



**Uku (Suing in His Capacity as Legal Representative of George Uku Mukima - Deceased) v Pioneer Foods Limited (Environment & Land Case 318 of 2012) [2024] KEELC 5529 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5529 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 318 OF 2012**

**A NYUKURI, J  
JULY 24, 2024**

**BETWEEN**

**LEONARD KYALO UKU (SUING IN HIS CAPACITY AS LEGAL REPRESENTATIVE OF GEORGE UKU MUKIMA - DECEASED) ..... PLAINTIFF**

**AND**

**PIONEER FOODS LIMITED ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. This suit was filed by George Uku Mukima by way of plaint dated 9<sup>th</sup> August 2012. However, on 7<sup>th</sup> July 2015, the plaintiff passed on and was substituted by his son and the personal representative of his estate one Leonard Kyalo Uku. Therefore, on 21<sup>st</sup> December 2018, Leonard Kyalo Uku filed an amended plaint dated 14<sup>th</sup> December 2018 seeking against the defendant, the following orders;
  - a. A declaration that the transfer of land parcel Numbers Donyo Sabuk/Koma Rock Block 1/20125 and Donyo Sabuk/Koma Rock Block 1/20127 to the defendant was wrongful, unlawful, and fraudulent.
  - b. An order that the defendant's name be cancelled from the registers for land parcel Numbers Donyo Sabuk/Koma Rock Block 1/20125 and Donyo Sabuk/Koma Rock Block 1/20127, and the deceased's name be restored back to the registers.
  - c. A permanent order of injunction restraining the defendant, its agents and/or servants from disposing off, developing, charging, mortgaging, cultivating, or in any other way interfering with land parcel Numbers Donyo Sabuk/Koma Rock Block 1/20125 and Donyo Sabuk/Koma Rock Block 1/20127.



- d. General damages and mesne profits for trespass and non user of land.
  - e. Costs of the suit and interest.
2. The plaintiff averred that the late George Uku Mukima (deceased) was the absolute registered owner of the parcels of land known as Donyo Sabuk/Koma Rock Block 1/20125 and Donyo Sabuk/Koma Rock Block 1/20127 each measuring 0.809 Hectares and situated at Koma Rock area in Machakos County (Suit Property).
  3. It was the plaintiff's averment that on 27<sup>th</sup> November 2008, the defendant wrongfully, unlawfully and fraudulently caused the suit properties to be transferred to itself. The plaintiff particularized particulars of fraud as against the defendant, including that the defendant transferred the properties herein without authorization of the deceased and without any transaction between them; forged transfer instruments; and transferred the said agricultural land without consent of the Land Control Board.
  4. That the deceased became aware of the fraudulent transfer when in May 2011 he found unlawful barbed wire fence on the suit properties and on conducting a search, realized that the properties were in the defendant's name. That the deceased requested the defendant to transfer the properties back to him in vain.
  5. The defendant entered appearance and filed defence dated 12<sup>th</sup> October 2012. The defendant denied the plaintiff's claim and stated that the plaintiff was estopped from denying knowledge of a transaction which he was fully aware and benefited from, having fully participated in perfecting the sale and transfer of the suit properties. It stated that all necessary consents were sought and obtained and that the transfer was impeccable. It accused the plaintiff of shamelessly concealing material facts and misrepresentations concerning meetings that the parties herein had at the plaintiff's home. It maintained that it was a bona fide purchaser for value and is the first registered owner of the subdivisions and therefore its rights are indefeasible in law.
  6. The matter proceeded to hearing by way of viva voce evidence. The plaintiff presented two witnesses while the defendant presented three witnesses.

#### **Plaintiff's evidence**

7. PW1 was Leonard Kyalo Uku, the administrator of the estate of the original plaintiff, the late George Uku Mukima. He adopted the contents of his witness statement dated 7<sup>th</sup> December 2018 as his evidence in chief. His testimony was that parcel numbers Donyo Sabuk/Koma Rock Block 1/20125 and 20127 were both subdivisions of the deceased's parcel Donyo Sabuk/Koma Rock Block 1/19671, which is an agricultural land.
8. He maintained that the defendant was a stranger to both the deceased and himself and insisted that the deceased has never transacted with the defendant regarding the suit property or any other parcel of land whatsoever. He also stated that in May 2011, the deceased found unlawful barbed wire fence on the suit property which prompted him to conduct searches on the suit property where of he discovered that on 27<sup>th</sup> November 2008, the suit property had been registered in the defendant's name. He further stated that the deceased has never sold the suit property or obtained Land Control Board consents for the transfer thereof or executed transfer forms in favour of the defendant. He therefore argued that the suit properties should be transferred back to the deceased's name. He produced the grant of letters of administration; register abstracts for parcels Donyo Sabuk Koma Rock Block 1/20125 and 20127 and a demand letter.



