



**Onditi v Nyaruri & another (Environment & Land Case 44 of 2020)
[2024] KEELC 5859 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5859 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 44 OF 2020**

**A OMBWAYO, J
AUGUST 23, 2024**

BETWEEN

JASON NYARURI ONDITI PLAINTIFF

AND

ABEL HAYORA NYARURI 1ST DEFENDANT

LAND REGISTRAR NAKURU 2ND DEFENDANT

JUDGMENT

(1) Introduction

(a) The Plaintiffs Case

1. Jason Nyaruri Onditi (hereinafter referred to as the plaintiff), vide an amended plaint dated the 6th September 2021, filed in court on the 13th September 2021, sought a declaration that the property known as Njoro/Ngata Block 2/1613 (Kiboron 'A') Belongs to him, and an order cancelling and rectifying the said title since the same was irregularly/illegally issued to the 1st Defendant and a permanent injunction restraining the 1st Defendant or his agents from trespassing, entering, accessing or in any way interfering with the plaintiffs possession of the said land. The Plaintiff's assertions are that the 1st Defendant with the help of the 2nd defendant fraudulently and illegally transferred the suit land to his name without the Plaintiff's authority. He also prayed for Costs of this suit.
2. The Plaintiff alleges that he is the rightful owner of the suit property since he purchased it from one Agnes Chepkeiyo Chemngorem (Deceased) on the 17th of March 2002 whereupon he was issued with a title on the 25th of August 2010. The Plaintiff further asserts that he discovered the aforesaid fraud/illegality sometime on the 24th of June 2020 when he conducted a search of the suit property only to note that the 2nd Defendant had issued another title deed to the 1st Defendant. Moreover, that he neither signed any transfer forms nor any consent from the LCB with regard to the suit property.



(b) 1st Defendant's Case

3. The 1st defendant in his amended statement of defense, Inter alia, averred that the suit against him failed to disclose a reasonable cause of action and that the Plaintiff attempted to purchase the property for himself instead of purchasing it for the 1st defendant and thus the agreement of the 17th of March 2002 never materialized and that he was the bonafide owner of the suit property having purchased it on the 3rd of June 2003 and having paid the full purchase price. He also denied all the allegations of fraud against him as alleged by the Plaintiff.
4. The 1st defendant filed a counterclaim wherein he stated that the Plaintiff fraudulently transferred the title to himself while knowing that the suit land was purchased by the 1st defendant and thus title ought to have been registered in the names of the 1st defendant. That the 1st defendant reported the said fraud to the authorities but later elected to have the matter settled outside the purview of the authorities when the plaintiff agreed to transfer the subject title from his names to the 1st defendant's names. Furthermore, the 1st defendant counterclaimed for a declaration that he is the proprietor of the suit land and prayed an injunction to remove the Plaintiff and his agents from the suit land and to permanently restrain them from entering, using or in any other way disturbing the 1st defendant's quiet possession of the suit land.

(c) The 2nd Defendants Case

5. The 2nd defendant neither filed a memorandum of appearance nor statement of defense

(2) Evidence on Record

(a) Plaintiff's Evidence

6. The matter came up for hearing on 23rd October 2023. The Plaintiff testified as PW1, adopted his statement dated 6th of July 2022 as his evidence in Chief. He states that he bought the suit land on the 17th of March 2002 from one Agnes Chepkeiyo Chemngorem. The purchase price was Kshs.350,000, whereof Kshs.270,000 was deposited at the time of the purchase and the balance of Kshs.80,000 was to be paid on or before the 15th of April 2003. He produced an agreement dated 17th of March 2002. It was also his evidence that all his children helped him purchase the suit property since the same was to be his matrimonial home. That he subsequently moved into the suit land with his wife wherein he started constructing a dwelling house with the help of his children. That he lived in the land until the year 2009 when he moved to the USA after getting a Green Card. That he requested his brother, Nathan Akama Onditi to follow up the issuance of property's title since he was out of the country. That his daughter Beatrice Bonchere Nyaruri and son Josephat Nyaruri remained in the suit land. That in the year 2019, when he came back from USA, he went to the suit land and discovered that the 1st Defendant had taken over the property and locked all the rooms and unlawfully obtained his title deed and allotment letter. That thereafter his daughter Beatrice Bonchere Nyaruri conducted a search and learnt that the 1st Defendant had fraudulently procured another title deed, with respect to the suit land, in his names. He concluded that the 1st Defendant does not have a house or any building in the suit property, which belongs to him and the larger family.
7. On Cross examination, PW1 stated that in the year 2002 he was living in his home at Rhonda Estate within Nakuru Estate. He bought the property with money contributed by his children and reiterated that he settled the balance of Kshs.80,000 as per the terms of the agreement dated 17th of March 2002 but he could not remember the exact period. He stated that he was in the USA in the year 2010 when



