



**Waithaka (On Behalf of the Estate of James Gicheru Muriuki) v Wambugu (Environment & Land Case 10 of 2018) [2025] KEELC 1282 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 1282 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 10 OF 2018  
JM MUTUNGI, J  
FEBRUARY 20, 2025**

**BETWEEN**

**JANE WANGUI WAITHAKA ..... PLAINTIFF  
ON BEHALF OF THE ESTATE OF JAMES GICHERU MURIUKI**

**AND**

**PETER NGUNJIRI WAMBUGU ..... DEFENDANT**

**JUDGMENT**

1. In the instant suit the Plaintiff, Francis Muriuki Wahome, instituted suit through his son James Gicheru Muriuki as the next friend against Peter Ngunjiri Wambugu. The Plaintiff had pursuant to Nyeri HC Misc App. No. 113 of 2007 been committed under the guardianship and custody of the next friend. In the Plaintiff, the Plaintiff averred the High Court in the said Misc. App. No. 113 of 2007 had issued a Prohibitory Order barring any dealing in Land Parcel LR Kiine/Sagana/58 (“the suit property”) which Prohibitory Order was registered against the title. The next friend averred that notwithstanding the Prohibitory Order, the Defendant fraudulently caused removal of the Prohibitory Order using a forged Court Order purportedly issued in Kerugoya PMCC No. 95 of 2008 and consequently had himself registered as owner of the suit property vide entries 13, 14 and 15 entered in the title register. The Plaintiff prayed for Judgment against the Defendant for:-
  - a. A declaration that entries numbers 13, 14 and 15 in the register of L.R Kiine/Sagana/58 are unlawful, null and void.
  - b. An order for cancellation of entries numbers 13, 14 and 15 in the register of L.R Kiine/Sagana/58.
  - c. Cost of the suit.



2. The Defendant filed a defence dated 25<sup>th</sup> November 2010. The Defendant denied the Plaintiff was of unsound mind as alleged by the next friend. He denied all the allegations of fraud contained in the Plaintiff. He denied any knowledge of Kerugoya PMCC No. 95 of 2008 referred to in the Plaintiff and asserted he never in any manner participated in the conduct of any such suit. The Defendant asserted that he personally dealt with the Plaintiff and that he had no notice he had any disability as alleged which in any event, he would himself being a Medical Doctor by profession would easily have noted if he had such a disability. The Defendant thus asserted that he was an innocent purchaser of land parcel Kiine/Sagana/58 without notice of any discrepancies in the title and/or the Plaintiff's capacity to act. He thus prayed that the suit be dismissed with costs.
3. The suit after a multiplicity of interlocutory applications pitting the next friend, James Gicheru Muriuki and his stepmother Rose Mumbi Muriuki who was the Plaintiff's 3<sup>rd</sup> wife was heard before Cheron, J on 18<sup>th</sup> March 2019 and 13<sup>th</sup> February 2020 when the Plaintiff testified and the Defendant and his witness, Kairu Mbuthia Advocate testified. The Plaintiff died after the close of the trial and was not substituted until 9<sup>th</sup> May 2023 when the Court rendered its Ruling allowing Jane Wangui Waithaka to substitute the Plaintiff. The Plaintiff in the meantime had filed their final closing submissions dated 23<sup>rd</sup> March 2020. The Defendant filed theirs dated 9<sup>th</sup> July 2024.
4. The Evidence of the Parties.  
The Plaintiff (PW1) testified that he had sued the Defendant for having fraudulently acquired his father's land. In his evidence he adopted the witness statement he recorded on 9<sup>th</sup> March 2015 and relied on the bundle of documents as per the list of even date. The bundle of documents were admitted in evidence as "PEX1 to 6". The Plaintiff denied that his father sold the suit land to the Defendant as he said his father was incapacitated by reason of sickness. He stated he was the one who was in occupation and possession of the land and that nobody had come to lay claim to the land. He claimed he did not know the Defendant.
5. The Plaintiff testified that his father had suffered a stroke, was diabetic and had been on a wheelchair from 2009. He stated the medical report dated 15<sup>th</sup> December 2007 (PEX6) issued by Dr. Pius Kigamwa a Consultant Psychiatrist outlined the sickness that his father was suffering from. He explained that his father passed away in 2012 and that he had instituted the suit on behalf of his estate.
6. In Cross examination the Plaintiff admitted there was a pending succession cause at Nyeri HC Succ. Cause No. 997 of 2012 and that his stepmother Rose Mumbi Muriuki holds the full grant to his late father's estate. He reiterated that he was on the suit land which he averred his father had given to him. The Plaintiff asserted that the Defendant had used forged documents to get the land transferred to himself. The Plaintiff stated the Defendant used a forged order in Kerugoya PMCC No. 95 of 2008 (PEX5) to have the Prohibitory Order registered pursuant to Nyeri HC Misc App No. 113 of 2007 removed to facilitate his registration as owner. The Plaintiff stated he had filed the suit in Nyeri for declaration that his father was under a mental disability and hence for appointment of Manager/guardian under the [Mental Health Act](#). The Plaintiff further stated that his father died before the case at Nyeri was concluded. He explained that he reported the alleged forgery to the Police though no action was taken against the Defendant.
7. In re-examination the Plaintiff explained that he obtained grant to institute the instant suit. He stated that his father had never instituted a suit against him. He stated the order used to remove the Prohibitory Order issued by the High Court was fake as the suit in which it was allegedly issued did not exist.



