 adopted his statement given on 5th May, 2023 as part of his evidence in chief.
16. PW2 further produced a list of documents dated 4th May, 2014 as PEX 1-10. He testified that he has a supplementary list at page 33 of the bundle of documents which he produced as PEX 11 and 12. PW2 further produced a pre-sale agreement and a certificate of official search dated 3rd July, 2014 as PEX 13.
17. He testified that they bought land from the 1st Defendant and they looked at the original title which he had. He testified that they paid money and visited the land. He testified that there were no structures or occupation and they took possession and subdivided it. He testified that the land was not transferred to the plaintiff and they have sued the 1st Defendant because she claimed the land belonged to her. He testified that there was a restriction by Mukite Musangi. PW2 testified that the suit number is 370 of 2011 and they did not see any search in any other person's name.
18. Upon cross-examination by Counsel Moenga, PW2 stated that they purchased land number Kiambogo/Kiambogo Block 2/268 Mwariki and they took possession and subdivided it. He stated that they did not do mutation. He stated that he can't remember the number of plots and the registered owner was Hannah Wairimu. He stated that they did a search and it was in the name of the 1st Defendant. He stated that they also did physical visits and did not occupy it. He stated that there was no restriction when they did the search. The Certificate of incorporation was produced as PEX 14 and the authority was produced as PEX 15.
19. Upon cross-examination by Counsel Opondo, PW2 stated that the certificate has the seal of Catholic dioceses and the written authority does not have a seal. PW2 informed the court that he has been instructed in the entire transaction. He stated that PEX 13 does not show who conducted the search. He stated that on 2nd September, 2011 a restriction was placed by the 2nd Defendant. PW2 stated that had they been made aware of irregularities, the Plaintiff could not have proceeded with the sale. He stated that he does not have minutes by the trustees. PW2 informed the court that the Bishop decided to purchase the suit land hence there are no resolutions of any meeting. He stated that he signed the sale agreement as trustee. He stated that the land was visited by a surveyor and he has no survey plan. He stated that he does not have a consent by the Land Control Board and no clearance certificates. PW2 stated that he never conducted search at County Land Registration.
20. Upon reexamination, PW2 testified that at the time of purchase there was no restriction on the property.



Defendant's Evidence

21. Hannah Wairimu Kahiga testified as DW1. She testified that she lives in Malindi and used to live in Naivasha. She testified that she has lived in Nakuru and used to collect timber. She testified that the land in dispute was hers and she used to know a broker by the name Kihenja. She testified that she used to sell land and she was interested in the suit land.
22. DW1 testified that she met the owner called Teresa Wanjiru Wangare who sold her the land. She testified that she had two parcels. She testified that she bought the whole land. She testified that the parcel of land was hers and she went to lands office and a transfer was signed. She testified that she sold the land to the Plaintiff and was given the title on 15th January, 2021. She testified that she has never stayed in the land and a person by the name Njoroge stayed in the land. She testified that she sold the land for Kshs19,800,000/= to the Plaintiff and she signed a transfer and court forms. She testified that the documents are hers. She testified that the Plaintiff did not obtain title due to the restriction and the restriction was placed by the 2nd and 3rd Defendants. She testified that the restriction was removed on 2nd July, 2014. DW1 further testified that when she sold the land, it was free from encumbrances. She testified that when she bought the land, she saw the original title from the seller.
23. DW1 testified that she did not forge the title and the land is hers. She testified that the he land is 4.6 Ha and she does not have any document.
24. Upon cross-examination by Counsel Orege, DW1 stated that she sold the land to the Plaintiff. She stated that when she sold the land, there was no restriction. DW1 was shown PEX 13 and she confirmed that it shows that there was no restriction. She stated that she removed the first restriction and she has never seen the original title of another person. She stated that she was not served with case number 370 of 2011. She also stated that the land was vacant and she has no claim against the Plaintiff. DW1 informed the court that she has used the money. She stated that the land was to be transferred to the Plaintiff. She further informed the court that she is ready to refund the money.
25. Upon cross-examination by Counsel Opondo she stated that she bought the land in 1998 December. She stated that she paid the first instalment in 1998 and the agent was Mr. Kihanya. DW1 stated that he is the one who prepared the agreement and she paid 80,000/= despite having no evidence. She stated that she paid upto 1999 February. DW1 stated that she does not remember when she went to the registrar. DW1 informed the court that Kihaya followed up consent and she got the title in 2001. She stated that she paid tax and she had a caretaker. DW1 stated that when she was selling the land, her advocate was Mr Orege. She stated that her advocate by the name Mongeri assisted her to get the restriction removed. She informed the court that she has never been called by the Registrar. DW1 was shown CMCC No. 748 of 2011 and she stated that she is not aware of this case and Teresia surrendered the original title.
26. Upon re-examination, DW1 stated that the agreement was lost and she paid in cash. She testified that she did not retain the evidence and both of them went to the board and the money was paid in full.
27. Elizabeth Wairimu Thimba testified as DW2 and stated that she lives in Nakuru at Mwariki Estate (B). She testified that she is aware of the case in court and adopted her witness statement dated 10th October, 2014 as her evidence in chief. She also adopted the witness statement dated 16th December, 2011 in ELC No. 367 of 2013 is adopted as her evidence in chief. She also adopted the witness statement in ELC 287 of 2014 dated 18th November, 2014 as her evidence in chief.
28. DW2 testified that Teresia Wanjiru Wangera was her mother in law. DW2 testified that she has the copy of title deed issued in the name of Teresia Wanjiru Wangare issued on 11th October, 1989 and it refers