- the title was issued in his name. He was at pains to explain why it took him 7 years to transfer title to his name after the alleged purchase. He admitted that one Zippora Bosibori Nyaruri was still young when the house in the suit land was constructed and thus did not contribute to its construction as alleged.
8. PW2, Nathan Akama Onditi, adopted his statement dated 21st of August 2022. The crux of his evidence in Chief was that he collected the Plaintiff's suit land title from the lands office in 2010 and released it to the Plaintiff's daughter sometimes in the year 2013. In Cross-examination, he stated that he did not have evidence to show that it is the Plaintiff who paid the purchase price of the suit land. When shown the letter dated 9/12/2019 addressed to the CID Nairobi and asked to explain how it was possible that he released the title in question to the Plaintiff's daughter and yet the Plaintiff himself states in his stated exhibit that he had handed over the title to the 1st defendant, he became evasive in his answer. PW2 subsequently admitted that monies that he received and built the main house on the suit land all came from the 1st defendant who was at the time in the USA. He also stated that the 1st defendant requested him to be in-charge of the construction of the house that the 1st defendant built on the suit land. PW2 essentially admitted that at all material times he updated the 1st defendant the progress of the construction house built on the suit land.
 9. PW3 Beatrice Bonchere Nyaruri adopted her written statement dated 21st of August 2022 as evidence in Chief. She testified that when she conducted a search at the lands registry sometimes on 24th of June 2020, she noted that the suit property's title deed had been fraudulently issued to 1st defendant on 17th of December 2015. She also stated that the 1st defendant participated in the purchase of the suit property for the parents but was not the owner. According to PW3, they came together as a family to buy the land for their parents. She was the treasure in Kenya whereas the plaintiff was the treasurer in the USA. They sent her ksh 270,000 which she paid the seller. They later contributed money to construct the house on the land. In the year 2019, the 1st defendant served them with a letter of eviction. On Cross-examination, PW3 stated that she contributed for the purchase of land but did not know how much because she did not keep any record. She admitted her contradiction between her statement and paragraph 3 of the supporting affidavit on record that she swore on the 21st of July 2020, and one filed on 22nd July 2023 where she stated that it is the Plaintiff who purchased the suit property.
 10. PW4 Josiah Omamba Ouma, adopted his written witness statement dated 6th of July 2022 as his evidence in Chief. The gravamen of his testimony was to the effect that he never executed any land transfer documents for the transfer of the suit property to the 1st defendant. He also stated that he had made an inquiry and confirmed that during the period of transfer the plaintiff was not in Kenya and hence would not have signed transfer forms in his absence. On Cross-examination, he confirmed that he never reported any cases of forgery to the authority. He further stated that he did not have a copy of the transfer forms that were presented to the land office. When he was confronted with a copy of an air ticket that indicated that the plaintiff was indeed in Kenya during the period of transfer he became evasive. PW 4 confirms that he knew PW 1, PW 2, PW 3, since they were all his clients. He also conceded that he instituted the instant suit on behalf of the plaintiff and later ceased to so to act as an advocate in the proceeding since he had signed the transfer forms that were listed in the first defendants' document. PW 4 also stated that he was not aware whether the power of attorney that had been used to institute this suit had been registered as required by law.
 11. PW 5 Mr. Collins Liyai Aliella, a land registrar, was brought to court pursuant to witness summons that had been issued by court. Though the land registrar had been sued as the 2nd defendant, he testified as the plaintiff's witness. In a nutshell PW 4 produced a certified copy of a green card of the suit property. He further testified that the said green card showed that the suit property was initially registered in the name of Agnes Chepkeiyo Chemngorem then to the plaintiff and lastly to the 1st defendant. He



also took the court through all the requirement of a valid transfer. PW 4 was shown a copy of transfer document and stated that he could not authenticate it since the same had not been lodged at the land registry and that the same should be in its original form. He further stated that a land registrar must sign a valid transfer document. He also stated that it was only the presentation book that would determine all the documents that were presented before the title in question could be issued to the first defendant. On Cross- examination, PW 4 stated that the green card that was produced as a plaintiff exhibit was a valid document. He also told the court that there was nothing in his possession that would determine how the plaintiff transferred the suit property from the original owner- the late Agnes Chepkeiyo Chemngorem.

(b) 1st defendants Evidence

12. The 1st defendant called 4 witnesses. DW1, the 1st defendant adopted his witness statement dated the 1st of March 2022 as evidence in Chief. In a nutshell, the 1st defendant stated that in the year 2002, he sent Kshs.500,000 to his mother to purchase land on his behalf. That the plaintiff took the said amount from DW 1's mother and attempted to purchase the suit property in his names. That after critical intervention from the 1st defendant, the plaintiff apologized and thereafter the 1st defendant sent more money to his mother who completed the purchase of the suit land. DW1 stated that because his father, the plaintiff, could not be trusted with money, he requested his uncle PW2 to oversee the house that he was constructing on the suit land. He produced evidence of western union funds transfer slips of the amounts that he used to send through PW2, his uncle, for the said construction. That the said amount totaled USD 13,843.
13. Further, DW1 testified that the plaintiff was not in Kenya in the year 2010 when the plaintiff's title was purportedly procured. That it is PW2 who impersonated the plaintiff and procured the title deed on his behalf in the year 2010. That sometime in the year 2015, while attending a family function in Kenya, the plaintiff agreed with DW1 that since they were both in the country, it was convenient for both of them to correct the mistake that had been done regarding the title that had been issued in the names of the plaintiff. That pursuant to the foregoing understanding, the plaintiff in the company of the PW2 and DW1 went to the land's office-Nakuru to correct the error that had been made by issuing the title to the plaintiff without any paperwork. That at the land's office, all the three were advised that it would not be possible to nullify the title that had been issued to the plaintiff, but it would be possible to have the plaintiff transfer the same to the DW1. That thereafter, the lands office presented transfer forms to them and advised them to go have them attested by an advocate. That on the way to the advocate's office, the plaintiff and DW1 took passport size photos that were to be attached to the land's office. That PW2 took them to the law firm of PW4 since he was the family's lawyer. PW4 attested the said transfer forms. That thereafter, the three of them returned the attested transfer forms to the lands office wherein they were advised to surrender the old title and go for a re-issue of one that was in the names of DW1 at a later day. DW1 stated that the plaintiff voluntarily surrendered the title that was in his names to the lands office wherein it was perforated. That sometime on the 17th of December 2015, the plaintiff, DW2 and DW3 collected the title in question.
14. That shortly thereafter the issuance of the said title was discussed among PW1's family Whatsapp group. That sometime on the 21st of November 2019, DW1 was summoned to the DCI offices Nakuru on suspicion of land fraud. That on the 22nd of November 2019, DW1 honoured the police summons and presented himself before the DCI offices Nakuru wherein he found the plaintiff. That at the said office the plaintiff admitted that DW1 was the actual owner of the suit property and the matter ended at that point. That sometime in the year 2020, the plaintiff and PW3 made up a conspiracy that PW3 and her children had stayed on the suit property all her life, yet she had lived with her husband for almost 20 years in Nairobi and Machakos. That the said conspiracy was made with an intention of