8. The Defendant, Peter Ngunjiri Wambugu testified as DW1. In his evidence he relied on and adopted his witness statement recorded on 9<sup>th</sup> March 2016. He also relied on the Defendant's bundle of documents and the same were admitted as "D EX1-6" as listed. The Defendant testified that he had nothing to do with Kerugoya PMCC No. 95 of 2008 and stated that the decree in the case was obtained in 2009 and by that time he had no interest in the suit land. The Defendant asserted he was not a party in the suit before the Magistrate's Court in which the alleged forged order was issued. He stated that he transacted with the seller of land parcel Kiine/Sagana/58 in 2010 after being introduced to him by a former Chief, one Daniel Mwangi Murage. He stated they after negotiations reached agreement whereby he agreed to purchase the land for the agreed consideration of Kshs 2,000,000/- as per the sale agreement dated 8<sup>th</sup> July 2010 ("D EX3"). The Defendant stated that before entering the agreement, he met the seller with his wife and that as at the time he (the seller) had recovered from the illness he was suffering from.
9. The Defendant asserted that he followed due process when he purchased the suit property and stated it was only after he sent his workers to the land, that he realised the seller had issues with members of his family.
10. In Cross-examination the Defendant affirmed he had not known the seller well as he only met him during the sale transaction. He stated though the land was 8 acres and he was buying 5 acres he was issued title for the whole land. He stated he was registered on 23<sup>rd</sup> July, 2010 and that he paid the full purchase price of Kshs 2,000,000/-.
11. The Defendant testified that he was not aware that a Prohibitory Order had been placed against the title of the suit property. He further stated he was not aware whether the wife of the seller was aware of the Prohibitory Order against the property. The witness further stated he would not know whether the orders in Kerugoya PMCC No. 95 of 2008 were forged. He stated the Prohibitory Order was registered as Entry No. 12 on the title on 24<sup>th</sup> December 2009 and was removed on 17<sup>th</sup> March 2010 while on 28<sup>th</sup> July 2010 a restriction was registered against the title. The Defendant finally stated that the Chief who had introduced him to the seller passed on sometime in 2018 but he affirmed, the wife of the seller Rose Mumbi was his witness in the proceedings.
12. Kairu Mbuthia (DW2) testified that he was an Advocate and that he had recorded a witness statement on 9<sup>th</sup> March 2016 that he wished to be adopted as his evidence. He stated he prepared the sale agreement between the seller and the Defendant and witnessed the execution and the payment of the deposit of Kshs 200,000/- being 10% of the purchase price. He explained he met the seller twice, when he took instructions and when he went to sign the agreement in his office. According to him, the seller did not have any apparent disability.
13. In Cross-examination he stated he did not know how the balance was paid as it was not paid in his office. He stated he carried out a search and the property had no encumbrances. He stated he never obtained a green card of the property. He stated he carried out the search in late June or early July 2010. He indicated a Lower Court could not remove a Prohibitory Order issued by the High Court. He stated he was unaware that the seller had been declared as lacking capacity to transact a sale transaction. He affirmed he did not know the seller before the sale transaction.
14. The parties filed written submissions in compliance with the Court's directions. The Plaintiff filed his submissions dated 23<sup>rd</sup> March 2020 while the Defendant filed his submissions dated 9<sup>th</sup> July 2024.
15. Submissions of the Plaintiff.