- to Kiambogo/Kiambogo/block 2/263 Mwariki. She testified that the title has not been transferred to any beneficiary.
29. Upon cross-examination by Counsel Orege, she stated that she is the widow to the late son of Teresia Wanjiru Wangare. She stated that her husband died in September 1978. She further stated that Teresia Wanjiru Wangare died in 1981. DW2 stated that her husband died in Tanzania, Mwanza and no report was made about his death. She stated that she was a clerk and she has a marriage certificate.
 30. DW2 informed the court that she has nothing to show that her husband was related to Teresia Wanjiru Wangare. She stated that the succession of Teresia Wanjiru Wangare is ongoing and she can't remember the date of sale. She further stated that she was brought by a couple to the house on the date of giving out the plots and was told that the 1st Defendant had stolen her mother land. She stated that her mother in law died in 2001. DW2 stated that the 1st Defendant claimed to have purchased the land in 1999 and she learnt that the land had been sold in 2014
 31. She stated that her mother in law had five acres in Bahati and four acres in Ndege.
 32. DW2 stated that she thinks her mother did not sell the land because she did not inform her. She stated that the Bahati land has been given to other people and the Ndege plots were given to others.
 33. Upon cross-examination, she stated that the green card is PEX 10 and entry 4 is made on 15th January, 2001 in favour of the 1st Defendant and the succession cause filed in 2002. DW2 stated that the title seems to be an original and she included the property in the succession. She stated that the grant has been confirmed. She stated that she does not know the issues of confirmation. She stated that the grant has been confirmed and no other property was contended. She stated that she was married in 1970 and she is 79 years old. She stated that they have never lived on the land.
 34. DW2 further stated that she was working at Kenya Railways company and she was paid in 1999 and came to Nakuru. DW2 stated that her mother in law never sold land and there are people who sell land without telling their families. She stated that she did not know that the 1st Defendant had a title and there was no restriction.
 35. Upon re-examination, DW2 testified that she filed a succession cause on 13th January, 2003. She testified that the succession cause is No. 81 of 2002 and the restriction was placed by herself on 23rd August, 2011. She testified that she has had the title in her custody since the death of her mother in law.
 36. Collins Liyai Alele testified as DW3. He testified that he is an advocate of High Court and a Land Registrar Nakuru. He testified that he received summons dated 5th February, 2023 and he has been a land registrar for three years. DW3 relied on a statement filed by the 4th defendant dated 12th January, 2023. DW3 produced the green card as DEX1 and it is for Kiambogo/Kiambogo/Block2 (Mwariki) 263. He testified that it is 4.60 Ha and the registry map sheet 344.
 37. DW3 testified that entry number 1 is dated 3rd December, 1988 and it is blank. DW3 confirmed that Hannah Wairimu is the 1st defendant and the last entries are restrictions. He testified that Section C is free from any encumbrance and the registered owner of one Hannah Wairimu Kahiga (the 1st Defendant). DW3 testified that these are the true records.
 38. Upon cross examination by Counsel Opondo, DW3 informed the court that he does not have the parcel file and he has not perused it. DW3 stated that the parcel file has documents supporting entries and he expects it to have the area list, a transfer on the pocket file, court orders and letters. DW3 further stated that the consent and stamp duty receipts are also required. He also stated that the original title requires to have been surrendered.