- painting a false picture that the suit land was family land. He produced an affidavit to prove the said marriage. That sometimes in the month of March 2020 PW3 started disturbing the 1st defendant's caretaker and maliciously causing destruction to the suit property. DW1 further stated that sometime in 2020 two of his siblings confirmed that it was within their knowledge that the suit land belonged to him. That sometime in the year 2020 DW1's mother wrote him a bitter letter regarding the suit land. In the said letter, his mother confirmed that DW1 indeed sent money to PW3 to purchase a house in Kenya and that DW1 indeed sent the money that was used to purchase the suit land.
15. That sometime later PW4 wrote a letter suggesting mediation but the 1st defendant rebuffed the suggestion since he no longer trusted the advocate who had sued him and yet he had, in the first place, signed the transfer forms that formed the basis of the instant suit. PW4 later recused himself after the 1st defendant protested his capacity to act in the suit on account of conflict of interest and that PW4 was a witness in the proceedings. On Cross-examination, DW1 stated that copies of the transfer forms that he tendered to court are the copies that he was given at Oumo's (PW4) office while in the company of PW1 and PW2. That in the year 2002 he was in the USA and he never signed any agreement but his mother signed it on his behalf and the same was manifest in the agreement dated 3rd of June 2003. That he had instructed his mother to purchase the suit property on his behalf. That in the year 2015 he was in Kenya.
 16. In re-examination, DW1 stated that in the year 2002 he was in the USA. That the agreement dated 3rd of June 2003 was signed by his mother on his behalf. That he is the one who purchased the property using his own money. That the letter authored by his mother addressed to him (pages 117-121 of the bundle) is evidence that his mother confirmed that he purchased the suit at a purchase price of Kshs.350,000 in an agreement that was drawn by law firm of Odhiambo and Odhiambo advocates.
 17. DW2 Stephen Macharia a mason adopted his written statement dated 18th of May 2022 in court on 18th of May 2022. The gist of his testimony in Chief was that he modified and repaired the house in the suit property. He also stated that, at all times, the 1st defendant paid him through his uncle PW2. Cross examined, he stated that all material times he was receiving payment from the 1st defendant through PW2. That on some occasions he would see PW1 on the suit property. That PW1 never paid him any monies. Re-examined, DW2 stated that he, Inter alia, reconstructed the whole roof of the house in the suit land.
 18. DW3 Thomas Njoroge, an electrician adopted his written statement dated 18th of May 2022 filed in court on 18th of May 2022. He stated that DW1 engaged him to install electricity in the house that was still under construction in the suit land. That DW1 intimated to him that the house belonged to him and that DW1 paid him for all the installation work through PW2. In Cross-examination, he stated that he installed electricity in the entire house. That it is DW2 that introduced him to DW1. That it is the 1st defendant who assigned him work in the suit land and paid for the services rendered. That the plaintiff never assigned him any work.
 19. DW4, John Otieno Abanja, adopted his written statement dated 16th September 2020 filed in court on 21st of September 2020 as his testimony in Chief. He stated that in the year 2019, the 1st defendant employed him as a caretaker in the suit land. That his duty was to guard the suit property from intruders and generally take good care of it since the DW1 was out of the country. That he was also authorized to welcome visitors who included the 1st defendant's relatives. That PW3 would visit from Nairobi, stay for some few days before going back to Nairobi. That sometimes in the month of March 2022, PW3 and her children visited the suit property and demanded to be allowed in the suit property contrary to the instructions that the 1st defendant had given the caretaker. That one Josphat, a brother to both PW3 and the 1st defendant, facilitated her entry to the suit property. That after PW3 had stayed in the



suit property for a month; she sent her sons to go stay in the servant quarters that the caretaker was living in. That the caretaker could not bear the intrusion and so he left and went to live in his house at Kaptembwa estate. Given the development, the 1st defendant instructed him to be visiting the suit property and give him a regular update regarding the state of the property. That at one point in time DW4 noticed that one of the windows of the 1st defendants' bedroom had been broken. That he made several visits to the property until the occupants declined to give him further access thereto. That at all material times, the 1st defendant paid him monthly using the mpesa platform. That PW3 later chased him away from the suit property.

20. Cross-examined, DW 4 stated that he became a caretaker in the year 2019. That the 1st defendant employed him. That he knew the plaintiff. That his duty as to take care of the property. That at the time he was employed, there was no one staying in the house in the suit property. That at all material times, PW 3 came to the property as a visitor. That at all material time, the plaintiff came to the property as a visitor. That DW 4 knew that the suit property belonged to the 1st defendant since he used to pay him monthly salary. That the plaintiff never paid DW 4 even for a day.
21. DW 5 Joyce Nyaruri Misiani adopted her written statement dated 9th of September 2020 as testimony in chief. DW 5, the first born child to the plaintiff stated that DW1 is her younger brother and that he was the owner of the suit property. That her father, the plaintiff neither bought the suit land nor built the house thereon. That the plaintiff never had the financial power to purchase the suit property or built the house thereon. That sometimes in the year 2002, her mother informed her that the plaintiff had attempted to deceitfully procure a sale agreement for the suit property in his name. She stated that their mother and all other family members were all apprehensive that the plaintiff had attempted to insert his name as a purchaser on the suit property. That the said apprehension was informed by the fact that the plaintiff had earlier sold family land i.e. Molo South/LAGWEDA BLOCK 1/134 without anyone's knowledge. That she had financially assisted in the projects and maintenance of the suit land solely because DW1 had allowed the entire family to utilize the house and the land while he was away. That the instant suit was unfortunate, and she categorically stated that she neither claimed ownership of the suit land nor the house built thereon. DW5 finally stated that the 1st defendant has never denied their parents entry to the house. That DW1 has always put the family first and always strived, for decades, to improve the life of their parents and the entire family. Cross-examined, she stated that the plaintiff did not have any dependents. That there was evidence in the western union money transfer documents that DW1 indeed purchased the suit property.

(3) Rival Submissions

(a) Plaintiffs Submissions.