9. On cross examination, he stated that the transfer of the suit property in the defendant's name happened in the year 2008 before he was appointed the deceased's estate's administrator. He denied having seen the agreement between Jennifer Kavenya Mutiso (hereinafter referred to as Jennifer) and the defendant. He confirmed knowing Jennifer.
10. PW1 also stated that although the defendant's documents showed his father's name on an alleged agreement with Jennifer, the same was not signed by the deceased. He stated that according to minutes from the District Officer, the same showed that this father was to be paid the balance for the land. He conceded to the letter dated 9<sup>th</sup> June 2010 from the District Officer's Office, showing that Jennifer promised to pay the deceased the balance of Kshs. 335,000/-.
11. He stated that he knew Jennifer bought land from the deceased, which she is in occupation, but that the title owned by Jennifer was not in dispute, because the same was paid for. He insisted that he had never seen transfer documents in respect of the suit property.
12. In re-examination, he stated that although the abstracts of the titles for the suit property showed that Kshs. 152,000/- and Kshs. 150,000/- were paid to his late father, that was not true and there was no such agreement as his late father never interacted with the defendant. He stated that he had not been shown any transfer documents transferring the suit property from his father to Jennifer.
13. PW2 was Fredrick Kibet, the Land Registrar, Machakos County. He produced a certified copy of register for properties known as Donyo Sabuk/Koma Rock Block 1/20125 and 20127. He stated that for title Number 20125, the property measures 0.809 Hectares which was as a result of subdivisions of Donyo Sabuk/Koma Rock Block 1/19671, which is found on survey map sheet 3. He confirmed that the said property was first registered in the name of George Uku Mukima as entry No. 1 and subsequently a transfer to Pioneer Foods Limited was registered as proprietor on 27<sup>th</sup> November 2008 as entry No. 2 and a title deed issued on the even date, as entry number 3.
14. In respect of property Number 20127, he stated that the same measures 0.809 Hectares and is found on registry map No. 3 and that the same was a result of subdivision of parcel No. Donyo Sabuk/Koma Rock Block 1/19671. He stated that the first entry of the register shows the name of George Uku Mukima who was registered as proprietor on 16<sup>th</sup> September 2008 and a transfer to Pioneer Foods Limited done on 27<sup>th</sup> November 2008 as indicated in entry No. 2. That entry No. 3 shows that a title deed was issued on even date. He stated further that on 18<sup>th</sup> November 2016, an encumbrance was created and a charge in favour of Kenya Industrial Estates Limited to secure a sum of Kshs. 4.9 Million was indicated as entry No. 1 at Part C of the register, which is the encumbrance section.
15. The witness stated that the nature of the title is an absolute/freehold title. He stated that for transfer of the suit property, what was required was a Land Control Board attendance; execution of transfer instruments; payment of stamp duty; booking the transfer for registration and a transfer done. He stated that to obtain consent from the Land Control Board, an application in triplicate is filled and one copy ought to be retained at the land registry. Further that the Land Registration Regulations of 2017 require that a transfer instrument be filled in triplicate and that one copy is retained at the land registry.
16. In cross examination, he stated that he was deployed to Machakos in July 2021 and that all entries on the suit property were done before he started working in Machakos. He pointed out that he had only brought the green card because he was summoned to produce the register. He stated that a consent and transfer instruments would ordinarily be in the parcel file. He stated that he could not tell if consents from the Land Control Board were issued in regard to transfer of the suit properties. He stated that he did not investigate if there was fraud. That marked the close of the plaintiff's case.