39. DW3 was shown the original title and he stated that it is in the name of Teresia Wairimu Wangera and the original title was not surrendered. He stated that they have done the transfer without title. He stated that when there are court orders, they obey them. He stated that they do transmission without the original. He further stated that conducting the transfer without surrendering the original title risks occurrence of fraud. He stated that when the owner is deceased, they require a transmission and they normally avail the title that is not proper. He stated that a consent is necessary and it is at the discretion the Registrar. He stated that a consent lapses at six months. He stated that the registrar is supposed to consider the documents of registration and issuance of notices. He stated that if he traces the parcel file he will produce it.
40. Upon cross-examination by Counsel Orege, he stated that the green card has a map sheet number No.3 and 4. He stated that the title deed indicates the map sheep 1(119/3/8/13/18). He was shown PEX 2 and he stated that the name is that of the 1st Defendant. He stated that the map sheet number is 3 and 4 and the title are in the name of the 1st Defendant. He also stated that the map sheet number comes with a green card.
41. DW3 stated that a map sheet to RIM shows the parcel number. He stated that it also shows the sketch of a number area. He stated that it guides on acreage due and access road. He stated that it keeps a mutation depending on subdivision. DW3 stated that the map sheet number does not change on subdivision. He stated that from the green card, the land was not subdivided. He stated that he is not aware any action by the 2nd and 3rd Defendant and it is not possible to have two green cards. He stated that when a file is lost he reconstructs the records. He stated that a reconstructed card shows at the top and he can't confirm that the original card for Teresia Wairimu Wangera is proper.
42. Upon re-examination, DW3 testified that before the transfer there must be a surrender and they do verify documents to confirm authenticity. He testified that they do have a seal and they compare documents. He testified that the inspection was done.

Plaintiff's Submissions

43. The Plaintiff filed submissions on 22nd May, 2024 and identified the following issues for determination:
 - a. Whether or not the Plaintiff is an innocent purchaser for value without notice?
 - b. Whether or not the Plaintiff acquired an indefeasible title to the property?
 - c. Whether or not the Title Deed bearing the name of Teresia Wanjiru Wangera should be cancelled?
 - d. In the alternative, whether or not the Plaintiff is entitled to refund of Ksh 19,800,000/= and the default damages in the sum of Ksh 3,960,000/= being the 20% of the purchase price from the 1st Defendant envisaged by paragraph 13 of the sale agreement.
 - e. Who should be entitled to the costs of the suit?
44. The Plaintiff submitted that it was a bonafide purchaser for value of the suit property without notice of any irregularity or defect of title. The Plaintiff submitted that whereas the 2nd and 3rd Defendants seek revocation of the Title Deed bearing the 1st Defendant's name citing fraud, they have neither laid any blame upon not taken action against the 4th Defendant and hence their claim may not be genuine. Reliance is placed on the case of Tarabana Company Ltd v Harcharan Singh Sehmi & 7 others [2020] eKLR. The Plaintiff submitted that they visited the suit property before the sale agreement and confirmed it was vacant, they conducted a search which made them believe on the impression given



by the 1st Defendant on the status of the property and the 2nd and 3rd Defendant's claim to the suit property came much later upon completion of the subdivision of the property into 83 plots.

45. The Plaintiff submitted that the registration of the 1st Defendant conferred upon her indefeasible title and interest over the suit land and the Plaintiff ought to be declared the rightful owner based on the fact that the 1st Defendant had sold her rights and interest over the title which the plaintiff duly paid for. The Plaintiff submitted that the information it obtained through the pre-sale agreement official search certificate was sufficient guarantee as to the validity of the title. Reliance is placed on Section 80 of the [Land Registration Act](#) and the case of David Peterson Kiengo & 2 others v Kariuki Thuo (2012) eKLR.
46. The Plaintiff submits that in the alternative, they urge the court to find the 1st Defendant breached the sale agreement dated 4th July, 2014 based on the fact that she had given the impression that she had sold the property free from any encumbrances. The Plaintiff submitted that it is entitled to refund of Ksh 19,800,000/= and the default damages in the sum of Ksh 3,960,000/= being the 20% of the purchase price from the 1st Defendant envisaged by paragraph 13 of the sale agreement. The Plaintiff also prayed for costs.