22. The plaintiff has identified two main issues for determination by this Honorable Court thus whether the title deed Njoro/ngata Block2/1613 (KIROBON 'A') was irregularly issued to the 1st Defendant and whether this court should issue an order of cancellation of the 1st Defendant's title for the parcel of land known as NJORO/NGATA BLOCK 2/1613 (KIROBON 'A').
23. On whether the title deed NJORO/NGATA BLOCK 2/1613 (KIROBON 'A') was irregularly issued to the 1st Defendant, the plaintiff submits that the title deed for the suit land was irregularly issued to the 1st Defendant by the 2nd Defendant and that this amounts to fraud. The land was purchased by the Plaintiff herein after his children helped him get the purchase price for the same. The suit property was registered in the name of the Plaintiff herein and not in the name of the 1st Defendant who purports to have bought the said parcel of land from the late Agnes Chepkeiyo Chemngorem on the 17th of March, 2022. The fact that the 1st Defendant contributed to the purchase of the suit property did not



amount to him having proprietary rights over the suit property. The plaintiff submits that it cannot be a coincidence that firstly the land was bought adjacent to the land that had been bought earlier and secondly, it is highly suspicious that the 1st Defendant is the only one among the children of the Plaintiff that is laying claim on the suit land. This proves his ulterior motives.

24. The plaintiff contends that the 1st Defendant, never called as a witness the vendor of the land Agnes Chepkeiyo Chemngorem to confirm that she indeed surrendered completion documents to him as a bonafide purchaser to facilitate the transfer . In the absence of such evidence, it is clear that the transfer of the land was done in collusion with the 2nd Defendants or its officers without the pivotal completion documents.
25. According to the plaintiff, there is no clear trail as to how the transfer was done. The 1st Defendant produced an incomplete transfer form that was purportedly signed by the Plaintiff who authorized the transfer of the suit property in the name of the 1st Defendant. The said transfer forms do not in any way denote a transfer form duly submitted to the lands office to authorize the transfer of the parcel of land to his name. Further, upon cross –examination he indicated he did not retain a copy of the transfer forms that were submitted to the lands office for the transfer to be effected. The plaintiff argues that in practice, transfer forms are filled and submitted to the registry in triplicate. The registry retains two duly stamped copies and the party to whom the transfer is being made in their favour retains one copy. If in the event the 1st Defendant lost his copy, he should have obtained a photocopy and present to the court to proof his case since the document is very critical. In the absence of the duly stamped copy of the transfer documents, the plaintiff has proven beyond reasonable doubt that there was fraud in the transfer of the suit land. This standard of proof has been discharged as required.
26. The plaintiff cites the decision of the the Court of Appeal in Mombasa Civil Appeal No. 312 of 2012: -Emfil Limited v Registrar of Titles Mombasa & 2 others (2014) eKLR stated:

“Allegations of fraud are allegations of a serious in nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.
27. Moreover that this Court has an implied duty to investigate and determine the validity of a title. This can be inferred from the case of Hubert L. Martin & 2 others Vs. Margaret J. Kamar & 5 others (2016) eKLR, where the Court held in this regard that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be held.. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging ones case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.
28. The plaintiff contends that he duly received a title after he had purchased the suit property and paid the full purchase price. The plaintiff submits that the 1st Defendant herein has not proved how he acquired the title to the suit property and therefore the same was fraudulently issued upon him without following the due procedure.



29. The plaintiffs submissions are underpinned on Section 26 (1) of the [Land Registration Act](#) which states as follows:-

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party: or
- b. Where the certificate of title has been acquired illegally , unprocedurally or through a corrupt scheme.”

30. He states that the law is very protective of title and title can only be impeached as provided in section 26 of the [Land Registration Act](#), 2012. It was the plaintiff's evidence that at no particular point did he sign and or appear before Mr. Josiah Oumo to sign any transfer documents in the year 2015. Further it was his evidence that he reported the issue of his title being fraudulently being transferred by the 1st Defendant vide a letter addressed to the Director of Criminal Investigations dated 9th December , 2019 immediately he learnt of the fraudulent actions of the 1st and 2nd Defendant. The plaintiff submits that he is the rightful and legal owner of the suit property and thus the subsequent registration of the 1st Defendant as the proprietor of the suit property was obtained fraudulently, illegally and without any basis in law.

31. On the 2nd issue as to whether this court should issue an order of cancellation of the 1st Defendant's title for the parcel of land known as NJORO/NGATA BLOCK 2/1613 (KIROBON ' A') the plaintiff submits that it is only this court that has the exclusive powers to cancel or revoke a title. This the court does by ordering the registrar to cancel or revoke the title and have the land registered to the rightful owner. The plaintiffs submissions are underpinned on Section 80 of the same [Land Registration Act](#), provides that:-

1. Subject to subsection (2) , the Court may order the rectification of the register by directing that any registration be cancelled or amended if it satisfied that any registration was obtained , made or omitted by fraud or mistake.
2. The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

32. The plaintiff relies on the decision of the court in Kisumu Misc No. 80 of 2008 Republic V Kisumu District Lands Officer & Another (2010) eKLR where the court held that:

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



33. Similarly the court of Appeal in Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-corruption Commission & 2 others (interested parties) (2018) eKLR agreed with the trial Court that

“The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of Law”

34. According to the plaintiff, it does not matter whether the 1st Defendant was involved in the fraudulent activities leading to the issuance of the title or not . Innocent holders of irregular titles can also have their titles impeached

Munyao J in the case of Elijah Makeri Nyangw’ra v Stephen Mungai Njuguna & another Eldoret E & L Case 609 (B) of 2012 (2013) eKLR where the Court observed as follows;

As may be observed , the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be part. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme...is the title impeachable by virtue of Section 26 (1) (b) First it needs to be appreciated that the title holder be part to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that the title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”

35. The plaintiff therefore asks this court, in glare of the evidence on record not to allow the 1st Defendant to benefit from his mischief and revert the land back to the plaintiff who is the bona-fide owner.

