



**Obara v Harambee Co-operative & Saving Credit Society Ltd & 2 others (Environment & Land Case 1588 of 2017) [2024] KEELC 13574 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13574 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 1588 OF 2017**  
**LN MBUGUA, J**  
**DECEMBER 5, 2024**

**BETWEEN**

**MERESIA AKEYO OBARA ..... PLAINTIFF**

**AND**

**HARAMBEE CO-OPERATIVE & SAVING CREDIT SOCIETY LTD ..... 1<sup>ST</sup> DEFENDANT**

**MILD STEEL ENGINEERING WORKS LTD ..... 2<sup>ND</sup> DEFENDANT**

**MELLITUS OLUOCH ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**The pleadings**

1. The plaintiff commenced this suit vide a plaint dated 15.1. 2004. She avers that by an agreement dated 8.3.1996, Nashon Otieno Wanjir (deceased) sold to her Plot Nos. 1021 and 1022 now known as LR No. Nairobi Block 82/4915 and Nairobi Block 82/4918 at ksh.404,000/= (the suit land). She states that the 2 plots were hived from a larger parcel known as Greenfields site and service scheme registered in the name of the 1<sup>st</sup> defendant. That after selling the 2 plots, Nashon Wanjir Otieno (deceased) formally introduced her to the 1<sup>st</sup> defendant as the purchaser and/or new owner, instructing them to transfer the suit land to the Plaintiff.
2. It is her case that in total disregard of her rights as the owner of the suit properties, and through fraudulent transactions of the 1<sup>st</sup> and 3<sup>rd</sup> defendants, the 1<sup>st</sup> defendant, processed a transfer of the suit land in favour of the 2<sup>nd</sup> defendant. That in the alternative, the 1<sup>st</sup> defendant was guilty of gross negligence in the aforementioned transfer.
3. The plaintiff therefore seeks judgement against the defendants jointly and severally for;



- a. A declaration that the plaintiff is the lawful owner of property known as LR No. Nairobi Block 82/4915 and Nairobi Block 82/4918.
  - b. An order directing the 1<sup>st</sup> defendant to transfer the said property namely LR No. Nairobi Block 82/4915 and Nairobi Block 82/4918 to the plaintiff.
  - c. An injunction restraining the 1<sup>st</sup> defendant from transferring the said property LR No. Nairobi Block 82/4915 and Nairobi Block 82/4918 to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants or to any other third party.
  - d. An order of injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, their servants or agents from developing, transferring, charging, alienating, occupying or in any other manner howsoever interfering with the property comprised in LR No. Nairobi Block 82/4915 and Nairobi Block 82/4918.
  - e. Costs of this suit.
  - f. Any other or such further relief this honourable court may deem fit and expedient to grant in the circumstances of this case.
4. The suit is opposed by the 1<sup>st</sup> defendant vide its statement of defence dated 10.3.2004 where it denies allegations levelled against it in the plaint and contends that the plaint does not disclose a reasonable cause of action against it.
  5. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants opposed the suit vide their joint statement of defence dated 4.3.2004 and amended on 16.3.2004. They also deny allegations levelled against them and contend that the plaint does not disclose any cause of action against them.

### **The Evidence**

6. The plaintiff called 3 witnesses, the 1<sup>st</sup> one (PW1) being Emmanuel Karisa Kenga, a document examiner. He prepared and produced a report dated 6.12.2017 as an exhibit. He avers that on 1.12.2017 he received a request from Ongegu and Co. Advocates to examine the following documents/ Specimens;
  - i. A1, a questioned document which was an agreement for sale dated 15.12.1995 between Nashon Otieno Wanjir and the 2<sup>nd</sup> defendant.
  - ii. A2, a questioned document which is an acknowledgement by Nashon Otieno authored by 2<sup>nd</sup> defendant dated 20.5.1996 for Ksh.216 000.
  - iii. B1-4 which were the known signatures of the deceased, Nashon.
7. PW1 examined the aforementioned documents and compared the same and did not find any agreement as between the questioned documents and the known signatures and arrived at a conclusion that the questioned signatures were forgeries. It was his testimony that before arriving at the said conclusion, he considered the pen lifts, pen strokes, pen speed and alignment of the signatures and also took into account the nature of variations of the signatures.
8. On cross-examination by counsel for the 1<sup>st</sup> Defendant, PW1 stated that of the documents he examined, none emanated from the 1<sup>st</sup> defendant.