2nd and 3rd Defendant's Submissions

47. The 2nd and 3rd Defendants filed submissions on 22nd May, 2024 and identified the following issues for determination:
- a. Whether there were proper authority and due diligence conducted by the Plaintiff in the transfer process?
 - b. Whether there were any irregularities or fraudulent activities in the transfer of the title?
 - c. Whether the Defendants' claims of ownership have been sufficiently substantiated?
 - d. Which title is valid and whether the title allegedly in the 1st Defendant's name should be impeached?
 - e. What reliefs should be issued?
48. The 2nd and 3rd Defendants submitted that the burden of proof in civil cases is on a balance of probability and reliance was placed on the case of Miller vs Minister of Pensions (1947) and Section 107 of the [Evidence Act](#).
49. They submitted that the Plaintiffs failed to conduct due diligence in the property transaction. Reliance is placed on Section 107 of the [Evidence Act](#) where the burden of proof is on the Plaintiffs to show they conducted proper due diligence before effecting the transfer. They submitted that in Kenya, the legal requirements for the approval and purchase of land especially concerning trusts and registered trustees are governed by; the [Land Act](#) Cap 280 of the Laws of Kenya, the [Land Registration Act](#), Cap 300 of the Laws of Kenya, The [trustees \(Perpetual Succession\) Act](#), Cap 164 of the Laws of Kenya and the Trustees Act, Cap 167 of the Laws of Kenya.
50. The 2nd and 3rd Defendants submitted that when purchasing land through a trust, the trust must clearly outline the trustees' powers, including the power to acquire, hold and dispose of land, trustees must have the legal capacity to hold and manage the land. They submitted that all that was produced before court is a letter of authority dated 25th July, 2014 granting Fr. Bernard Ngaruiya to testify and swear affidavits on its behalf.
51. They submitted that the Plaintiff cannot benefit from the defence that it was a bona fide purchaser as it ought to have been more cautious in undertaking its due diligence noting that the Property had



a restriction dislodged just a day to the agreement being made. Further it was prudent noting the transactional amount that they would have been more cautious noting the intention they had and the rushed manner in which the transaction was being undertaken. Reliance is placed on the cases of Dina Management Limited vs County Government of Mombasa & 5 others (SC Petition No 8 (E010) of 2021) and Samuel Kamere v Lands Registrar, [Kajiado Civil Appeal No 28 of 2005 [2015] eKLR.

52. The 2nd and 3rd Defendants submitted that the Plaintiff's disregard for the Caveat Emptor notice placed on the suit land, failed to authenticate the title deed held by the 1st Defendant and made payment to the 1st Defendant before obtaining necessary transfer consent, thereby precluding them from claiming innocence as purchasers for value without notice. They further submitted that the Plaintiff predicates their alleged entitlement to the suit land on a title deed in the name of the 1st Defendant, who allegedly did not possess good title to the suit land initially to convey to the Plaintiff. The 2nd and 3rd Defendants further submitted that the High Court Case No 370 of 2011 indicates fraudulent activities by the 1st Defendant in acquiring the title deed to the suit property, rendering the Plaintiff's claim to good title through the 1st Defendant untenable. Reliance is placed on the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR).
53. The 2nd and 3rd Defendants invoked the nemo dat quod non habet principle and submitted that the title deed purportedly acquired by the Plaintiff from the 1st Defendant is void of legal effect given that the 1st Defendant lacked the legal authority or capacity to convey the disputed land to the Plaintiff as asserted. Reliance is placed on the case of Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maim [2019] eKLR.
54. The 2nd and 3rd Defendants also rely on Section 26 (1) (a) (b) of the [Land Registration Act](#) No 3 of 2012 and the cases of Daudi Kiptugen vs Commissioner of Lands & 4 others [2015] eKLR and Fanikiwa Limited vs Sirikwa Squatters Group & 20 others (Petition No 32 (E036) of 2022 consolidated with Petition No 35 (E038 of 2022)). They submit that the 2nd Defendant is the legal and rightful owner of the suit property. They submit that indeed the 2nd Defendant's mother Teresia Wanjiru Wangera is the rightful and legal registered proprietor of the suit land herein known as Kiambogo/Kiambogo Block 2/263 (Mwariki) measuring approximately 11 acres and they urged the court to find in favour of the same.