(b) 1st defendant’s submissions

36. The 1st defendant submitted that there were four issues for determination thus;
- a. Whether Beatrice Bonchere Nyaruri had capacity to institute this suit on behalf of plaintiff.
 - b. Whether the plaintiff has proved fraud against the 1st defendant
 - c. Whether the contract executed in the year 2002 between the plaintiff and Agnes Chepkeiyo Chemngorem was and legally enforceable.
 - d. Whether a declaration should issue declaring the 1st defendant the bonafide owner of the suit property.
37. The 1st issue raised by the 1st defendant is whether Beatrice Bonchere Nyaruri had capacity to institute this suit on behalf of plaintiff. The 1st defendant submits that the issue has been exhaustively dealt with in our notice of motion dated 26th of February 2024 filed in court on 28th of February 2024 together with the submissions filed thereto dated 3rd of April 2024 and filed in court on 5th of April 2024.



38. On the 2nd issue as to whether the plaintiff has proved fraud against the 1st defendant, the 1st defendant rightly submits that the law with regard proof of fraud in civil proceedings is settled. The party alleging it, must plead it, particularize it and eventually prove it. The 1st defendant cites the case of Kuria Kiarie & 2 others vs. Sammy Magera (2018) eKLR where the Court of Appeal rendered itself thus;

“ 25 the next and only other issue is fraud. The law is clear and we take it from the case of Vijay vs Nansingh Madhusingh Darbar & Another (2000) eKLR, eherr Tunoi, JA. (as he then was) stated 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 alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”. (Emphasis added). The same procedure goes for allegations of misrepresentation and illegality. As regards the standard of proof, this court in the case of Kinyanjui Kamau vs. George Kamau (2015) eKLR expressed itself as follows;

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See 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 forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

39. The 1st defendant cites the black Law Dictionary 10th Edition which that defines fraud thus;-

“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”. That the authors of the above dictionary quote the following extract from John Willard, A Treatise on Equity Jurisprudence 147 (Platt Potter ed. 1879)

“Fraud has been defined to be, any kind of artifice by which another is deceived). Hence, all surprise, trick, cunning dissembling, and other unfair way that is used to cheat anyone, is to be considered as fraud”

40. The 1st defendant argues that applying the above parameters to the facts of this case, we do not see how it can be said that 1st defendant misrepresented himself or misled the 2nd defendant into transferring the title to his names. According to the defendant, the feeble attempt that was made by the plaintiff by the insistence on the 1st defendants documents to advance his case. Unfortunately, their own witness PW 5, the land registrar, diffused the said attempt by asserting that the copy of the transfer



form in question was incomplete in the sense that it had not been lodged at the lands registry and that the same was not in its original form. PW5 further stated that a lands registrar must sign a valid transfer document. He also stated that it was only the presentation book that would determine all the documents that were presented before the title in question was issued to the 1st defendant. PW4 Mr. Ouma's testimony regarding the same document was also of no consequence in as far as allegations of fraud were concerned in light of the land registrar's position. It is also noteworthy that only a few days after title was transferred from the plaintiff to the 1st defendant, the family in its' WhatsApp group discussed about the same transfer in the month of January 2016. Notably one of the siblings, owner of telephone number (919) 741-7283 is on record as stating that all along the plaintiff herself knew about the name change. PW3 is also on record encouraging the 1st defendant to sort out his Kitale plot too. According to the 1st defendant, the whole family knew in January 2016 that transfer had been affected from the plaintiff to its' rightful owner the 1st defendant.

41. The allegations of misrepresentation and or illegality on the part of the 1st defendant must also fail since they do not meet the threshold espoused in *Kuria Kiarie & 2 others vs. Sammy Magera* (2018) eKLR (supra).
42. The 3rd issue according to the 1st defendant is whether the contract executed in the year 2002 between the plaintiff and Agnes Chepkeiyo Chemngorem was a valid and legally enforceable. The basis of the plaintiff's claim is the contract between him and Agnes Chepkeiyo Chemngorem signed in the year 2002 (The month is not clearly visible). The 1st defendant argues that it was a term of the said contract that the purchase price of the suit property was agreed at Kshs.350,000 =. That Kshs.270,000 was paid at execution of the said agreement and a balance of Kshs.80,000 was to be paid on or before the 15th of April 2003. Meaning the said contract must have been executed between 1st January 2002 and 15th of April 2003). Other than the said contract, the plaintiff neither testified that he cleared the said balance nor tendered any evidence to show that he cleared the said balance. His silence on the said issue was basically deafening. The 1st defendant submits that the plaintiff was silent on the said issue simply because of the second agreement that was executed by the plaintiff's wife on behalf of the 1st defendant on the 3rd of June 2003. It is also noteworthy that in her letter to the 1st defendant, the plaintiff's wife stated that the plaintiff was present when the second agreement was drafted at Odhiambo and Odhiambo advocates firm. Further, it is also noteworthy that clause 5 of the said agreement was to the effect that the vendor was to give the purchaser (plaintiff) vacant possession thereof upon full and final payment of the purchase price. Conversely, there is no dispute that the second agreement was complete in the sense that it confirms that the entire purchase price was acknowledged. It is also not a coincidence that the second agreement was with respect to the same property, and that it was done by the same law firm within a span of a short period. Going by the 1st defendant's evidence that was also corroborated by the plaintiff's evidence, the first agreement was automatically nullified by the second agreement on account of the fact that the plaintiff wanted to fraudulently purchase the suit property in his names contrary to the instructions that he had been given by the 1st defendant. The same fraud was subsequently detected and rectified by the intervention of plaintiff's wife and the 1st defendant. It is also abundantly clear that the 1st defendant never pushed the said criminal activity, on the part of the plaintiff, since the plaintiff happens to be his father. There is also ample evidence that authorities were actively involved in the said fraud but for the relationship between the parties involved, they advised the plaintiff to transfer the property to the 1st defendant, which the plaintiff did, and the matter rested at that point. Pursuant to the foregoing we opine that since the plaintiff never completed paying the purchase price for the alleged purchase of the suit property, he cannot legally make any legitimate claim on the basis of an incomplete and/or nullified and/or amended agreement.