## Defence's evidence

17. DW1 was Gitari Njeu Thara a director of the defendant. He adopted the contents of his witness statement dated 12<sup>th</sup> October 2012 as his evidence in chief. It was his testimony that on 22<sup>nd</sup> January 2008, he bought 4 acres of land from Jennifer Kavenya Mutiso and that the two parties signed a land sale agreement. According to him, the 4 acres were to be hived from the parcel of land known as Donyo Sabuk/Koma Rock Block 1/19671 belonging to the plaintiff but from whom Jennifer had bought 7 acres. He confirmed that he saw the agreement between Jennifer and the deceased dated 20<sup>th</sup> August 2006 which was written in Kamba language and which he understood well as he understands the language well.
18. He stated that he was assured by Jennifer that a Land Surveyor called Paul Kivaa Kitaka had been nominated by the deceased to undertake subdivision and grant him 4 acres. He claimed that after the subdivisions were done, he held a meeting with the Surveyor and Jennifer and sought to know who would sign the transfer instrument. That again, he got assurance from Jennifer that she had discussed the matter with the plaintiff who had agreed to sign a direct transfer of 4 acres. That later, Jennifer asked him to give her the defendant's PIN certificate and passport size photographs of the defendant's two directors. He added that Jennifer was carrying blank transfer forms which she asked him to sign and seal with the company seal which he did the following day when he met Jennifer and Paul in Tala.
19. The witness explained that he will secure the plaintiff's signature and that in November 2008, the surveyor called him to go pick the title.
20. He alleged that after the transfer, he fenced the land and did developments thereon of about Kshs. 5,000,000/-. He claimed that in June 2010, the plaintiff passed by the suit property and left a message with the defendant's workers that the witness should call him. He alleged that when he called the deceased, the latter's concern was the acreage which he alleged was more than 4 acres and sought that the same be confirmed.
21. He also stated that he had a meeting with the deceased at his house in Kangundo, where his son Kennedy took minutes. That they agreed to meet at the District Officer's office to get consent to subdivide the land. That he paid Kshs. 6,000/- to the surveyor. That the survey was done and his land confirmed to be 4 acres. That he got information from Jennifer that when they were at the District Officer's office, on 9<sup>th</sup> June 2010, the deceased raised the issue of unpaid balance, which Jennifer promised to pay by 31<sup>st</sup> December 2010.
22. He produced the agreement dated 20<sup>th</sup> August 2006 in Kamba language between the deceased and Jennifer; agreement between himself and Jennifer dated 22<sup>nd</sup> January 2008; minutes for the meeting held on 21<sup>st</sup> June 2010; agreement at the District Officer's place dated 9<sup>th</sup> June 2010 and title deeds for Donyo Sabuk Komarock Block 1/20125 and 20127.
23. In cross examination, he maintained that he bought the suit property from Jennifer. He stated that he was not present when the alleged agreement between Jennifer and the deceased happened. He stated that he attended the Land control board meeting with the deceased and that he handed over the transfer instrument to the Land Registrar. He stated that they engaged the deceased's advocate. He stated that the meeting they had with the deceased was for ascertaining the acreage of the land which had been registered in his name. He alleged that Jennifer informed him that he was paying the deceased by instalments and that she told him she had finished paying the deceased.