Analysis And Determination

55. After analyzing the pleadings, the evidence of the parties and the submissions, the following issues arise for determination:
 - a. Whether the Plaintiff is a bona fide purchaser for value without notice?
 - b. Whether the 1st Defendant had a good title to pass to the Plaintiff?
 - c. Who should pay the Costs of the suits?

A. Whether the Plaintiff is a bona fide purchaser for value without notice?

56. It is the Plaintiff's case that on 4th July, 2014 it entered into an agreement whereby the 1st Defendant sold and the Plaintiff purchased all that parcel of land known as Kiambogo/Kiambogo Block 2/263 (Mwariki) measuring approximately 11 acres at a sum of Kshs 19,800,000/= . It is also the Plaintiff's case that it received a letter dated 21st July, 2014 by the 2nd Defendant which informed it of the existence of a High Court case against the 1st Defendant over the property and there exists a restriction registered on 22nd July, 2014 against the property in favour of the 2nd and 3rd Defendants. It is the Plaintiff's case that it discovered that the restriction was removed by the 4th Defendant on 2nd July, 2014 confirming the 1st Defendant's exclusive ownership over the suit property.



57. It is also the Plaintiff's case that the title deed bearing the name of Teresia Wanjiru Wangera allegedly issued on 5th October, 1989 procured by the 2nd and 3rd Defendants is not genuine or legitimate and fraudulently procured as it is at variance with the green card procured by them being the root upon which the Title deed ought to have been founded.
58. It is the 1st Defendant's case that she legally and lawfully sold the suit land and transferred the land which is currently registered in the name of the Plaintiff after following the proper established procedures. It is her case that it is the 2nd and 3rd Defendants who are intent at fraudulently wanting to enter the Plaintiff's land.
59. It is the 2nd and 3rd Defendant's case that being the administrator and beneficiary of the estate of Teresia Wanjiru Wangera, they are the legal and rightful registered owners of all that parcel of land known as Kiambogo/Kiambogo Block 2/263 (Mwariki) measuring approximately 11 acres. It is their case that the title document to the suit land is registered in the name of the late Teresia Wanjiru Wangera and the Title deed issued on 11th October, 1989. It is their case that as Administrator and Beneficiary, they have petitioned for confirmation of the Grant of letters of Administration in Nakuru High Court Succession No 81 of 2002, in which the above property is listed as one of the deceased assets, but they are yet to obtain the certificate.
60. The Plaintiff has submitted to this court that it was a bonafide purchaser for value of the suit property without any notice of any irregularity or defect of title. In the case of *Lawrence Mukiri Vs Attorney General & 4 Others* [2013] eKLR the Court stated what amounts to bona fide purchaser for value, thus:

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

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

61. This court finds that the Plaintiff has proved that it was a bona fide purchaser for value as the 1st Defendant sold and the Plaintiff purchased all that parcel of land known as Kiambogo/Kiambogo Block 2/263 (Mwariki) measuring approximately 11 acres at a sum of Kshs 19,800,000/=.

B. Whether the 1st Defendant had a good title to pass to the Plaintiff?

62. A certificate of title is prima facie held to be evidence of ownership of the stated land. This is provided for in Section 26(1) of the [Land Registration Act](#) which provides; -

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –



- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

63. However, the said ownership can be challenged as provided by 1(a) & (b) above. The 2nd and 3rd Defendants have produced a title deed in respect of Kiambogo/Kiambogo Block 2/263 issued to Teresia Wanjiru Wangera issued on 11th October, 1989. The court notes that the Plaintiff in the further further amended Plaint dated 7th May, 2024 has listed the particulars of breach, misrepresentation of facts on the part of the 1st Defendant.

64. The Plaintiff relied on the veracity of the records provided by the 4th Defendant and it is based on that information that the Plaintiff entered into the transaction with the 1st Defendant in respect of the suit property. This court will now determine whether the 2nd and 3rd Defendants have proved the root of their title.

65. The Court of Appeal in *Munyu Maina Vs. Hiram Gathiha Maina*, Civil Appeal No.239, of 2009, held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

66. From the pleadings on record, the 1st Defendant in the Plaint dated 2nd October 2014 (In ELC Case No 287 of 2014) averred that she is the registered owner of the suit property. A certified copy of a green card is produced which shows that she was the registered proprietor on 15th January, 2001. The same green card shows that a restriction was placed by the 2nd and 3rd Defendant on 2nd September, 2011 and it was removed on 2nd July, 2014 by a court order in CM Court Nakuru App No 55 of 2014.