43. The 1st defendant cites this court's decision in *Thuo Commercial Limited vs Nakuru Workers Housing Co-operative Society* (Environment & Land Case 558 of 2013) [2024] KEELC 1329 (KLR) wherein this court rendered itself thus;

“ 62. I have perused the sale agreement and it is clear that the completion date was 8th June 1990. Despite there being a disparity on the remaining balance, it is not in dispute that in line with paragraph 1(c) of the sale agreement, the balance of Kshs.600,000 was to be paid on 8th of June, 1990 which the defendant failed to do so.

63. DW1 testified that their advocate had requested for the competition documents so that they could pay the balance of the purchase price (DEX12) but the same were not released. It is noteworthy that the sale agreement did not provide that the balance of the purchase price was to be paid upon a party meeting certain condition. The agreement clearly stipulated that time was of the essence thus the competition date was on 8th June 1990. DW2 further testified that the balance of the purchase price had never been completed but that he was ready to comply with the agreement once he was issued with the competition documents.

64. In the Court of Appeal case of *National Bank of Kenya Ltd. vs Pipeplastic Sunkolit (K) Ltd & another* [2003] 2 E.A 503 held as follows;

“A court of law cannot rewrite a contract between the parties and that the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and provided.

65. Further the case of *Mwita & another vs Lydia Mburugu* (Suing as the Legal Representative of the Estate of the Late Daniel Mathiu Mbiti & another (Environment and Land Appeal E022 of 2021) [2022] Justice Nzili in allowing the appeal cited the case of *William Kazungu Karisa vs Cosmas Angore Cnzera* [2006] eKLR , where it was held as follows;

“...the basic rule of law of contract is that parties must perform their respective obligations in accordance with terms and conditions of the contract executed by them and an agreement could only be amended or varied by the consent of the parties.”

66. It is not In dispute that Clause 1 of the sale agreement was specific on the timelines on the payment of the purchase price had already been agreed upon at the signing of the agreement. DW1 could therefore not claim that it was ready and willing to pay Kshs.600,000 upon the plaintiff meeting certain conditions. This clearly meant that the defendant did not fulfill its part of the contract obligation to wit payment of the balance of the purchase price on the completion date.



67. In the case of Sisto Wambugu V Kamau Njuguna (1983) eKLR the court held that:

“...contracts for sale of land gives the vendor the right to rescind the sale if the purchaser does not pay on the appointed day after giving a reasonable notice to the defaulting party making time of essence.

68. In the instant case, the defendant having failed to pay the balance within the stipulated completion date, the plaintiff had the right to rescind the sale agreement. From the foregoing, I find that the defendant breached the terms of the contract.”

44. The 4th issue is whether a declaration should issue declaring the 1st defendant the bonafide owner of the suit property. The 1st defendant filed a counterclaim wherein he gave particulars of fraud and breach of trust on the part of the plaintiff. (now defendant) to wit, that the plaintiff (now defendant) never signed any transfer documents transferring the suit property to his names since at all material times he was in the USA, that he purported to register the suit property while he knew or ought to have known that the same was purchased by and for the benefit of the 1st defendant (now plaintiff), that he took advantage of the plaintiff's absence to penetrate the foregoing fraud and that he purported to settle on the suit property with his adult children while he has his home elsewhere and while he knows that the suit property is not family land. That it is not in dispute that the title deed in the names of the plaintiff was issued while he was in USA. The plaintiff never demonstrated how he transferred the suit property from Agnes Chepkeiyo Chemngorem to his names. Even though the plaintiff filed a response to the counterclaim he never rebutted the 1st defendant's position by way of evidence. The 1st defendant has also proved beyond peradventure that the plaintiff indeed took advantage of his absence to perpetrate the said illegalities. The claims by the plaintiff in the response to the counterclaim were never substantiated. In the main, the 1st defendant's case remained uncontroverted

Analysis and Determination

45. This case revolves on the parcel of land known as Njoro/ Ngata Block 2 (Kirobon A) 1613 measuring approximately 0.4047Ha depicted on registry sheet map 2 edition 1 opened on 7th March 2005. It resulted from the subdivision of parcel no Njoro/ Ngata Block 2 (Kirobon A) 116. The parcel of land was registered in the names of Agnes Chepkeiyo Chemngorem on 7th March 2005 and later in the names of Jason Nyaruri Onditi on the 25th August 2010 and title deed issued to Jason Nyaruri Onditi on the same date thus 25th August 2010. On the 17th December 2015, the land was registered in the names of Abel Hayora Nyaruri. On the 5th October 2023, the land registrar registered a caution by Jason Nyaruri Onditi claiming beneficiary interest. Before the registration of the caution, the plaintiff by amended plaint dated the 6th September filed in court on the 13th September 2021, sought a declaration that the property known as Njoro/Ngata Block 2/1613 (Kiboron 'A') Belongs to him, and an order cancelling and rectifying the register and title since the same was irregularly/illegally issued to the 1st Defendant and a permanent injunction restraining the 1st Defendant or his agents from trespassing, entering, accessing or in any way interfering with the plaintiffs possession of the said land. The Plaintiff's assertions are that the 1st Defendant with the help of the 2nd defendant fraudulently and illegally transferred the suit land to his name without the Plaintiff's authority. He also prayed for Costs of this suit. The 1st defendant denied the claim by plaintiff. Both the plaintiff and the 1st defendant claim the properties to be theirs. I have considered the evidence on record and rival submissions and do find the following issues ripe for determination namely:-



(1) Whether Beatrice Bonchere Nyaruri had the capacity to institute this suit on behalf of the plaintiff.

