



REPUBLIC OF KENYA



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**Gikoi v Kahiu & 4 others (Environment & Land Case E743 of 2017)
[2025] KEELC 686 (KLR) (12 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E743 OF 2017**

BM EBOSO, J

FEBRUARY 12, 2025

BETWEEN

MICHAEL KAMINJA GIKOI PLAINTIFF

AND

ZEPHANIAH MWANGI KAHIU 1ST DEFENDANT

ALICE KENDI MWIKINYA 2ND DEFENDANT

LAND REGISTRAR, KIAMBU COUNTY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

ICEA LION LIFE ASSURANCE CO LTD 5TH DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit revolves around the question of validity of the transfer, in November 2016, of land parcel number Kiambaa/Kanunga/2215 [the suit property] from Michael Kaminja Gikoi [the plaintiff] to Zephaniah Mwangi Kahiu [the 1st defendant] and the subsequent transfer of the same parcel of land by Zephaniah Mwangi Kahiu to Alice Kendi Mwikinya [the 2nd defendant] in August 2017. Contemporaneous with the transfer to Alice Kendi Mwikinya, the land was charged to ICEA Lion Life Assurance Company Limited to secure a loan of Kshs 4,429,800. The validity of the two successive transfers and the charge are challenged through this suit.
2. The plaintiff contends that the two transfers and the charge were procured fraudulently and he wants them nullified by this Court. The key questions that fall for determination in this Judgment are:
 - (i) Whether the registration of the suit property in the name of Zephaniah Mwangi Kahiu was procured fraudulently;



- (ii) Whether Zephaniah Mwangi Kahi passed a good title to Alice Kendi Mwikinya;
- (iii) Whether the plaintiff is a trespasser on the suit property;
- (iv) Whether the plaintiff is entitled to any of the reliefs sought in the primary suit;
- (v) Whether the 2nd and 5th defendants are entitled to any of the primary reliefs sought in their counterclaim;
- (vi) Whether the 2nd and 5th defendants are entitled to an indemnification by the 1st, 3rd and 4th defendants;
- (vii) Whether the charge registered in favour of the 5th defendant should be annulled; and
- (viii) What orders should be made in relation to costs of this suit. Before I analyse and dispose the issues, I will outline, in summary, the parties' respective cases, evidence, and submissions.

Plaintiff's Case

3. The plaintiff initiated the suit through a plaint dated 18/09/2017. In summary, the plaintiff's case is that, at all material times he was, and he still is, the legitimate proprietor of land parcel number Kiambaa/Kanunga/2215, measuring approximately 0.0465 hectares together with the developments thereon. He purchased the suit property in 2009 from Teresiah Njoki Thiongo and he has resided on it all along. The plaintiff avers that on 8/11/2016 and 16/8/2017, the 1st and 2nd defendants, in collusion with the 3rd, 4th and 5th defendants, illegally and fraudulently caused the suit property to be registered in the name of the 1st defendant and subsequently in the name of the 2nd defendant who later charged it to the 5th defendant without his (the plaintiff's) consent or knowledge, with the aim of dispossessing him of the property
4. The plaintiff contends that the 2nd defendant fraudulently colluded with the 5th defendant and entered into an illegal contract enabling the 2nd defendant to accept the suit property as security for a loan of Kshs 4,429,800, to the detriment of the plaintiff. He has itemized various particulars of fraud on part of the defendants and contends that their fraudulent actions have caused him embarrassment, loss and irreparable damage.
5. The plaintiff prays for the following reliefs:
 - (i) a permanent injunction restraining the defendants against disposing, selling, transferring, alienating or purporting to exercise the chargee's statutory power of sale over the suit property;
 - (ii) an order revoking or cancelling the title documents registered and in possession of the defendants and decreeing the Land Registrar to issue to him a proper title relating to the suit property;
 - (iii) a declaration that the title purported to be registered in the name of the 2nd defendant was obtained fraudulently and that the 2nd defendant does not have a legitimate claim over the suit property;
 - (iv) a declaration that the transaction between the 2nd and 5th defendants, creating the impugned legal charge over the suit property, is null and void due to the fraudulent title.; and
 - (v) costs of the suit.