24. In re-examination, he stated that he did not know of the dispute between Jennifer and the deceased and that when Jennifer and the deceased appeared before the District Officer, the dispute was on payment. He maintained that it was the deceased who transferred the suit property to him.
25. DW2 was Jennifer Kavenya Mutiso. She adopted the contents of her witness statement dated 12<sup>th</sup> October 2012 as her evidence in chief. Her testimony was that she was a land dealer who engaged in buying and selling undeveloped land.
26. She stated that on 20<sup>th</sup> August 2006, she bought 8 acres of land from the deceased at Kshs. 80,000/- per acre. That the same was in regard to parcel number Donyo Sabuk/Koma Rock Block 1/19671. She stated that she paid part of the purchase price in the sum of Kshs. 230,000/- leaving a balance of Kshs. 330,000/-. She claimed that the plaintiff allowed her to deal with the land as the owner.
27. It was her evidence that on 22<sup>nd</sup> January 2008, she sold 4 acres of the suit property to the defendant, hence hiving off the four acres from the above title. She stated that at the time of sale, she had not fully paid the deceased but that he was aware of the goings on and agreed to sign the transfer directly to the defendant.
28. According to her, there was some “small misunderstanding” between her and the deceased over delayed payment of the balance in May 2010. She stated that the plaintiff complained to the District Officer over the delayed payment upon which she was summoned by the latter on 9<sup>th</sup> June 2010. That in the meeting before the District Officer on 9<sup>th</sup> June 2010, she agreed to settle the balance owed to the deceased in the sum of Kshs. 335,000/- on or before 31<sup>st</sup> December 2010. She insisted that at the time of selling the 4 acres to the defendant, she was the beneficial owner of the suit property.
29. She claimed that when the defendant completed paying her, she went to the deceased to obtain completion documents and that the deceased told her that she will get the documents from Paul Kivaa Kitaka. That the deceased called Mr. Kitaka and told him to avail all that was needed for transfer to Jennifer.
30. She asserted that she has since paid the deceased the whole balance and that the deceased transferred to her parcel Donyo Sabuk/Koma Rock Block 1/20660. She maintained that the transfer of the 4 acres to the defendant was above board.
31. In cross examination, she stated that she bought 7 acres from the deceased, although she stated in her statement that she bought 8 acres. She conceded that according to the agreement with the deceased done in 2006, the payment was supposed to have been completed in October of the same year, but that she completed paying in 2008. She further stated that she attended the Land Control Board with the deceased but she did not know the registration number of the land she bought. She conceded that when she was selling the land to the defendant, she had not completed payments to the deceased. She also conceded that she had no written authority from the deceased allowing her to deal on the suit property. She further conceded that plot number 20660 was not a subdivision of parcel No. 19671.
32. In re-examination, she stated that she was the one who introduced the defendant to the deceased and that the former was required to transfer the land to the defendant. She stated that she never obtained consent from the Land Control Board in respect of the suit property but that having introduced the deceased and the defendant, she left them to proceed with the transaction. She stated that she could not know of subsequent transactions between the two and that she paid the entire consideration.
33. DW3 was Paul Kivaa Kitaka. He adopted his witness statement dated 12<sup>th</sup> October 2012 as his evidence in chief. His evidence was that he was a surveyor and that he knew the deceased. He alleged that in 2008, he received a call from the deceased asking him to meet him at his home. That it was upon



their meeting that the deceased asked him to assist Jennifer to transfer the land she had bought from him. He stated that the deceased gave him his original title for parcel No. 1/19671, PIN certificate and passport size photograph. He claimed to have worked for the deceased before; and that that was not the first time to work for him. He claimed that he booked a date for applying consent to subdivide and transfer the suit property. That they obtained all the necessary consents. He stated that he is the one who facilitated the transfer of the suit property to the defendant with the knowledge and concurrence of the deceased.

34. In cross examination, he stated that he had attained a certificate in Lands Survey. According to him, the deceased attended the Land Control Board meeting and that he has the consent in his office. He stated that the deceased, Jennifer and the defendant's directors agreed in his presence. He confirmed that whoever surveys land, keeps mutation documents.
35. He stated that although he was instructed by the deceased to facilitate the transfer, he had no letter of instruction. In re examination, he stated that he booked the board meeting but that it is the parties went and obtained the consent from the Land control board and brought it to him to conclude the transaction. He stated that he was given all documents for transfer. That marked the close of the defence case.
36. Parties were allowed to file written submissions in support of their respective cases. The plaintiff's submissions were filed on 3<sup>rd</sup> April 2023, while no submissions were filed by the defence.

#### **Plaintiff's submissions**

37. Counsel for the plaintiff relied on Section 3 (3) of the *Law of Contract Act* and argued that there was no contract between the deceased and the defendant. Counsel argued that the agreement dated 22<sup>nd</sup> January 2008 was not between the deceased and the defendant and that DW2 who was the vendor in the agreement was not the registered proprietor of the suit property. Counsel submitted that therefore DW2 had no capacity to transact over the suit property. Counsel also submitted that DW1 admitted that when he bought the suit property, he knew that DW2 was not the owner and had no authority from the registered proprietor to sell the land and had not fulfilled her obligations in her contract with the deceased, and hence the defendant cannot claim to be a bona fide purchaser. Counsel submitted that one cannot sell what they do not have, and relied on Section 23 (1) of the *Sale of Goods Act*.
38. Regarding the conveyance process, counsel submitted that the same was not complied with. In regard to due diligence, it was argued for the plaintiff that no search was produced by the defence to demonstrate due diligence on the part of the defence. Counsel argued that the agreement was not entered into with a party with the requisite capacity.
39. It was further submitted that Section 6 of the Land Control Board was not complied with as no consent for the transfer was exhibited. Reliance was placed on the case of Michael Njiru Kariuki v. Ferdinand Ndungu Waititu & 3 Others [2021] eKLR for the proposition that it is trite that if no evidence is tendered to support an averment in a pleading, the averments are mere statements.
40. Counsel placed reliance on Section 26 of the *Land Registration Act* and argued that a title can be impeached on grounds of fraud, misrepresentation, illegality, lack of procedure or corruption. The court was referred to the cases of Vijay Morjaria v. Nansingh, Madhusingh Darbar & Another [2000] eKLR and Kinyanjui Kamau v. George Kamau [2015] eKLR for the proposition that allegations of fraud must not only be pleaded but must also be strictly proved. Counsel argued that the plaintiff had proved fraud as the deceased did not participate in the transactions that led to the titles in the defendant's name. counsel maintained that the deceased did not attend the Land Control Board or execute transfer documents to vest the suit property in the defendant's name.