46. This issue was also raised in the notice of motion dated 26th of February 2024 and the submissions therein. The suit was commenced on 22nd July 2020 by Beatrice Bochere Nyaruri suing as a donee of a Power of Attorney donated by Jason Nyaruri Onditi. On the 28th February 2024, the 1st defendant filed an application dated 26th February 2023 with the import that this court lacks jurisdiction to hear and determine the plaintiff's suit as the same is nullity ab initio. The application is based on grounds that the plaintiff instituted this suit on 22nd of July 2020 through one Beatrice Bochere Nyaruri who did not have a registered power of Attorney that could legally enable her file the same and hence this suit is a nullity incompetent ab initio.
47. That at the time of institution of this suit the said Beatrice Bochere Nyaruri did not have a registered power of attorney as required by the Law. On the 23rd, 24th and 25th Of October 2023, when this matter was heard the Plaintiff neither produced nor referred to a power of attorney that he had purportedly donated to the said Beatrice Bochere Nyaruri before this suit instituted.
48. The 1st defendant argues that on the 23rd, 24th and, 25th of October 2023 when this matter was heard the Plaintiff; the said Beatrice Bochere Nyaruri and witness, one Mr. Josiah Oumo were resolutely mute and evasive with regard the existence and/or of the alleged power of attorney. That failure by the part of the Plaintiff to donate- and register a power of attorney before purporting to file a suit through Beatrice Bochere Nyaruri on the 22nd of July 2020, rendered the entire suit nullity ab initio. That the said Beatrice Bochere Nyaruri lacked locus standi to institute the suit on 22nd of July 2020 as she did not have a registered power of attorney and hence the suit is incompetent and nullity ab initio. The suit being nullity ab initio all acts that have ensued therefrom are of no legal consequences.
49. Jason Nyaruri Onditi contended that the argument by the defendant is frivolous, mischievous, lacking in merit, a mere afterthought, incompetent and the same has been brought in bad faith and ought to be dismissed. That the plaint was amended pursuant to the leave granted by the court which leave arose out of an application by the 1st Defendant to amend the defence and both counsels were in agreement that they should all be granted leave to amend their respective pleadings. The 1st Defendant's counsel did not object to the request by plaintiffs advocates on record to amend the plaint. The plaintiff argues that the claim 1st Defendant herein that the suit was filed by a person who did not have the locus standi is overtaken by events as the plaint was amended to reflect Jason Nyaruri as the Plaintiff in the suit.
50. He cites the case of Mutuku and 3 others vs. United Insurance Co. Ltd. (2002) KLR 250 cited the case of Nyeri HCCC No. 108 of 2004, Cecilia Wamuyu Kabu & another Vs. Zipporah Wangui Kabu (unreported) where the court stated as follows: "..... the effect that an amended pleading supersedes and replaces the original pleadings. It is his view that the amended pleading is valid. The plaint having been amended superseded the original plaint and the same ought not to form the basis upon which the suit herein is dismissed.
51. The court in the case of Teclah J. Tuwei (Administrators of the Estate of late Malakwen Arap Cheruiyot v Kimaiyo Chirchir [2021]eKLR cited with approval the case of Jefitha Muchai Mwai v Peter Wangio Thuku (2015) elk where the court held that:

"in the spirit of Article 159 of *the Constitution* courts should try as much as possible to sustain causes rather than striking out or dismissing a suit for reasons that are merely technical and curable by a simple step that does not prejudice the other party."



52. I have considered the issue and do find that by Power of Attorney dated 19th June 2020, donated the plaintiff donated power to Beatrice Bonchere Nyaruri to make decision concerning his property to act as an agent on his property L.R No Njoro/Ngata/block 2/116 (Kirobon 'A') measuring one acre. Armed with this power of Attorney the Donee Beatrice Bonchare Nyaruri filed this suit. Unfortunately, she filed the suit before registering the power of Attorney. In the case of Alfred Njau & Others vs City Council of Nairobi (1982) KAR 229, the Court held that;

“the term locus standi means a right to appear in Court, and conversely, to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings.”

Hon Justice Kibunja faced with similar facts of unregistered Power of Attorney held in Daniel Kipketer Rugut that:-

“That it follows that the power of attorney which confers upon the donee a right to deal with immovable property, like the one the Plaintiff relies on, must be registered. That failure to register such a power of attorney means the donee, in this case the Plaintiff, cannot claim any right under it. That the failure to register the power of attorney means the stamp duty was not paid on it as required under Section 19 of the Stamp Duty Act. That a power of attorney whose stamp duty has not been paid cannot be accepted for registration under Section 46 of the Land registration Act. The Plaintiff had an obligation in law under Section 107 of the Evidence Act Chapter 80 of Laws of Kenya to tender evidence that the power of attorney he sought to rely on as the basis of his capacity had been registered in accordance with the law, but failed to do so. That further, the power of attorney do not comply with Section 44 (1), (2), (4), (5)(b) of the Land Registration Act as it does not have the signature of the Plaintiff to signify his acceptance. That further the certificate required in respect of a power of attorney executed outside Kenya has not been availed or attached to the document.

(f) That further, the power of attorney the Plaintiff relies on was executed in the United States of America and cannot be admitted under Section 88 of the Evidence Act Chapter 80 of Laws of Kenya without prove of the seal or stamp or signature by way of affidavit or otherwise by the Notary authenticating it.”

53. In this matter, I do find that the suit was commenced by a person without capacity. However, the same was amended and Jason Nyaruri Onditi became the plaintiff and therefore the facts of this case are deferent from the facts in the cases cited by the 1st defendant. The pleadings were amended to bring in the plaintiff as a party and therefore the amendment cured the irregularity. I do find that the party before me is Jason Nyaruri Onditi who has the capacity to bring the suit.

(2) The second issue is whether the plaintiff has proved fraud against the 1st defendant and conversely whether the 1st defendant is a bonafide owner of the property.

54. The parcel of land in dispute was purchased vide two agreements signed by the proprietor who was the vendor namely Agnes Chemngorem of P.O Box 15294 Nakuru and of id no 2180961587 on one part and the parents of the plaintiff. The 1st agreement was signed by the father of the plaintiff as the purchaser on 17th day of an unknown Month 2002 whereas the 2nd agreement was signed on the 3rd day of June 2003 by the plaintiff's mother as the purchaser.