1st Defendant's Case

6. With leave of the Court, the 1st defendant was served with papers relating to the primary suit and to the counterclaim through notices in the local daily newspapers. He neither entered appearance nor filed defence. He is alleged to be the one who procured the two impugned transfers. The plaintiff's claim against him was undefended. The counterclaim against him was also undefended.

Case of the 2nd & 5th Defendants

7. The 2nd and 5th defendants filed a joint statement of defence and counterclaim dated 5/6/2018. The defence and counterclaim were amended on 15/1/2020. The two defendants contest the allegation that the plaintiff is the legitimate proprietor of the suit property. They also contest the allegation of collusion and fraud as set out in the plaint. They contend that they carried out proper due diligence before the suit property was purchased by the 2nd defendant and before the charge was registered against the title in favour of the 5th defendant.
8. Through their counterclaim, the 2nd and 5th defendants contend that they conducted proper due diligence which culminated in the acquisition of the suit property by the 2nd defendant from the 1st defendant who was the registered proprietor at the time. They add that in September 2017, the plaintiff trespassed onto and entered into the suit property and proceeded to lock the main gate, claiming that he was the owner of the suit property. They further contend that the trespass and the activities of the plaintiff have caused the 2nd defendant loss and damage.
9. By way of counterclaim, the 2nd and 5th respondents seek:
 - (i) a declaration that the 2nd defendant is the registered, true, lawful and exclusive owner of the suit property;
 - (ii) a declaration that the charge held in favour of the 2nd defendant is valid;
 - (iii) a permanent injunction restraining the plaintiff against trespassing on, entering into, taking over possession, constructing on, interfering with, disposing of, transferring and/or in any other manner whatsoever dealing with the suit property;
 - (iv) a mandatory injunction compelling the plaintiff to deliver vacant possession of the suit property to the 2nd defendant; and
 - (v) damages for trespass. As an alternative to the above reliefs, the 2nd and 5th defendants pray for an order compelling the 1st, 3rd and 4th defendants to indemnify the 2nd defendant for loss of the suit property at the prevailing market value of the suit property.

Case of the 3rd & 4th Defendants

10. The 3rd and 4th defendants filed a joint statement of defence dated 13/2/2018, in which they denied collusion and fraud on the part of the Land Registrar. They contend that if the suit property was registered in the names of the 1st and 2nd defendants, the said registrations were based on documents presented to the Land Registry, adding that officers in the Land Registry exercised due diligence and believed the said documents to be genuine and proceeded to act on them in good faith. It is the case of the 3rd and 4th defendants that the Land Registrar professionally performed his duties as prescribed by the law. The duo urge the Court to dismiss the suit against them.