41. Counsel also relied on the case of *Giella v. Cassman Brown* [1973] EA 358 and *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR to argue that the plaintiff is entitled to orders on injunction. They cited Section 107 of the *Evidence Act* and argued that the plaintiff had proved his case on the required standard and that his claim ought to be allowed. Further reliance was placed on Section 27 of the *Civil Procedure Act* for the argument that the plaintiff was entitled to the costs of the suit.

### **Analysis and determination**

42. The court has carefully considered the pleadings, evidence and submissions file. The only issue that arise for determination is whether the registration of the suit properties in the defendant's name was based on any or all of the following vitiating factors; illegality, want of procedure or fraud.

43. Section 26 of the *Land Registration Act* provides for conclusiveness of title and states as follows;

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

44. Therefore, registration to title vests in the proprietor absolute and indefeasible ownership of the land, unless it is proved that the proprietor obtained registration by fraud, or misrepresentation, or illegality, or want of procedure or corruption.

45. In the case of *Elijah Makeri Nyangwara v. Stephen Mungai Njuguna & Another* [2013] eKLR, the court held as follows;

The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate has been acquired through a corrupt scheme.

46. Similarly, in the case of *Munyu Maina v. Hiram Gitbiba Maina Civil Appeal No. 239 of 2009*, the Court of Appeal held as follows;

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.

47. Fraud should not only be pleaded but the same should be strictly proved on a standard that is above the standard of proof in ordinary civil cases of the balance of probabilities, but less than the standard



required in criminal cases of beyond reasonable doubt. In the case of *Vijay Morjaria v. Nansingh Madhusingh Darbar & Another* [2000] eKLR, it was held as follows;

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

48. Similarly, in the case of *Kinyanjui Kamau v George Kamau* [2015] e KLR, the court stated 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 reasonable doubt as in criminal cases...

49. In this case, the plaintiff pleaded particulars of fraud being that;

- a. The defendant wrongfully, unlawfully and secretly transferred to itself the suit property when there had been no transaction between the deceased and the defendant and when the deceased had not authorized such transfer.
- b. That the transfer forms/instruments in favour of the defendant were forged purporting to have been signed by the deceased.
- c. Causing the two parcels which are agricultural land to be transferred to the defendant without the necessary consent from the Land Control Board.
- d. Causing the deceased's name to be cancelled from the land register and having the same replaced with the name of the defendant.

50. In addition, he denied participating in the transactions leading to the registration of the suit property in the defendant's name, by denying executing a sale agreement; applying for consent from the land control board; and executing transfer instrument.

51. Section 3 (3) of the *Law of Contract Act* provides as follows,

3. No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. The contract upon which the suit is founded—
  - i. is in writing;
  - ii. is signed by all the parties thereto; and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.



52. Therefore, unless it is a public auction or there exists a trust, a contract for disposition of an interest in land must be in written and executed by the two parties to the contract, in the presence of their two witnesses.
53. It is not disputed that the suit property is agricultural land and therefore the sale was subject to the provisions of the *Land Control Act*. Section 6 of the said Act provides as follows;
6. Transactions affecting agricultural land
- 1) Each of the following transactions, that is to say—
- (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;
- (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.
54. Section 8 of the *Land Control Act* provides as follows;
- 8.
- (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:
- Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.
- (2) The land control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.
- (3) For the purposes of subsection (1), an application shall be deemed to be made when it is delivered to the authority prescribed in the manner prescribed.
- (4) An application under subsection (1) shall be valid notwithstanding that the agreement for the controlled transaction is reduced to writing, or drawn up in the form of a legal document, only after the application has been made.
55. Therefore, sale of agricultural land is validated by grant of consent from the Land Control Board, which is granted, upon application by the parties to the sale, within six months of their agreement.
56. There is no dispute that before the two suit properties were registered in the name of the defendant, they had been lawfully owned by and registered in the name of the plaintiff.