The submissions by the Plaintiff essentially were that the transfer of the suit property to the Defendant was procured fraudulently. The Plaintiff who had initiated the suit on behalf of his father as his next



friend on the basis that his father lacked capacity on account of mental disability argued that the father with whom the Defendant purportedly transacted had no capacity to enter into any sale of land transaction. The Plaintiff (next friend) through Nyeri HC Misc Civil Application No. 113 of 2007 was appointed guardian and was granted custody of his father and the Court issued a Prohibitory Order that was registered against the title of land parcel Kiine/Sagana/58 (suit property) and several other properties registered in his late father's name. The Prohibitory Order issued on 5<sup>th</sup> November 2007 was to last until the Petition was determined and/or until further orders of the Court.

16. The Plaintiff contended that the order issued in Kerugoya PMCC No. 95 of 2008 on 23<sup>rd</sup> February, 2009 ordering the removal of all Prohibitory Orders placed over land parcel No. Kiine/Sagana/58 was not valid as there was never a suit where his father sued him as purported. The Plaintiff submitted that he adduced in evidence proceedings in respect of Kerugoya PMCC No. 95 of 2008 and the decree therein that clearly showed the suit related to a claim of refund of Kshs 1,500/- and not the land parcel Kiine/Sagana/58. The suit also did not involve the parties shown in the "fake order" but other parties. The Plaintiff submitted the invalid order issued in the Magistrate's Court was registered against the suit property as Entry No. 13 effectively removing the Prohibitory Order registered as Entry No. 12 pursuant to the High Court Order. The Plaintiff argued the removal of the Prohibitory Order was fraudulent, unlawful and illegal. The Plaintiff submitted the Defendant was a party to the fraud and/or was aware of the fraud/or could have become aware by exercise of due diligence.
17. The Plaintiff additionally submitted that his father had no capacity to transact with the Defendant owing to his mental status and in support of this assertion pointed to the medical diagnosis made by Dr. Pius A Kigamwa on 15<sup>th</sup> December 2007 that he had developed dementia. The Plaintiff argued with age the dementia could only have become worse and not better. In support of his submissions in regard to lack of mental capacity the Plaintiff relied on the Case of MKN (suing as the next friend of PNK being a person of unsound mind) –vs- NMN (2019) eKLR.
18. The Plaintiff in concluding his submissions stated that although the Defendant indicated he would be satisfied if he was refunded the Kshs 2,000,000/- he had paid in purchase price this was not contained in his pleadings and that the Defendant had not raised a Counterclaim. The Plaintiff reiterated that parties were bound by their pleadings and were not free to canvass issues that were not pleaded and in support of this proposition the Plaintiff relied on the Supreme Court Case of Raila Amolo Ondinga & Another –vs- IEBC & 2 Others (2017) eKLR relied upon and cited with approval by Mrima, J in the Case of Daniel Otieno Mugore –vs- South Nyanza Sugar Co. Ltd (2018) eKLR. The Supreme Court in the case stated:-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled proposition that no party should be permitted to fraud beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the question's that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable, nor permissible for a Court to frame an issue not arising on the pleadings.”