Plaintiff's Evidence

11. The plaintiff testified as PW1. He adopted his witness statement dated 18/9/2017. He produced:
 - (i) the green card relating to the suit property;
 - (ii) copy of the mutation form and map relating to the suit property;
 - (iii) sale agreement between him and Teresiah Njoki Thiongo;
 - (iv) the demand letter;
 - (v) photographs relating to the structures on the suit property;
 - (vi) copy of his identity card;
 - (vii) transfer conveying the suit property to him;
 - (viii) consent relating to the above conveyance of the suit property to him and the application for consent in respect of the above transfer
12. In summary, the plaintiff's evidence was that, at all material times, he was the registered proprietor of the suit property. He added that unknown to him, the defendants caused the suit property to be registered in the name of the 1st defendant and subsequently in the name of the 2nd defendant. He stated that unknown to him, the defendants caused a charge to be registered against the title in favour of the 5th defendant.
13. Shown the green card, he stated that entry number 1 denoted registration of the land in the name of Teresiah Njoki Thiongo; entry number 2 denoted registration of the land into his name; entry number 3 denoted issuance of title to him; entry number 4 denoted registration of the land into the name of the 1st defendant; entry number 5 denoted issuance of title to the 1st defendant; entry number 6 denoted registration of the land into the name of the 2nd defendant; and entry number 7 denoted issuance of title to the 2nd defendant. It was his evidence that he did not know the 1st defendant until the 1st defendant was arrested and arraigned in court over fraudulent registration of the suit property into his name. He stated that he neither sold nor transferred the suit property to the 1st defendant.
14. The plaintiff added that on 8/9/2017, he reported to the Police the loss of his title and the fraudulent transfer of his land. This led to the arrest of the 1st defendant and his arraignment in Court in Kiambu CMC Criminal Case No. 1737 of 2017 in which the 1st defendant was charged with the offence of conspiring to defraud. He added that the 1st defendant subsequently jumped bail. He stated that he never went to the Land Control Board to procure any consent relating to the impugned transfer. It was his evidence that the 1st defendant procured the registration of the suit property into his name fraudulently. He added that the passport size photo and the signature in the impugned transfer were not his.
15. The plaintiff stated that Nelly Wanjiru Kinyanjui who is captured in the second impugned transfer instrument as a spouse to the 1st defendant is his [the plaintiff's] former wife. Lastly, he stated that he sued the 2nd defendant because she colluded with the 1st defendant, adding that he did not know her prior to discovery of the impugned transfers.
16. In cross examination, the plaintiff testified that he learnt about the fraudulent transactions in September, 2017, adding that his wife vacated the house and they separated at that point. He added that he suspected that his former wife had a hand in the disappearance of his title from the house. It



was his testimony that the signature and the photograph on the transfer exhibited by the 3rd and 4th defendants were not his.

Evidence of the 2nd and 5th Defendants

17. The 2nd defendant testified as DW2. She adopted her witness statement dated 28/2/2020 as part of her sworn evidence in chief. In summary, her evidence was that she was the registered proprietor of the suit property. She purchased the suit property from the 1st defendant vide a sale agreement dated 11/5/2017, at a purchase price of Kshs 4,600,000. The suit property was subsequently registered in her name vide a transfer dated 2/8/2017. The suit property was subsequently charged to the 5th defendant to secure a loan which she obtained from the 5th defendant to purchase the suit property.
18. The 2nd defendant added that on 11/9/2017, the plaintiff went to the offices of the 5th defendant where she [the 2nd defendant] worked, alleging that the suit property had been irregularly sold to her. She stated that she referred the plaintiff to the advocates who had handled the transaction on her behalf. The 2nd defendant added that when she subsequently visited the suit property on 12/9/2017 to inspect it, she found a lock on the main gate and on enquiring from the two guards stationed at the gate, she was informed that the plaintiff had placed the locks on the gate and had instructed them not to allow any one to tamper with the locks. She added that at that point, she found the plaintiff residing on the suit property. She reported the matter to the Police at Kiambu Police Station.
19. In cross examination, the 2nd defendant stated that she was a prosecution witness in Kiambu CMC Criminal Case No. 1737/2017 in which the 1st defendant was accused of selling property that did not belong to him. She added that the 1st defendant did not show her the sale agreement through which he purchased the suit property from the plaintiff, stating that she did not ask for it because the suit property was already in the name of the 1st defendant.
20. Shown the statement which she made to the Police, the 2nd defendant stated that when she called the 1st defendant for the purpose of obtaining vacant possession of the suit property, his number had been switched off and remained switched off. She added that up to the time of testifying in this suit, she had not been able to trace or reach the 1st defendant for the purpose of him giving her vacant possession of the suit property. She further stated that besides the purchase price, she lent the 1st defendant Kshs 300,000 which the 1st defendant had disappeared with. The 2nd defendant stated that she learnt about availability of the suit property through a newspaper advertisement.
21. The 5th Defendant led evidence by Naomi Munyi who testified as DW1. She adopted her witness statement dated 20/2/2020. She produced the following 8 exhibits:
 - (i) sale agreement dated 11/5/2017;
 - (ii) official search dated 29/3/2017; (iii) transfer dated 8/8/2017;
 - (iv) title deed dated 16/8/2017,
 - (v) official search dated 16/8/2017;
 - (vi) charge registered on 16/8/2017;
 - (vii) letter dated 27/9/2017 from the 5th defendant; and (
 - viii) copy of the 2nd defendant's statement to the Police.
22. In summary, the evidence of DW1 was that she was the 5th defendant's General Manager in charge of Strategy and Innovations. She stated that prior to financing the 2nd defendant in the purchase of