9. On cross-examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW1 averred that the documents which he was given were copies but they were clear, legible and suitable for comparison purposes, adding that the originals were not availed to him so his mandate was limited to comparison.
10. PW1 was shown the original of specimen A1 and A2 and he reiterated that they were indeed copies of the original and there was no agreement between the signatures on the questioned documents and the known signature, adding that he was informed that the author of the known signature was deceased but he was not told as to who knew the signature of the deceased.
11. He averred that the content of A1 and B1 was the same save that the vendor's signature on B1 was not witnessed, adding that B2 was not given to him by Odera Okumu Advocate.
12. PW1 also stated that one person can have more than 1 signature, adding that the documents he examined were provided to him by counsel and that a known signature is obtained from past records of the signatory.
13. In re-examination, PW1 reiterated that the original of A1 and A2 which he was shown and the photocopy are the same adding that the known signatures of the deceased were; letter of acceptance from the 1<sup>st</sup> defendant, power of attorney and the sale agreement and they did not agree with the signatures on the questioned documents.
14. PW2 was Paul Amuga, an advocate of the High Court practicing in Nairobi. He told the court that the plaintiff and Nashon Otieno Wanjir (deceased) were his former clients. He adopted his witness statement dated 6.12.2017 as his evidence in chief. He testified that he wrote the letter dated 14.2.1996 at the request of and on instructions of Nashon Otieno Wanjir (deceased) to convince the 2<sup>nd</sup> and 3<sup>rd</sup> defendants whom the deceased had sold the subject 2 plots to, to pay the balance of the purchase price because they were unwilling to pay before subdivision was completed.
15. He averred that after drafting the said letter, he gave it to Nashon Otieno (deceased) to hand deliver the same to the defendants and on 31.5.1996, Nashon went back and told him that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants still refused to pay.
16. That consequently, Nashon (deceased) cancelled the sale to the 2<sup>nd</sup> defendant and refunded the sum of ksh.17,500/= which was issued by the deceased's employer, provincial commissioner, Nairobi area and was accompanied with a handwritten letter dated 31.5.1996, adding that the deceased gave him copies of the cheque and the letter.
17. He averred that the deceased then proceeded to sell the 2 plots to the plaintiff herein and that the transaction was handled by Odera Okumu Advocate who is now deceased.
18. PW1 also told the court that it came as a surprise when the Plaintiff was brought to his office by the deceased's widow complaining that the plots had been taken over by someone else, thus he became a witness to demonstrate that the deceased sold the suit property to the plaintiff.
19. He averred that the acknowledgement dated 20.5.1996 is a fraud because the signature thereon is fake and the deceased could not have made a refund of ksh.17,500/= on 31.5.1996 if he had received the full purchase price by 20.5.1996.
20. In cross-examination by counsel for the 1<sup>st</sup> defendant, PW2 stated that the 1<sup>st</sup> defendant would not have known the circumstances of the letter he drafted dated 14.2.1996 without being explained to since it was silent on all the aspects he testified on. He pointed out that the letter was a confirmation that the plots had been sold and it was also instructing the 1<sup>st</sup> defendant to adjust its records to reflect the aspect