19. The Plaintiff further submitted the Defendant never offered any proof that he indeed paid Kshs 2,000,000/- for the purchase price pointing out the green card indicated the consideration paid for the land as Kshs 100,000/-. The Plaintiff contended there was no valid letter of consent of the Land Control Board obtained as his father was not capable of making the application as he could not sign. The Plaintiff submitted the Defendant could not have been a bonafide purchaser for value



without notice and placed reliance on the Court of Appeal Cases of *Weston Gitonga & 10 Others –vs- Peter Rugu Gikanga & Another* (2017) eKLR where the Court considered the doctrine of Bonafide purchaser and held that the elements that a party relying on the doctrine needed to prove to succeed were as outlined in the Uganda Case of *Katende –vs- Haridar & Company Ltd* (2008) EA 173 as follows:-

- i. That he holds a certificate of title;
- ii. That he purchased the property in good faith;
- iii. That he had no knowledge of the fraud;
- iv. That he purchased for valuable consideration;
- v. The vendor had apparent valid title;
- vi. That he purchased without notice of any fraud;
- vii. That he was not party to any fraud.

20. The Plaintiff further submitted that had the Defendant carried out appropriate due diligence and visited the suit land he would have discovered that the Plaintiff was in possession of the land and that he had a beneficial interest over the land. The Plaintiff thus contended the Defendant never acquired a good title and that the title he got was null and void.

21. The Defendant in his submissions submitted that with the death of Francis Muriuki Wahome the guardianship orders issued to James Gicheru Muriuki, his son who initiated the proceedings dissipated as they could not continue after the death of the subject. The Defendant further contended the ad litem Grant, James Gicheru Muriuki obtained to enable him to proceed with the suit on behalf of his late father's estate following his death, ceased to exist and/or have any validity once a full grant in respect of his father's estate was issued. The Defendant relied on Rule 38(2) of the Probate & Administration Rules which provides:-

“Upon the making of a grant under any provision of these Rules other than Rules 36 and 37, any earlier grant made under either of those Rules (in this subrule called the temporary grant) shall cease to have effect, but without prejudice to any act or other thing lawfully done thereunder, and the holder of the temporary grant shall forthwith surrender that temporary grant and account to the Court for all the assets collected and shall be given credit for any payments properly made and expenses properly incurred by him as such holder.”

22. The Defendant further in support of his submission that the Plaintiff was without any locus standi following the issue of full grant in favour of Rose Mumbi Muriuki in respect of the deceased estate relied on the Case of *Phillis Wanjiru Kigumi & Another –vs- Francis Mwangi & Another* (2015) eKLR where the Court stated thus:-

“The effect of Section 38(2) of *Law of Succession Act* (reference ought to have been to the Probate and Administration Rules) in the context of this case is that once the full grant of representation to the deceased estate was issued to the estate was issued to the Applicants, they were granted full legal to take charge and manage all assets and of the deceased estate while the right of objectors to gather and preserve the estate accruing as a result of grant of the Limited Grant Ad Colligenda Bona was automatically extinguished. It therefore follows



that the objectors no longer have any legal right to deal with the deceased's estate in any manner or form including the collection of rent from houses in the suit land.”

23. The Defendant further cited the case of Winrose Emmah Ndinda Kiamba –vs- Agnes Nthambi Kasyoka (2021) eKLR where Kemei, J commenting on the application of Rule 38(2) of the Probate & Administration Rules stated:-

“ 13. The above provisions are clear and that such a grant is normally issued due to the exigencies arising in relation to the estate and which could not wait for issuance of full grant through the normal way. It is also issued without prejudice to the right of any other person to apply for full grant of representation to the deceased. As such, Limited Grant may not be subjected to full and strict compliance with the requirements meant for, as if it is full grant of representation. Again, the person to whom the grant is so made undertakes to administer the estate according to the Law but limited for the purpose for which the grant is issued until a further grant of representation is made by the Court.”