the suit property, the 5th defendant performed the necessary due diligence. She termed as baseless, the plaintiff's allegation of collusion and fraud involving the 5th defendant.

23. In cross-examination, she stated that it was the responsibility of the loan applicant to go to the ground, adding that the company normally appoints a valuer to inspect and value the offered security.

3rd and 4th Defendants' Evidence

24. The 3rd and 4th defendants led evidence by Roseline Wanjiru Macharia who testified as DW3. She was a Land Registrar based at Kiambu Land Registry at the time of testifying. She produced 28 exhibits. She testified that according to the records held by the Land Registry, Michael Kaminja Gikoi was registered as proprietor of the suit property on 10/12/2009. He subsequently transferred the suit property to Zephaniah Mwangi Kahiu on 8/11/2016 through an undated transfer that was registered on 8/11/2016. It was her evidence that the transfer was booked in the Day Book [Presentation Register] as number 211B
25. DW3 added that the Land Registry had copies of the consent of the Land Control Board and copies of the Identity Card and KRA Pin of the plaintiff. She stated that the Land Registry had a copy of the cancelled title of the plaintiff. It was her further evidence that the documents which the Land Registrar relied on complied with the legal requirements. She stated that the Land Registry had not received any complaint of loss of title by the plaintiff.
26. During cross-examination, she stated that the Land Registry did not have the original conveyance documents relating to the transfer from the plaintiff to the 1st defendant. She added that she did not know how much stamp duty was paid on the transfer instrument conveying the suit property from the plaintiff to the 1st defendant. She stated that the instrument of transfer conveying the land from the plaintiff to the 1st defendant was undated and did not contain the consideration. She added that the attestation part was also undated. She further stated that the signature in the plaintiff's Identity Card and the signature on the impugned transfer differed. She stated that the Land Registry did not have the Presentation Form relating to booking number 211B.

Plaintiff's Submissions

27. The plaintiff filed written submissions dated 24/7/2024 through M/s Mukabane & Kagunza Advocates. Counsel for the plaintiff identified the following as the four issues that fell for determination in the suit:
- (i) Whether the plaintiff was the rightful owner of the suit land;
 - (ii) Whether the plaintiff had proved fraud against the defendants;
 - (iii) Whether the registration of the suit property in the name of the 1st defendant and subsequently in the name of the 2nd defendant and the subsequent charge were legal; and
 - (iv) Whether the plaintiff is entitled to costs of the suit.
28. On whether the plaintiff is the rightful owner of the suit property, counsel for the plaintiff submitted that the plaintiff produced documents showing how he acquired the suit property from the previous owner, adding that the plaintiff tendered a green card showing that he was at all material times the registered proprietor of the suit property.
29. On whether the plaintiff proved fraud on part of the defendants, counsel submitted that the plaintiff had "pleaded and particularized fraud" on part of the defendants. Counsel replicated the pleaded particulars of fraud and the provisions of Sections 24(b), 25 and 26 of the *Land Registration Act*.