- of change of ownership. He contends that the letter forwarding the cheque to the 2<sup>nd</sup> defendant was not copied to the 1<sup>st</sup> defendant and that the cheque was cleared and paid on 10.6.1996.
21. He averred that much later, he wrote a demand letter dated 20.8.2023 to the 1<sup>st</sup> defendant who responded stating that Mr. Wanjir (deceased) had been allocated the suit plots but he had since written to the 1<sup>st</sup> defendant instructing it to transfer the suit property to the 2<sup>nd</sup> defendant.
  22. In cross-examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW2 stated that he was not involved in the execution of the sale agreement dated 1.12.1995 adding that when Nashon Otieno Wanjir (deceased) went to him, he had the said agreement with him although he had not signed it himself.
  23. He also stated that the sale agreement at page 8 of the plaintiff's supplementary list of documents dated 6.12.2017 is signed by the seller and the purchasers but it is undated while the sale agreement at page 15 of the same bundle dated 1.12.1995 is signed, adding that the late Wanjir wrote to the 1<sup>st</sup> defendant on 2.4.1996 to advise on change of address.
  24. He stated that on 31.5.1996, Wanjir (deceased) informed him that the 2<sup>nd</sup> defendant had refused to pay and he had found another purchaser adding that the agreement between the plaintiff and the deceased was dated 8.3.1996.
  25. PW2 also contended that he did not have a copy of the deceased's ID card, that he did not prepare any instrument for execution by the deceased and that he did not witness his (Nashon's) signature at any given time.
  26. He stated that there were 2 sale agreements between the deceased and the 2<sup>nd</sup> defendant; one in December 1995 and another one in January 1996 and that when the plaintiff went to him, he had an irrevocable power of attorney.
  27. In re-examination, PW2 averred that there are payments made to the 1<sup>st</sup> defendant by the plaintiff which was by a banker's cheque for ksh.174,000/=.
  28. He also stated that he did not do a letter to the 1<sup>st</sup> defendant revoking the instructions of 4.2.1996. He however did a demand letter of 20.8.2003. He avers that the plaintiff had disclosed that she is the one who paid the infrastructure money to the 1<sup>st</sup> defendant in 1996, adding that the letter relating to change of address was done after the deceased introduced the plaintiff to the 1<sup>st</sup> defendant with the intention being to ensure that the plaintiff received all correspondence.
  29. PW2 also stated that he knew the signature of the deceased as he had interacted with many documents which have the deceased's signature and that the acknowledgement at page 11 of the defendant's documents and the refund of ksh.17,500/= has not been denied and neither has the payment of ksh174,000/=.
  30. The plaintiff Meresia Akeyo Obara (PW3) was the 3<sup>rd</sup> witness in her case. She adopted her witness dated 27.2.2017 as her evidence in chief. She produced 7 documents as P. Exhibit 1-7 and 9 items from her supplementary list dated 6.1.2017 as P. Exhibit 8-16. She also presented the originals of items 8-11 and 16 which are; power of attorney, letter of offer dated 18.8.1994 and receipts from the 1<sup>st</sup> defendant.
  31. In her witness statement, she states that she engaged Nashon Otieno wanjir (deceased) who told her that he had 2 pieces of land by virtue of being a member of the 1<sup>st</sup> defendant which owned parcel LR No. 82/2703 and which it subdivided for allocation to its members.
  32. She states that as at march 1996, the deceased still owed the 1<sup>st</sup> defendant ksh. 174,000/= which had to be paid before the deceased could take full ownership of the plots and be able to sell them.