24. The Defendant thus submitted that the full grant issued in favour of Rose Mumbi Muriuki extinguished the Limited Grant issued to James Gicheru Muriuki and henceforth he ceased to have a locus standi to prosecute the suit.

25. The Defendant noted that after the death of James Gicheru Muriuki, his wife Jane Wangui Waithaka was issued with grant of Letters to his estate and was substituted to replace him as the Plaintiff in the instant case. The Defendant contended the said Jane Wangui Waithaka was not appointed as Administrator of the Estate of Francis Muriuki Wahome (deceased) and hence had no authority and/or capacity to represent his estate and lacked any locus standi to lay any claim to any assets of the estate of Francis Muriuki Wahome (deceased).

26. The Defendant further submitted that the allegations that the deceased, Francis Muriuki Wahome, was of unsound mind were never proved and that at any rate the Defendant was not aware of any alleged disability of the deceased. He contended that he dealt with the deceased as a normal person and he had no signs of any mental incapacity. The Defendant finally submitted the forgery allegations and fraud allegations against the Defendant were not proved and remained as mere allegations. The Defendant maintained he was a bonafide purchaser for value without any notice and consequently could not be faulted.

27. Having reviewed and considered the pleadings, the evidence and the submissions of the parties, the following issues arise for determination:-

- i. Whether the Plaintiff, James Gicheru Muriuki (deceased) and the Administrator of his estate Jane Wangui Waithaka had locus standi to represent the estate of Francis Wahome Muriuki (deceased).
- ii. Whether Francis Wahome Muriuki (now deceased) was suffering from any mental disability?
- iii. Whether land parcel Kiine/Sagana/58 was transferred to the Defendant fraudulently?
- iv. Whether the Defendant was a bonafide purchaser for value without any notice?
- v. What reliefs/orders should the Court grant?



28. It is not disputed that James Gicheru Muriuki/Deceased who was a son of Francis Muriuki Wahome (deceased) was vide Nyeri HC Misc App. No. 113 of 2007 appointed guardian of Francis Muriuki Wahome on 5<sup>th</sup> November 2007. The order appointing the said James Gicheru Muriuki as guardian directed various other actions to be performed including the subject being examined by a Neurologist and a Psychiatrist and medical reports on the mental state of the subjects being prepared and filed in Court. Order 5 as per the orders issued provided as follows:-
5. That Prohibitory Order do issue against the following properties until the determination of the petition hereof or until further orders of this Court:-
- (a) All subdivisions of Nyeri/Lusoi/432;
  - (b) Karatina Plot No. B1/26
  - (c) Karatina Plot BI/31, B1/136, B1/139;
  - (d) Plot 1371/Malindi
  - (e) Daiga/Umande Block 1/138/Mukima
  - (f) Iria-ini Chehe/8
  - (g) Kiine/Sagana/58
  - (h) Iria-ini Chehe/15
29. Evidently land parcel Kiine/Sagana/58 notwithstanding the Prohibitory Order had been registered against the title was in 2010 sold and transferred to the Defendant without the involvement of the Next friend James Gicheru Muriuki who had been appointed guardian of Francis Muriuki Wahome. It was upon discovery of what he considered to be a fraudulent sale that the Next Friend of Francis Muriuki Wahome instituted the present suit. On the basis of the order in the High Court Case Misc 113 of 2007 James Gicheru Muriuki had capacity to institute the suit as guardian of Francis Muriuki Wahome.
30. The subject, Francis Muriuki Wahome, died in April 2012 before the High Court matter was finalised and the Plaintiff in June 2012 was issued adlitem Letters of Administration for the purpose of substituting the deceased Plaintiff, Francis Muriuki Wahome in the present suit. He was substituted and although Rose Mumbi Muriuki wife of the deceased Francis Muriuki Wahome applied to be substituted as Plaintiff on the basis that she had obtained a full Grant of Administration of her late husband's estate, the Court declined to revoke the substitution of James Gicheru Muriuki as Plaintiff and dismissed her application inter alia on the basis that she was conflicted as her interests were divergent to those of the estate. Indeed she had been named and listed as a defence witness.
31. The Plaintiff, James Gicheru Muriuki, died on 21<sup>st</sup> October 2020 after the suit had been fully heard. The Defendant closed the defence case on 13<sup>th</sup> February 2020 and directions were given on filing of the final submissions which were to have been filed by 6<sup>th</sup> April 2020. The onset of the Covid Pandemic no doubt caused disruption as the matter was next mentioned on 14<sup>th</sup> January 2021 by which time the Plaintiff had died. The Plaintiff's wife, Jane Wangui Waithaka was substituted in place of her husband as Plaintiff vide this Court's ruling delivered on 9<sup>th</sup> May 2013.
32. The Defendant in his submissions has argued that since Rose Mumbi Muriuki was issued the full grant in respect of the Estate of Francis Muriuki Wahome, any other limited grant issued to any other person in regard to the estate ceased to have validity by virtue of Rule 38(2) of the Probate and Administration Rules. In the instant case, the said Rose Mumbi Muriuki, had herself applied to substitute her deceased husband as Plaintiff and had also opposed the substitution of James Gicheru Muriuki (deceased) to