30. On whether the two impugned registrations and the charge were legal, counsel submitted that the key question was how the suit property could be transferred to and registered in the name of the 1st defendant without any sale agreement, adding that the answer to that question was - “by way of fraud,” which fraud was well within the knowledge of the 2nd to 4th defendants. Counsel described the Land Registrar’s conduct as “deplorable”, adding that the process that was used to register the 1st defendant as proprietor of the suit property was unprocedural, illegal and contrary to the law and therefore the title held by the 2nd defendant is illegal. Counsel faulted the 2nd defendant for failing to lead evidence by the land agent who introduced her to the 1st defendant.
31. Counsel contended that the transfer of the suit property from the plaintiff to the 1st defendant and subsequently to the 2nd defendant were done without the participation or knowledge of the plaintiff and was therefore fraudulent.

2nd and 5th Defendants’ Submissions

32. The 2nd and 5th defendants filed written submissions dated 16/9/2024 through M/s Hamilton Harrison & Mathews. Counsel for the 2nd and 5th defendants identified the following as the four issues that fell for determination:
- (i) Whether the suit property was fraudulently transferred from the plaintiff to the 1st defendant;
 - (ii) Whether the 2nd defendant acquired the suit property fraudulently as alleged;
 - (iii) Whether the plaintiff has trespassed on the suit property and if an order for vacant possession should be given to evict him from the premises; and
 - (iv) Whether the 2nd defendant is entitled to the reliefs sought in the counterclaim.
33. On transfer of the suit property to the 1st defendant, counsel submitted that the 3rd and 4th defendants produced documents showing that there was consent by the Land Control Board and that there was a transfer signed by the plaintiff. Counsel argued that it was the duty of the plaintiff to bring a report by a documents examiner to prove that he did not sign the exhibited conveyance documents. Counsel contended that the plaintiff’s allegation that the suit property was fraudulently transferred from him to the 1st defendant remained a mere allegation which had not been proven.
34. On whether the 2nd defendant acquired the suit property lawfully, counsel submitted that the 2nd defendant carried out proper due diligence, and subsequently entered into a sale contract pursuant to which she paid the agreed purchase price to the 1st defendant who was the registered proprietor of the suit property at the time. Counsel added that the suit property was duly transferred to the 2nd defendant vide a transfer dated 2/8/2017 and a title was subsequently issued to the 2nd defendant.
35. On whether the plaintiff is guilty of trespass, counsel cited Section 3 (1) of the *Trespass Act* and submitted that the plaintiff trespassed on the suit property on 12/9/2017 and proceeded to lock the gate to the suit property. Counsel contended that the plaintiff is guilty of trespass, emphasizing that the 2nd defendant is the registered proprietor of the suit property.
36. In conclusion, counsel submitted that the plaintiff having failed to prove fraud in the two registrations, his suit should fail and the 2nd defendant as the registered proprietor of the suit property should be granted the primary reliefs sought in the counterclaim. In the alternative, counsel submitted that should the Court annul the 2nd defendant’s title, the plea for indemnification should be granted as against the 1st, 3rd and 4th defendants jointly and severally because they are the parties “who occasioned the loss”. On quantum, counsel urged the court to use the sale price as a matric from which



to assess the damages to be paid by the trio. Counsel urged the court to dismiss the plaintiff's suit and condemn the plaintiff to pay costs of the primary suit and the counterclaim.