57. The plaintiff's complaints are that the defendant obtained registration thereof without a sale agreement between the deceased and the defendant; that the deceased did not execute application for consent from the land control board to transfer the suit property to the defendant; that no consent from the land control board was issued for transfer of the suit property in favour of the defendant; and that the deceased did not execute transfer instrument in favour of the defendant. I agree with the plaintiff's submissions that to obtain lawful transfer of agricultural land like in this case, the defendant required to have a written sale agreement; application for consent to the land control board; consent from the land control board, and transfer instrument executed by the deceased.
58. The plaintiff produced title deeds demonstrating that the suit property was initially lawfully registered in the deceased's name before being registered in the defendant's name, and having stated that the deceased did not enter into an agreement with the defendant; did not apply for consent to transfer the suit property to the defendant; did not execute a transfer instrument in favour of the defendant; has discharged the burden of proof expected of a plaintiff under Section 107 of the *Evidence Act*. Therefore, the evidentiary burden shifted to the defendant to rebut the existence of fraud, illegality and or want of procedure and demonstrate that the transfer of the suit property from the deceased to the defendant was procedural, lawful and without any taint of fraud.
59. In supporting its defence, the defendant's witnesses testified that the suit property was sold by the deceased to one Jennifer Kavenya Mutiso, who in turn sold it to the defendant. The defendant's director and Jennifer Kavenya insisted that all the relevant documents were signed by the deceased and claimed that the defendant was a bona fide purchaser for value without notice.
60. A bona fide purchaser for value or an innocent purchaser for value is one who honestly and in good faith purchases property, without notice of fraud or being party to any form of fraud.
61. In the case of *Katende V Haridar & Company Limited* [2008] 2 E.A. 173 where the Court of Appeal in Uganda held that:  
For the purposes of this appeal, it suffices to describe a bona fide purchaser as 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 that:
- (a) he holds a certificate of title;
  - (b) he purchased the property in good faith;
  - (c) he had no knowledge of the fraud;
  - (d) he purchased for valuable consideration;
  - (e) the vendors had apparent valid title;
  - (f) he purchased without notice of any fraud;
  - (g) he was not party to any fraud.
62. I have considered the defendant's documents. The defendant's director PW1 maintained that the defendant purchased the suit property from Jennifer on the strength of the agreement dated 20<sup>th</sup> August 2006 between Jennifer and the plaintiff. That agreement written in Kamba language was not translated to the language of the court. However, from the evidence on both sides, it was clear that the agreement showed that there was unpaid balance of Kshs. 330,000/- which was more than a half of the consideration due and owing from Jennifer to the deceased. This balance remained unpaid from 2006, and on 9<sup>th</sup> June 2010, this position still persisted as was confirmed by the commitment of Jennifer



before the District Commissioner in her agreement dated 9<sup>th</sup> June 2010 promising to settle the balance of Kshs. 335, 000/= by 31<sup>st</sup> December 2010. It is therefore clear that when the defendant entered into agreement with Jennifer on 22<sup>nd</sup> January 2008, for purchase of 4 acres from land parcel No. 19671, the defendant knew that Jennifer had not paid over 50% of the purchase price of the parcel of land it was purporting to purchase. Although Jennifer testified in court saying that she paid this balance, she did not provide any evidence of such payment nor did not state when and how the payments were made, which therefore means that to date, the balance of Kshs. 335, 000/= remains unpaid to the deceased.