replace her husband as Plaintiff. In both instances, Rose Mumbi Muriuki was unsuccessful and the record does not indicate she appealed any of the Rulings. In regard to the application by Jane Wangui Waithaka to substitute her husband as Plaintiff, the Defendant opposed the application but the Court in a considered Ruling allowed the application. The Ruling was not appealed against. In consequence therefore the deceased, James Gicheru Muriuki (deceased) and his wife Jane Wangui Waithaka were regularly substituted as Plaintiff to represent the estate of Francis Muriuki Wahome in the instant case. It is therefore my determination that the late James Gicheru Muriuki having been substituted to represent the Estate of Francis Muriuki Wahome in these proceedings and having testified before he died, his wife Jane Wangui Waithaka had locus to stand in his place as the personal legal representative of his estate to receive any ensuing Judgment.

33. On the merits of the case it was the Plaintiff's contention that the Defendant acquired the suit property irregularly and fraudulently and sought a declaration that the transaction leading to the removal of the Prohibitory Order registered against the title and the registration of the Defendant was illegal and null and void. The Plaintiff sought the cancellation of entries 13, 14 and 15 made against the title of the suit land.
34. To substantiate his claim that there was fraud, the Plaintiff adduced evidence that the order utilised to remove the Prohibitory Order placed pursuant to the order of the High Court of 5<sup>th</sup> November, 2007 was fake or a forgery. As per the abstract of title (green card) the Prohibitory Order issued by the High Court was registered as Entry No. 12 and was removed vide entry No. 13 pursuant to an order purportedly issued in Kerugoya PMCC No. 95 of 2008. The Plaintiff exhibited a decree purported to have been issued in the Magistrate's Court in PMCC No. 95 of 2008 where Muriuki Wahome was the Plaintiff and James Gicheru Muriuki was the Defendant. The decree was said to have been issued on 23<sup>rd</sup> February 2009 ordering as follows:-
1. That the Prohibitory Order placed on land parcel No. Kiine/Sagana/58 be removed.
  2. That the Land Registrar Kirinyaga be and is hereby ordered to remove all the Prohibitory Order placed on land parcel No. Kiine/Sagana/58.
35. This decree was registered by the Land Registrar, Kirinyaga on 17<sup>th</sup> March, 2010. The Plaintiff also had in his bundle of documents exhibited a decree purportedly issued in the same matter on 21<sup>st</sup> November 2008 and signed by P. T. Nditika, SRM. As the Plaintiff, James Gicheru Muriuki was indicated as the Defendant in the Magistrates case and he denied any involvement in such a case. He made a report to the police who launched investigations regarding the decree. The investigations revealed the Kerugoya SPM's Court never had a Civil Case No. 95 of 2008 between Muriuki Wahome –vs- James Gicheru Muriuki where such Decree was issued. The Plaintiff exhibited a letter from Kerugoya Senior Principal Magistrate's Court dated 7<sup>th</sup> October 2010 addressed to the DCIO Kerugoya denying the existence of such a case. The content of the letter was as follows:-