33. She avers that the deceased had initially intended to sell the 2 plots to the 2<sup>nd</sup> defendant but the sale could not be completed since the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had only paid him a deposit of ksh.24,000/= but refused to pay the balance, insisting that they could only pay the balance after the 1<sup>st</sup> defendant processed titles for the plots in the 2<sup>nd</sup> defendant's name.
34. That owing to the situation, the deceased had decided to cancel the sale to the 2<sup>nd</sup> defendant and wanted to sell to willing buyer who would pay the purchase price immediately.
35. She states that they settled on ksh.404,000/= as purchase price for the 2 plots of which she paid ksh.174,000/= directly to the 1<sup>st</sup> defendant vide a bankers cheque no.088291 dated 8.3.1996 and the balance to the deceased directly in tranches of ksh.150,000/-, 324,000/= and 80,000/=.
36. She states that she is aware that the deceased refunded to the 2<sup>nd</sup> defendant the deposit of ksh.24,000/= which it had paid him on signing the sale agreement dated 15.12.1995 and it was made partly by cheque of ksh.17,500/= which was delivered to the 2<sup>nd</sup> defendant with the deceased's handwritten letter dated 31.5.1996.
37. That after the deceased (Nashon) sold the plots to her, he took her to the 1<sup>st</sup> defendant's office and introduced her and gave them a copy of the sale agreement that they had signed, evidence that she had paid him ksh.404,000/= for the plots. That Nashon also gave the 1<sup>st</sup> defendant a letter dated 2.4.1996 by which he sought that communication pertaining to the parcels be thorough PW3's then address at the Kenya Embassy in Cairo where her husband was working at the time of which the 1<sup>st</sup> defendant acknowledged this information vide its letter dated 31.8.1996.
38. That she followed up her title and the 1<sup>st</sup> defendant told her that it was being processed, but in January 2004, she learnt that the 2<sup>nd</sup> defendant was pursuing the same plots in collusion with some officers of the 1<sup>st</sup> defendant and the latter had issued the 2<sup>nd</sup> defendant with a beacon certificate on 25.6.2003.
39. She contends that the allegation by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that the 2<sup>nd</sup> defendant paid the deceased ksh.216,000/= on 20.5.1996 is untrue because he could not have received the said sum from the 2<sup>nd</sup> defendant on 20.5.1996 as the 2<sup>nd</sup> defendant received a cheque of ksh.17500/= on 31.5.1996 as refund of deposit.
40. In cross-examination by counsel for the 1<sup>st</sup> defendant, PW3 reiterated that she paid ksh.174, 000/= to the 1<sup>st</sup> defendant as part of her purchase price but receipts were issued in the deceased's name, thus the said transaction alone does not entitle her to claim ownership.
41. She stated that she stood by her witness statement that the 1<sup>st</sup> defendant has openly shown bias in the dispute by supporting the 2<sup>nd</sup> and 3<sup>rd</sup> defendants even after being shown evidence that she is the one who paid it ksh.174,000/= and owing to the fact that the deceased introduced her as owner in April 1996.
42. On cross-examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, PW3 stated that the deceased had intended to sell the 2 plots to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants but the sale did not materialize as they did not meet the purchase price.
43. She stated that Nashon Wanjir later died but refunded the 2<sup>nd</sup> defendant whatever had been paid.
44. PW3 also stated that she saw the agreement with the 2<sup>nd</sup> defendant which came earlier than hers, adding that there was fraud since everything in the file relating to the suit land disappeared.
45. In re-examination, PW3 reiterated that she paid ksh.174,000 because she was told to pay before the sale agreement was drafted. She also stated that she did not overpay the purchase price, being that she