55. In the 1st agreement, the purchaser paid the vendor Ksh 270, 000 upon execution of the agreement and the balance of ksh 80,000 was to be paid before the 15th April 2003. The parcel of land was sold in



vacant possession and that the purchaser had seen the plot. The Vendor undertook to let the purchaser take possession upon payment of final and full purchase price. The agreement was witnessed by Tom O. Ojienda advocate and drawn by Odhiambo and Odhiambo Advocates. The second agreement was done approximately one year after the first agreement and was witnessed and drawn by the same advocate. The difference between the 1st agreement and second agreements is that the 2nd agreement was signed by the plaintiff's mother. At the time of signing this agreement, the purchaser had paid full price. The main issue in respect of the agreements is, who paid the purchase price. The plaintiff was unable to explain how he paid the purchase price and was very evasive when cross examined on the issue as to whether he paid the same but his wife in DEX 52 explained in the document that the purchase price was paid by the 1st defendant although he was buying the property for his parents. I have discerned both agreements and DEX 52 and do find that the purchase price was paid by the plaintiff but the same was to enable his parents to acquire a home. The mother of the 1st defendant said it all in DEX 52 at page 2 of the letter but at page 118 of the 1st defendant's documents that the 1st defendant sent them money amounting to Ksh 350,000 to buy land from Agness Chepkeyio Chemngoren. There is no doubt as per this letter that the parcel of land was bought through funds sent by the plaintiff to the mother and that the same was registered in the plaintiff's name. There is no communication from the 1st defendant to his mother to indicate that the property was to be registered in his name. His mother believed that the property was bought by the 1st defendant to settle them and they took possession of the same and the 1st defendant constructed them a house and continued renovating the same. This court finds that there is no evidence that the plaintiff fraudulently registered the land into his name on 25th August 2003 although the process of transfer is not clear. The plaintiff was issued with a title deed on the same date and that the family of the initial owner Agnes Chepkeyio Chemngoren has never complained. On the other hand, the transfer of the land to the 1st defendant from the plaintiff is shrouded in procedural improprieties and irregularities as the 1st defendant has not demonstrated that the transfer was signed by the plaintiff. The plaintiff denied signing the transfer and therefore it is the 1st defendant's burden to prove that the plaintiff signed the transfer. The 1st defendant did not produce a duly registered transfer instrument and therefore he has not demonstrated that he followed procedure in transfer of land. The 1st defendant did not produce a duly stamped transfer of Land instrument that was duly registered by the registrar of lands Nakuru. The application for consent of the land control Board was not signed by the purchaser and vendor. Moreover, there is no consent of the land control board. The upshot of the above is that the whole process was irregular, illegal and a nullity. The upshot of the above is that the 1st defendant having involved himself in irregular dealing in the transfer of the property, he is not a bona-fide owner of the property.

56. The land registrar who testified as PW 5 in his evidence indicated that he could not produce the presentation book as the same could not be traced. He further stated that he did not have the instruments used to transfer the parcel of land from the plaintiff to the 1st Defendant. He further indicated that the alleged transfer forms that were produced by the 1st Defendant if indeed were used to transfer the suit property ought to bear the official stamp from the lands department which they do not bear and ought to have been signed by both parties. He urges the court to find that the title deed issued to the 1st Defendant was irregularly issued hence ought to be cancelled. I do find that the title issued to the 1st defendant was issued irregularly.
57. On the 3rd issue as to whether the contract executed in the year 2002 between the plaintiff and Agnes Chepkeyio Chemngoren was a valid and legally enforceable, this court finds that there are two valid contracts between the vendor and the 1st defendant's father who is the plaintiff and the vendor and the 1st defendant's mother. The contracts are duly executed by the vendor and purchaser and are dated though the date in the 1st agreement is not clear. They are duly witnessed by an advocate who is a



commissioner for oaths and drawn by an advocate of the High Court of Kenya. Both agreements demonstrate that full purchase price was paid. I do find that the agreements executed in the years 2002 and 2003 are valid and legally enforceable and were in respect of the suit property signed by the 1st defendants father and mother respectively.

58. On the 4th issue as to whether this court should issue an order of cancellation of the 1st Defendant's title for the parcel of land known as NJORO/NGATA BLOCK 2/1613 (KIROBON ' A') the plaintiff , I do agree with the plaintiff and find that this court that has the exclusive powers to cancel or revoke a title. This the court does by ordering the registrar to cancel or revoke the title and have the land registered to the rightful owner. The plaintiffs submissions are underpinned on Section 80 of the same *Land Registration Act*, provides that:-

1. Subject to subsection (2) , the Court may order the rectification of the register by directing that any registration be cancelled or amended if it satisfied that any registration was obtained , made or omitted by fraud or mistake.
2. The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

59. The plaintiff relies on the decision of the court in Kisumu Misc No. 80 of 2008 Republic V Kisumu District Lands Officer & Another (2010) eKLR where the court held that:

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

61. Similarly the court of Appeal in Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-corruption Commission & 2 others (interested parties) (2018) eKLR agreed with the trial Court that

62. The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of Law”

63. According to the plaintiff, it does not matter whether the 1st Defendant was involved in the fraudulent activities leading to the issuance of the title or not. Innocent holders of irregular titles can also have their titles impeached Munyao J in the case of Elijah MakeriNyangw'ra v Stephen MungaiNjuguna & another Eldoret E & L Case 609 (B) of 2012 (2013) eKLR where the Court observed as follows;

“As may be observed , the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be part. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme...is the title impeachable by virtue of Section 26 (1) (b)First it needs to be appreciated that the title holder be part to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that the title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”



64. On this issue I do find that the entries by the land registrar being entries nos 4 and 5 were made illegally. In conclusion, I do make the following orders a declaration that the property known as Njoro/Ngata Block 2/1613 (Kiboron 'A') Belongs to him, and an order cancelling and rectifying the said title since the same was irregularly/illegally issued to the 1st Defendant and a permanent injunction restraining the 1st Defendant or his agents from trespassing, entering, accessing or in any way interfering with the plaintiffs possession of the said land. The counter claim is dismissed. There will be no orders as to costs as the parties belong to one family.

JUDGMENT DATED, SIGNED AND DELIVERED ELECTRONICALLY, THIS 23RD DAY OF AUGUST 2024

A.O.OMBWAYO

JUDGE