The D.C.I.O

Kirinyaga

PO Box 19

Kerugoya

Date 7<sup>th</sup> October, 2010

RE:- S.P.M'S Court Civil Case No. 95 of 2008

Michael Mwirigi Kibui –vs- Erastus Gitari Murage



Reference is made to your letter Ref. CID/SEC/4/4/6/Vol. XX/47 dated 5<sup>th</sup> October 2010. In our above mentioned case the referred matter is of friendly loan of Kshs 1,500/- while in your referred Civil Case as captioned in the annexures it touches land parcel No. Kiine/Sagana/58. There are no such orders in our above mentioned file.

Also note that the parties in our above case are quite different from those referred to in the purported order.

S. H. N. Gatana

For: Senior Principal Magistrate

Kerugoya

36. The plaint and proceedings of the case PMCC No. 95 of 2008 Kerugoya indicated that the parties were Michael Muringi Kibui –vs- Erastus Gitari Murage and that the claim related to a refund of Kshs 1,500/- on account of money advanced by the Plaintiff to the Defendant as a friendly loan. The suit was filed by Maina Kagio & Company Advocates for the Plaintiff. The decree used to remove the Prohibitory Order registered against the suit property quite evidently was not issued in Kerugoya SPM's Court and specifically was not issued in Kerugoya PMCC No. 95 of 2008. The order used to remove the Prohibitory Order could only have been fraudulently obtained by whoever tendered the same for registration at the Lands Office.
37. The Prohibitory Order at any rate having been issued by the High Court could not have been removed by an order issued by the Subordinate Court. The Prohibitory Order was clear that it was to remain in force until the Petition in the High Court was determined and/or until further orders of the Court. It did not mean orders from any Court but the Court where the Petition was filed.
38. Rose Mumbi Muriuki appeared as an objector in HC. Misc Application No. 113 of 2007 and was represented by Counsel on 5<sup>th</sup> November 2007 when the order appointing James Gicheru Muriuki as guardian of Francis Muriuki Wahome and issuing the Prohibitory Order was made. She was therefore all along aware of the order. The Defendant in his evidence stated in 2010 when he was purchasing the suit property, the seller Francis Muriuki Wahome was accompanied to Nairobi by his wife, Rose Mumbi. He stated they informed him the seller had been incapacitated and was in a wheelchair prior to 2010 but he had recovered. There can be no doubt that Rose Mumbi was aware of the order placing custody of her husband under the Plaintiff James Gicheru Muriuki, and further that the High Court had issued a Prohibitory Order against the suit property that she escorted her husband to Nairobi to sell to the Defendant. The evidence points irresistibly to the said Rose Mumbi being the prime mover in obtaining what I have held to be a fictitious order from the Magistrates Court to remove the Prohibitory Order.
39. On the evidence I am satisfied that the Prohibitory Order registered against the suit property was unlawfully and illegally removed. The suit property could not be lawfully dealt with by the registered owner and/or any other person for as long as Entry No. 12 (the Prohibitory Order) was not lawfully removed. At the time the Defendant purchased the property, the seller Francis Muriuki Wahome (deceased) was under the guardianship and custody of James Gichere Muriuki (deceased Plaintiff) pursuant to the High Court Order issued on 5<sup>th</sup> November 2007 which order had not been discharged. The registered owner, Francis Muriuki Wahome, could not by virtue of the order, act personally and/or independently. If indeed he was well and able to personally act, he would have applied to the High Court to have the orders issued on 5<sup>th</sup> November, 2007 discharged. He did not and therefore the orders remained valid until they were discharged by his death in 2012.