3rd and 4th Defendants' Submissions

37. The 3rd and 4th defendants filed written submissions dated 25/9/2024 through Ms Mwhiki Ndundu, Senior State Counsel. The Learned Senior State Counsel identified the following as the two issues that fell for determination: (i) Whether the plaintiff proved fraud on part of the defendants; and (ii) Whether the transfer of the suit property should be revoked.
38. On whether the plaintiff proved fraud, counsel cited Section 107 (1) of the *Evidence Act* and submitted that it was the burden of the plaintiff to prove fraud in the impugned registrations and titles. Citing various decisions on the standard of proof in claims of fraud, counsel submitted that the plaintiff had failed to prove fraud against the defendants. Counsel argued that it was the duty of the plaintiff to subject the registration documents which were tendered by the 3rd and 4th defendants to forensic examination to prove that the signatures on the documents were not his. Counsel added that the criminal proceedings instituted against the 1st defendant were not conclusive proof of fraud, adding that a party is presumed innocent until proven guilty.
39. Counsel argued that the suit property was duly registered in the names of the 1st and 2nd defendants and no evidence had been provided to demonstrate fraud, adding that the impugned transfers and registrations were done in compliance with statutory provisions.
40. On whether the transfers should be revoked, counsel submitted that the plaintiff had failed to meet the threshold in Section 26 of the *Land Registration Act*, adding that the plaintiff having failed to prove fraud, there was no basis for revocation of the transfers.
41. On the 2nd and 5th defendants' plea for indemnification, counsel cited Section 81(1) of the *Land Registration Act* and submitted that there was no evidence of negligence, mistake or fraud on part of the Land Registrar to warrant indemnification. Counsel urged the Court to reject the plea for indemnification.

Analysis and Determination

42. The Court has considered the pleadings, evidence and submissions on both the plaintiff's primary claim and the counterclaim by the 2nd and 5th defendants. The Court has also considered the relevant legal frameworks and jurisprudence. As observed in the introductory part of this Judgment, the following are the key issues that fall for determination in the primary suit and in the counterclaim:
 - (i) Whether registration of the suit property in the name of Zephaniah Mwangi Kahiu was procured fraudulently;
 - (ii) Whether Zephaniah Mwangi Kahiu passed a good title to Alice Kendi Mwikinya;
 - (iii) Whether the plaintiff is a trespasser on the suit property;
 - (iv) Whether the plaintiff Michael Kaminja Gikoi is entitled to any of the reliefs sought in the primary suit;
 - (v) Whether the 2nd and 5th defendants are entitled to any of the primary reliefs sought in their counterclaim;
 - (vi) Whether the 2nd and 5th defendants are entitled to an indemnification by the 1st, 3rd and 4th defendants;



- (vii) Whether the charge registered in favour of the 5th defendant should be annulled; and
 - (viii) What orders should be made in relation to costs of these proceedings. The eight issues will be analysed sequentially in the above order. I will be brief in my analysis
43. Was the registration of the suit property in the name of the 1st defendant [Zephaniah Mwangi Kahi] procured fraudulently? There was common ground that up to 8/11/2016, the suit property was registered in the name of the plaintiff [Michael Kaminja Gikoi]. The plaintiff testified that he neither sold nor transferred the suit property to the 1st defendant. It was his evidence that he did not know the 1st defendant until the time he discovered that his property had been transferred to the 1st defendant and the 1st defendant had subsequently transferred it to the 2nd defendant. He made a report to the Police. Upon the Police carrying out investigations, the 1st defendant was arrested and arraigned in Court to face criminal charges relating to his registration as proprietor of the suit property. The plaintiff further testified that he did not apply for consent nor attend any Land Control Board meeting to seek consent relating to the impugned transfer. It was his evidence that he did not know the advocate who was indicated as having witnessed the impugned transfer, emphasizing that he never executed the transfer.
44. A perusal of the instrument of transfer at the centre of the impugned registration reveals that the transfer did not contain any consideration. Secondly, the transfer was undated. Thirdly, the transfer was not stamped by the Collector of Stamp Duty. That is not all. The transfer did not have a chronological booking number in the Presentation Register [Day Book]. Booking number 211B was introduced and inserted as an added entry at the bottom of the page of the Presentation Register [Day Book]. If the transfer was a bonafide instrument being procedurally presented to the Land Registry and coming after instrument number 211, it should have been booked as instrument number 212. The duplication of number 211 and introduction of suffix “B” was clearly intended to mislead the public and the court that this was a regularly presented and registered instrument. It is clear from any keen observer that the reason why it was assigned number 211B and inserted as the last item at the bottom of the page is that other items had already been booked and entered in the Presentation Register [Day Book]. Put differently, this was a subsequent irregular insertion made after legitimate entries had filled up the pages. Any law-abiding Land Registrar would have rejected the undated, unstamped and unbooked transfer that did not have consideration.
45. It does also emerge from the evidence of the 2nd defendant that upon receiving purchase price from the 2nd defendant, the 1st defendant switched off his phone and vanished. He could not be reached to give vacant possession of the suit property in terms of the contract that he had entered into with the 2nd defendant. Up to the time the 2nd defendant testified in this suit, the 1st defendant had not stepped forward to grant the 2nd defendant vacant possession of the suit property which he had sold to her.
46. That is not all. While aware that he received purchase price from the 2nd defendant and purported to convey the suit property to her, and while also aware that the two registrations that he procured had been challenged through these proceedings, the 1st defendant did not bother to step forward to defend the two registrations and the title he conveyed to the 2nd defendant. Consequently, the primary claim against him is undefended. The plaintiff’s evidence against him is uncontroverted.
47. Besides the purchase price, the 1st defendant swindled the 2nd defendant the sum of Kshs. 300,000. This cannot be said to be the conduct of a genuine land seller.
48. The totality of the forgoing is that the plaintiff proved on the balance of probabilities that he neither sold nor transferred the suit property to the 1st defendant. How then did the 1st defendant procure the impugned registration? In the absence of evidence of sale; in the absence of evidence of payment