- paid ksh. 174,000/= plus kshs. 80,000 and a further ksh. 150,000/=, but the 1<sup>st</sup> receipt was not written in her name as the 1<sup>st</sup> defendant refused to write it in her name.
46. She also stated she sued the 3<sup>rd</sup> defendant as he was the manager of the 2<sup>nd</sup> defendant and he is the one who went to the 1<sup>st</sup> defendant's offices to change everything after Nashon Wanjir died.
  47. The 1<sup>st</sup> defendant did not proffer any evidence.
  48. The case of the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants was advanced by 2 witnesses, the 1<sup>st</sup> one being Melitus Oluoch Odero, the 3<sup>rd</sup> defendant (DW1). He adopted his witness statement dated 1.2.2012 as his evidence in chief. He produced 8 documents contained in his trial bundle dated 10.7.2017 as D. Exhibit 1-8.
  49. In his testimony, DW1 told the court that the cheque at page 8 of the plaintiff's bundle of 27.2.2017 is unknown to him and that the 2<sup>nd</sup> defendant never got it.
  50. His evidence is that he is a director of the of the 2<sup>nd</sup> defendant and that he met Nashon Wanjir Otieno (deceased) sometime in 1995 who told him he had a plot for sale. They settled on the purchase price at ksh.240,000/=. DW1 then went to the 1<sup>st</sup> defendant and confirmed that the plots belonged to the deceased and on 1.12.1995, they signed an agreement for sale of Plot No.'s 1021 and 1022 and the deceased's advocates wrote to the 1<sup>st</sup> defendant confirming the sale.
  51. That they initially paid 10% of the purchase price then later on 20.5.1996, they paid ksh.216,000/= to the deceased and thereafter paid legal fees ,stamp duty and transfer charges of ksh.33,372/= to the 1<sup>st</sup> defendant.
  52. He states that they also paid ksh.148,000/= for additional infrastructure and were issued with a receipt and a beacon certificate in 2003.
  53. On cross-examination by counsel for the plaintiff, DW1 stated that for the cheque of ksh.17,500/= at page 22 of the plaintiff's consolidated bundle dated 4.3.2021, the person to be paid was the 2<sup>nd</sup> defendant where he (DW1) is a director and that he has never seen the letter dated 31.5.1996. He does not have a statement to show that the said cheque was not credited into the 2<sup>nd</sup> defendant's account. He also averred that the sale agreement at page 6-9 of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's bundle was prepared by their advocates, then it was signed by the 3 directors of the 2<sup>nd</sup> defendant and Otieno (deceased) was with them but he left without signing and signed at his advocates offices.
  54. He stated that the sale agreements were 3 of which he gave Otieno all of them but he just returned one after signing the agreement dated 1.12.1995 and it has a stamp and seal of the 2<sup>nd</sup> defendant while the one at page 56-59 of the plaintiff's consolidated bundle has no date, stamp and seal of the 2<sup>nd</sup> defendant.
  55. DW1 also stated that he heard PW1 saying that the signature on the sale agreement at page 9 of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants bundle dated 10.7.2017 is not similar to the one with the plaintiff adding that that he did not have a report to rebut PW1's findings but the deceased returned to them 1 signed copy of the agreement for sale.
  56. DW1 also averred that the acknowledgement dated 20.5.1996 at page 11 of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's bundle dated 10.7.2017 was prepared by the 2<sup>nd</sup> defendant but he was not present.
  57. He contended that the 1<sup>st</sup> defendant had no problem if buying and selling of plots happened without their involvement and that the deceased did not give him an original allotment, he gave them a copy.