63. From the chronology given above, it is clear that at the time of the agreement between Jennifer and the defendants in 2008, the defendant was aware that Jennifer had not paid the entire purchase price but still owed Kshs. 330,000/=, which ought to have been paid in 2008. Nevertheless, it proceeded to have the suit property transferred to its name despite the same not having been fully paid for by Jennifer. Therefore, the defendant knew or ought to have known that Jennifer having breached the sale agreement between her and the deceased and having failed to fully and substantially pay consideration for the suit property, at the time it purported to purchase the same, cannot be said to be an innocent purchaser. I therefore, hold and find that the defendant is not a bona fide or innocent purchaser for value without notice.
64. In addition, Jennifer not having been the legal or equitable owner of the suit property, could not pass good title to the defendant. Hence doctrine of *nemo dat quod non habet* applies in this case.
65. Fundamentally, the plaintiff questioned the process of the defendant's registration stating that he did not sign any transfer documents or seek consent from the Land Control Board. Instead of the defendant availing evidence of the documents, all it did was to wave a title to the court and agreements between itself and Jennifer. The defendant did not produce a copy of the transfer instrument, application to the land control board for consent and consent from the Land Control Board which in my view confirms the plaintiff's complaints that the process of the defendant's registration was not proper. Having considered the defendant's evidence, none of the witnesses stated in their evidence as to having witnesses the deceased sign the above documents in favour of the defendant. There was no coherence in their evidence on the processes of transfer of the suit property to the deceased. The evidence of DW2 (Jennifer) is contradictory and also contradicts the evidence of DW1. The latter stated that the first time he met the deceased was in 2010, that is two years after registration of the suit property in the defendant's name, yet PW2 stated that she introduced the deceased to the defendant and left the two to proceed with the transaction. Besides, on obtaining consent from the land control board, DW2 stated in cross examination that she was present at the board and in re-examination stated that she introduced the parties and left them to deal. It is rather unsettling that the defendant has no single document executed by the deceased towards the transfer of the suit property, and yet claims that the deceased transferred the land to it. What we have is a title in the defendant's name without any proof that the transfer thereof was executed by the deceased, or that the deceased applied for consent to the land control board, or that a consent from the said board was issued or that the deceased signed mutations to subdivide the suit property. Essentially the defendant has totally failed to demonstrate that the root of his title is clean, because what he has is a title with no single document supporting how it was obtained.
66. Therefore as the defendant has failed to avail documents to support the legality, procedure and legitimacy of its titles and having failed to rebut the plaintiff's legitimate queries raised in terms of the particulars of fraud, illegality and want of procedure, I find and hold that the defendant's registration as proprietor of the suit properties was obtained illegally, without the proper procedure and fraudulently and therefore its title has been successfully impeached by the plaintiff.



67. Regarding the prayer for general damages and mesne profits for trespass and non-user of land, it is trite that since both of them are damages in regard to trespass, therefore the court cannot grant both as that would amount to double compensation.
68. Mesne profits are defined in Section 2 of the *Civil Procedure Act* as follows;
- “Mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.
69. Therefore, mesne profits being the profits actually received or which would reasonably be expected to be received by the trespasser during the period of trespass are specific damages which must be specifically pleaded and strictly proved.
70. Having considered the pleadings and evidence herein, it is clear that the plaintiff did not plead or prove actual loss suffered and or mesne profits and therefore that claim fails.
71. It is trite that trespass is actionable per se without proof of actual loss or damage. In this case, the plaintiff pleaded and stated that the defendant trespassed on his property and fenced the same with a barbed wire. This evidence was not rebutted by the defendant and therefore, I find and hold that the plaintiff is entitled to general damages for the trespass. Considering the circumstances of this case and the nature of the trespass complained of, which is fencing the suit property, it is my view that an award of Kshs. 100,000/= shall be reasonable compensation for damages for trespass.
72. In the result, this court finds and holds that the plaintiff has proved his case on the required standard, against the defendants. Therefore, the plaintiff's claim succeeds and this court hereby enters judgment for the plaintiff against the defendant as follows;
- a. A declaration be and is hereby made that the transfer of land parcel numbers Donyo Sabuk/Koma Rock Block 1/20125 and Donyo Sabuk/Koma Rock Block 1/20127 to the defendant was wrong, unlawful and fraudulent.
  - b. An order is hereby issued that the defendant's name be cancelled from the register for land parcel numbers Donyo Sabuk/Koma Rock Block 1/20125 and Donyo Sabuk/Koma Rock Block 1/20127 and the name of the deceased, George Uku Mukima be restored back to the registers.
  - c. A permanent order of injunction is hereby issued restraining the defendant, its agents and or servants from disposing off, developing, charging, mortgaging, cultivating or in any other way interfering with land parcel numbers Donyo Sabuk/Koma Rock Block 1/20125 and Donyo Sabuk/Koma Rock Block 1/20127.
  - d. A sum of Kshs. 100,000/= is hereby awarded to the plaintiff being general damages for trespass.
  - e. The plaintiff is awarded the costs of the suit.
73. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24<sup>TH</sup> DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**



In the presence of;

Mr. Mundia for plaintiff

Mr. Masaviru for defendant

Court assistant – Josephine