40. The Plaintiff adduced evidence that demonstrated there was a valid High Court Order appointing him guardian and placing custody of Francis Muriuki Wahome under him. He also adduced evidence to demonstrate that the Prohibitory Order registered against the suit property was unlawfully and illegally removed. By reason of the High Court order, the said Francis Muriuki Wahome (deceased) could not act in person and any documents purporting to have been executed by him could only be forged and/or fraudulent. I therefore hold there was sufficient evidence to prove fraud.
41. The deceased (Francis Muriuki Wahome) having been committed to the custody of the Plaintiff (James Gicheru Muriuki (now also deceased) had no capacity to act personally. The sale agreement he purportedly entered into on 8<sup>th</sup> July 2010 when he was still under the guardianship and custody of the Plaintiff was a nullity and of no legal effect. The agreement was null and void.
42. The Defendant has contended he was an innocent purchaser for value without any notice. He argued he carried out due diligence and followed due process to have the title of the suit property registered in his name. The Advocate of the Defendant who drew the sale agreement for the Defendant in his evidence stated he only carried out a search which revealed there were no encumbrances on the property. He stated he never obtained a green card of the suit property and he was not aware what was in the green card. The Defendant also testified he had not obtained a green card of the property and that he only did a search in 2010. In the Case of Samuel Kamere –vs- Lands Registrar (Kajiado)(2015) eKLR the Court of Appeal stated as follows:-
- “--In order to be considered a bonafide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly, they paid valuable consideration for the purchase of the suit property.
43. In the Supreme Court of Kenya Court, Case of Dina Management Ltd –vs- County Government of Mombasa & 5 Others (2023) eKLR held that a title document alone is not sufficient proof of ownership especially where it was tainted with illegalities. The holder of the title document must surpass reliance on the title alone to show the process of acquisition from inception was legal. The Court held purchasers needed to exercise greater caution especially where the land may have changed hands severally.
44. In the instant case the purchaser (Defendant) most certainly needed to have gone beyond the certificate of official search and to obtain the history or root of the title he sought to purchase. The green card quite often offers a mirror respecting the history of a property. If the Defendant had obtained a greencard, he would have noted the registration of the Prohibitory Order pursuant to a High Court Order and the purported removal vide an order from the Lower Court. That ought not to have happened as the Lower Court cannot discharge an order of the High Court. That would have put him on notice to carry out further due diligence to verify the veracity of the orders. Owing to rising cases of fraud, it should also be necessary for intending purchasers to do physical verification of the land the subject of sale and if necessary to use the services of a Surveyor. In the instant case a physical visit to the land would have revealed the Plaintiff was in possession and that he was laying claim to the land.
45. I am in the premises not persuaded the Defendant was a bonafide purchaser for value without notice as he failed to carry out the appropriate and necessary due diligence to verify the particulars and ownership of the suit property. It is my determination that the Defendant did not acquire the suit land procedurally. The deceased at the time he entered the sale agreement was under disability having been committed for guardianship under the Plaintiff. The Prohibitory Order was equally not procedurally



removed. The title held by the Defendant in the premises is liable to be cancelled pursuant to the provisions of Section 26 (1) (b) of the [Land Registration Act](#), 2012.

46. For all the above reasons I find that the Plaintiff has proved his case on a balance of probabilities. I accordingly enter Judgment in favour of the Plaintiff as prayed under prayers (a) (b) and (c) of the Plaint dated 18<sup>th</sup> October 2010.

Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

**J. M. MUTUNGI**

**ELC - JUDGE**