58. Referred to the letter dated 14.2.1996 from Amugo & company advocate who were acting for the deceased and addressed to the 1<sup>st</sup> defendant, he stated that the 2<sup>nd</sup> defendant paid money after the letter had been written and that it is not true that the balance paid was refunded.
59. DW1 contended that he has never seen the letter dated 2.4.1996 at page 19 of the plaintiff's consolidated bundle addressed to the 1<sup>st</sup> defendant on notification of change of address.
60. He also avers that the deceased just took them to the 1<sup>st</sup> defendant, he did not write any letter to introduce them. He doesn't know when Nashon died. He denies that they forged documents for the 2 plots to be registered in the name of the 2<sup>nd</sup> defendant.
61. In re-examination, DW1 stated that they paid a deposit of ksh. 24,000/= for the 2 plots at the time of signing the agreement, then the balance was paid when the deceased went to their office then they signed the acknowledgement dated 20.5.1996.
62. With regard to the opinion report of PW1, DW1 stated that since Otieno had died, PW1 could not get his finger prints /signatures for comparison thus the said opinion is inaccurate.
63. DW2 was Josephine W. Wambua, an advocate of the High Court of Kenya as at the time of the transaction, (now Judge of the High Court). She adopted her witness statement dated 25.10.2018. In her oral testimony in court, she Produced an original sale agreement dated 15.12.1995 between the deceased Nashon and the 2<sup>nd</sup> defendant whom she had represented in many matters including its incorporation.
64. She testified that she witnessed signatures of the 2<sup>nd</sup> defendant's directors namely Mundira, Oluoch and Luvonga adding that she did not witness the signature of the deceased and that by the time the parties in the sale agreement came to her, they had commenced the transaction relating to sale of plots No. 1021 and 1022 in which the vendor was Nashon Otieno Wanjir (deceased), the purchaser was the 2<sup>nd</sup> defendant, and the purchase price was ksh.240,000/= of which the purchaser had already paid the deposit.
65. She averred that since the purchasers had the allotment letters and all details of the vendor, they just signed the sale agreement in her presence and since the vendor was not present, the 3<sup>rd</sup> defendant who was with his co-directions took the 3 copies of the sale agreement to the deceased for signature and returned 2 copies which she dated and gave them their client's copy.
66. She averred that on a date she could not recall, the vendor and the purchaser's directors sought for advice on how to transfer the plots and she advised them to go to the 1<sup>st</sup> defendant and have the transfer effected so that the title deed would be issued in their names.
67. DW2 also contended that in 2004, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants brought to her an application dated 16.8.2004 filed by the plaintiff who was claiming the same plots, and alleging that she had bought the same vide an agreement for sale dated 8.3.1996 to enable her law firm to respond but she could not complete the matter as she had joined the Kenya Anti-corruption commission.
68. On cross-examination by the plaintiff, DW2 stated that she never acted for Nashon (deceased), she had a retainer with the 2<sup>nd</sup> defendant until 2004 when she closed her firm. That in the course of the retainer, she cautioned the 2<sup>nd</sup> defendant about paying the deceased before its name was registered in the sacco as she had established that the 1<sup>st</sup> defendant did not have titles.



69. DW2 also stated that the vendor and purchasers had already paid each other and they had documents which she did not retain adding that she would not know if the signature of Nashon (deceased) was altered as he did not sign before her.
70. Referred to clause 9 of the agreement for sale dated 1.12.1995 (page 53 of the plaintiff's consolidated bundle dated 4.3.2021), she stated that completion date was 30.12.1995 and that it is the only document she interacted with adding that since it was an informal transfer, there were no other legal instruments to be drawn by her, so her clients had to follow up with the 1<sup>st</sup> defendant to complete the transaction.
71. She stated that she cannot remember whether she saw the letters dated 14.2.1996, 20.8.2003 and 9.9.2003.

### **Submissions**

72. The submissions of the plaintiff are dated 27.3.2024 where she contends that she discharged her burden of proof that she purchased the suit property from the deceased and followed due process as per the 1<sup>st</sup> defendant's policy on effecting changes from one owner to another. The case of Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR is cited to submit that the 2<sup>nd</sup> defendant is not a bonafide purchaser for value as no consideration was made in view of the refund by the deceased hence its title cannot be protected under Section 26 of the [Land Registration Act](#).
73. It is also submitted that the Plaintiff was able to prove ingredients of fraud and negligence on the part of the defendants. To this end, the case of Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR as well as the case of Kinyanjui Kamau v George Kamau [2015] eKLR are cited.
74. In its submission's date 20.6.2024, the 1<sup>st</sup> defendant associates itself with the submissions of the 2<sup>nd</sup> defendant on the basis that the letter dated 14.2.1996 authored by Paul Amuga Advocate was not disputed. The 1<sup>st</sup> defendant also submits that if the court upholds the Plaintiff's claim, then it should decide on the issue of liability as between the defendants in light of the claim against co-defendants on record.
75. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed submissions dated 22.4.2024 where they argue that no cause of action was disclosed against the 2<sup>nd</sup> defendant by the plaintiff. It is argued that since the 2<sup>nd</sup> defendant has certificates of title issued by the lands office, Section 26 of the [Land Registration Act](#), 2012 speaks in its favour as no fraud was proved in its acquisition of the suit property.
76. It is also argued that the suit is filed outside the statutory period being that the cause of action emanates from a sale agreement dated march 1996 and the case was filed in 2002. It is pointed out that an action based on tort may not be brought after 3 years as per Section 4 (2) of the [Limitation of Actions Act](#).
77. The plaintiff filed supplementary submissions dated 2.7.2024 in response to the defendants' submissions, submitting that PW2 had explained that the only reason that Amuga & Co. Advocates wrote the letter dated 14.2.1996 was for the comfort and assurance of the 2<sup>nd</sup> defendant to pay the balance of the purchase price to Nashon (deceased), but they did not pay hence the refund as per the letter dated 31.5.1996.