of purchase price; and in the absence of evidence of genuine conveyance instruments duly executed by the plaintiff, the logical conclusion is that the 1st defendant procured the registration fraudulently. That is the finding of the court on the first issue.

49. Did Zephaniah Mwangi Kahiu [the 1st defendant] pass a good title to Alice Kendi Mwikinya? My answer to the above question is in the negative. The 1st defendant did not have a legitimate title to pass to the 2nd defendant. The 1st defendant had procured his registration and title through fraud. He had no good title to pass to the 2nd defendant. What the 1st defendant held and passed to the 2nd defendant was a fraudulent title.
50. The evidentiary burden of the holder of an impeached title in proceedings where the claimant has discharged his burden of proof was reiterated by the Supreme Court of Kenya in *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021 (2023) KESC 30(KLR)) as follows:

“As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] KLR, where the registered proprietor’s root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

51. In the same decision, the Supreme Court of Kenya rendered itself on the fate of the title of a purchaser who acquires an illegal or fraudulent title as follows:

“Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 50 (6) limits the right as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.

52. In *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, the Court of Appeal outlined the following Principle:

“It is our finding that as between West End and Arthi, no valid title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”

53. Regrettably, the title which the 1st defendant purported to pass to the 2nd defendant was a fraudulent fake. It therefore follows that the 2nd defendant did not receive a good title from the 1st defendant. What she received was the fraudulent fake like the one Arthi Highway Developers Limited had. Put differently, the 2nd defendant was conned by the 1st defendant.

54. Is the plaintiff a trespasser on the suit property? The 2nd defendant contended that the plaintiff is a trespasser on the suit property. Her case was that she acquired the suit property from the 1st defendant. The Court has analysed the available evidence and has made a finding to the effect that the plaintiff neither sold nor transferred the suit property to the 1st defendant. The Court has made a further finding to the effect that the 1st defendant did not have a good title to pass to the 2nd defendant,