67. The 2nd and 3rd Defendants on the other hand are the administrator and beneficiary of the estate of Teresia Wanjiru Wangera, and it is their case that they are the legal and rightful registered owners of all that parcel of land known as Kiambogo/Kiambogo Block 2/263 (Mwariki) measuring approximately 11 acres.

68. It is not in doubt that the suit property was initially registered in the name of Teresia Wanjiru Wangera. The legality of the subsequent transfer to the 1st Defendant is the 2nd and 3rd Defendants contention. The 2nd Defendant (Plaintiff in ELC CASE NO 369 OF 2013) averred in the plaint filed in court on 19th December, 2011 that the deceased did not at any time, sell and/or transfer the property known as KIAMBOGO/KIAMBOGO 2/263 (Mwariki) or any part thereof to the 1st Defendant, her agents, servants and/or any other person or engage in any such dealings so as to cause title in the property to vest in the 1st Defendant. The 2nd Defendant goes on to list the particulars of fraud on the part of the 1st Defendant as:

- a. By herself, servants or agents fraudulently obtaining documents of title to the suit premises.
- b. By herself, her agents, servants and or employees forged the deceased’s signature on the transfer documents.



- c. By herself, agents, servants and/or employees uttered forged documents to the Land Registrar thereby causing him to issue a title deed to the suit premises to the Defendant.
 - d. By herself, agents, servants and/or employees caused the transfer to the Defendant of the suit premises without the consent of the deceased.
 - e. By herself, agents, servants and/or employees tampered with the records at the Land Registry leading to the disappearance of the true records in respect of the suit premises.
 - f. By herself, agents, servants and/or employees using the deceased's original title deed to procure registration without her consent.
 - g. Purporting to obtain the suit premises without payment or consideration for it.
69. The Court of Appeal in Mombasa, in Civil Appeal No. 312 of 2012;- Emfil Limited Vs Registrar of Titles Mombasa & 2 others [2014] eKLR held as follows;-
- “Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.
70. Fraud is defined under the Black's Law Dictionary 10th Edition as
- “A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”.
71. The 1st Defendant has not provided this court with any sale agreement or transfer documents to show how the suit property was transferred from Teresia Wanjiru Wangera to herself. This court thus finds that the 1st Defendant has failed to prove that she had good title to pass to the Plaintiff. The threshold of fraud which is above a balance of probabilities and below reasonable doubt has thus been reached by the 2nd and 3rd Defendants. The 1st Defendant has not proved to this court that she legally and procedurally acquired the title in respect to the suit property which she subsequently used to sell the suit property to the Plaintiff.

C. Who should pay the Costs of the suits?

72. The general rule is that costs follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act*. (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason directs otherwise.

Disposition

73. Having analyzed the available evidence and the issues above, this Court finds and holds as follows:
- a. An order be and is hereby issued directing payment by the 1st Defendant to the Plaintiff of a total sum of Ksh 23,760,000/= (being the purchase price in the sum of Kshs 19,800,000/= and the default damages in the sum of Ksh 3,960,000 being the 20% of the purchase price envisaged by the agreement).
 - b. A declaration is hereby issued that the purported title deed issued in the name of the 1st Defendant was fraudulently obtained and that the property belongs to or forms part of the estate of the deceased.



- c. An order is hereby issued cancelling the title deed issued to the 1st Defendant.
- d. A permanent injunction is hereby issued restraining the 1st Defendant by herself, her servants, agents and/or employees from entering, remaining on or in any other manner dealing with or interfering with the quiet possession or enjoyment of KIAMBOGO/KIAMBOGO BLOCK 2/263 (Mwariki) by the beneficiaries of the estate of the deceased.
- e. ELC CASE NO 287 OF 2014 is hereby dismissed with costs.
- f. Costs of ELC CASE NO 227 OF 2014 is awarded to the 2nd and 3rd Defendants.
- g. Costs ELC CASE NO 369 OF 2013 is hereby awarded to the 2nd Defendant.

It is so ordered.

DATED AND DELIVERED ELECTRONICALLY AT NAKURU THIS 31ST DAY OF JULY, 2024

A.O. OMBWAYO

JUDGE