- observing that what the 1st defendant passed to the 2nd defendant was a fraudulent fake. From the totality of the evidence placed before Court, the plaintiff is the legitimate proprietor of the suit property. The 2nd defendant was conned by the 1st defendant. It therefore follows that the plaintiff is not a trespasser on the suit property.
55. Is the plaintiff entitled to any of the reliefs sought in the primary suit? All the reliefs sought in the plaint revolve around the two impugned registrations. The Court having made the above findings on the two registrations, and the Court having made a finding to the effect that the plaintiff is the legitimate owner of the suit property, it follows that prayers (a) to (d) of the plaint are available to the plaintiff.
 56. Are the 2nd and 5th defendants entitled to the primary reliefs in the amended counterclaim? The primary reliefs in the amended counterclaim seek an affirmation that the 2nd defendant is the legitimate proprietor of the suit property and protection of the 2nd defendant's proprietorship. The Court has made a contrary finding on ownership. The court found that the plaintiff is the legitimate owner of the suit property. It therefore follows that prayers (a) to (g) of the amended counterclaim are not available.
 57. Is the 2nd defendant entitled to indemnification by the 1st, 3rd and 4th defendants? As against the 1st defendant, the basis of indemnification is clear from the pleadings and from the evidence. The 1st defendant received purchase price from the 2nd defendant purporting to sell to her title that he knew was a fraudulent fake. He has not stepped forward to defend the title which he sold to the 2nd defendant. There is therefore a proper basis for an order of indemnification against him.
 58. As against the 3rd and 4th defendants, the 2nd defendant needed to clearly set out the particularized basis upon which she sought indemnification from the duo and invite them to respond to the particularized pleadings. In the absence of clear pleadings and pleaded particulars, it would not be proper to condemn the Kenyan tax payer to bear the burden of indemnification.
 59. For the above reasons, the court finds that there is a proper basis for requiring the 1st defendant, as the architect of the loss which the 2nd defendant finds herself in, to indemnify the 2nd defendant. The indemnification is hereby assessed at the sum of Kshs 4,600,000 which is the purchase price which the 1st defendant received from the 2nd defendant. The sum will attract interest from the date of filing the counterclaim in June 2018.
 60. Should the subsisting charge in favour of the 5th defendant be annulled? Regrettably, the answer to this question is in the affirmative. What was passed to the 2nd defendant is a fraudulent fake. The charge is anchored on the fraudulent fake. The Court has made a finding to the effect that the fake title stands to be revoked/cancelled as prayed by the plaintiff. It follows that the charge stands annulled on the ground that it was anchored on a fraudulent title conveyed to the 2nd defendant by the 1st defendant.
 61. On costs, the architect of the fraud that culminated in the primary suit and in the counterclaim is the 1st defendant. Consequently, he will bear costs of the primary suit and the counterclaim.
 62. In conclusion, the primary suit by Michael Kaminja Gikoi succeeds wholly. The counterclaim by the 2nd and 5th defendants partially succeeds to the extent that the 1st defendant is decreed to indemnify the 2nd defendant by refunding to her the purchase price together with interest at court rate from the date when the counterclaim was filed in June 2018.
 63. In the end, the primary suit and the counterclaim are disposed as follows:
 - a. It is hereby declared that Michael Kaminja Gikoi is the legitimate proprietor of land title number Kiambaa/Kanunga/2215



- b. An order is hereby issued revoking and/or cancelling entry numbers 4,5,6 and 7 in the proprietorship section of the land register relating to title number Kiambaa/Kanunga/2215.
- c. An order is hereby issued cancelling entry number 1 in the encumbrances section of the land register relating to title number Kiambaa/Kanunga/2215
- d. It is hereby declared that the title documents held by the 2nd defendant in relation to land parcel number Kiambaa/Kanunga/2215 are invalid and the charge instrument held in favour of the 5th defendant in relation to the same title is equally invalid and is hereby annulled.
- e. The 1st defendant is hereby ordered to indemnify the 2nd defendant by refunding to her the purchase price in the sum of Kshs 4,600,000 together with interest at court rate from the date of filing the counterclaim in June 2018.
- f. The 1st defendant shall bear costs of the primary suit and the counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF FEBRUARY, 2025

B M EBOSO [MR]

JUDGE

In the Presence of

Mr. Kagunza for the Plaintiff

Mr. Oyare for the 2nd and 5th Defendants

Mr. Motari for the 3rd and 4th Defendants