### **Determination**

78. I have considered the pleadings, the evidence and the rival submissions. Before delving into the issues for determination, I must point out that the submissions of the 1<sup>st</sup> defendant are of no value as they dwell on issues of facts, yet the said entity did not tender evidence. Another preliminary issue



for consideration is the one raised by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in their submissions touching on Limitation of time. The said issue was not pleaded and it was not made a subject of contest during the trial. It is therefore untenable to raise the said issue on the platform of submissions, hence the court declines to determine the question of limitation.

79. I find that the issue falling for determination is; who between the plaintiff and the 2<sup>nd</sup> defendant is the legitimate owner of the suit plots?. There is no counterclaim made by the defendants, but nevertheless, the plaintiff has an obligation to prove her case in line with the provisions of Section 107 of the [evidence Act](#). In *Samson S. Maitai & another V. African Safari Club Limited & Another* [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

80. There is no controversy that the 2 parcels in contention were allocated to Nashon Otieno Wanjir (deceased) by the 1<sup>st</sup> defendant by virtue of his membership in that entity.
81. At the onset, I must point out that I have not in any way found the evidence of PW1 being of any value. The reason being that his analysis of questioned and known signatures are not anchored on any credible evidence. After all PW1 could not give an account of the known signatures of Nashon who was apparently deceased by the time of the analysis.
82. The plaintiff's case is that she purchased Plot Nos. 1021 and 1022 now known as LR No. Nairobi Block 82/4915 and Nairobi Block 82/4918 from Nashon Otieno Wanjir (deceased), a member of the 1<sup>st</sup> defendant which has now taken sides and has allegedly processed titles to the 2<sup>nd</sup> defendant.
83. On its part, the 2<sup>nd</sup> defendant claims that it is the lawfully registered proprietor of the suit parcels, but titles which are evidence of registration were not availed to the court. Thus the court can only examine the documents presented by the competing parties to determine whose claim is superior as between the plaintiff and the 2<sup>nd</sup> defendant.
84. The plaintiff led evidence that before she came into the picture, Nashon Otieno Wanjir (deceased) had intended to sell the suit plots to the 2<sup>nd</sup> defendant and they had even drafted a sale agreement, of which 2<sup>nd</sup> defendant had paid the deceased ksh.24 ,000/= as deposit.
85. The evidence of DW1 on the other hand was that there was a sale agreement entered into between the 2<sup>nd</sup> defendant and the deceased. The same was drawn by DW2 and it is dated 15.12.1995. DW2 told the court that she witnessed only the signatures of the directors of the 2<sup>nd</sup> defendant, adding that DW1 took the sale agreement to the deceased who was to sign it in the presence of his counsel.
86. PW2 led evidence that the deceased approached him to draft the letter dated 14.2.1996 (page 10 of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's bundle dated 1.2.2012) to convince the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to pay the balance of the purchase price which they were unwilling to pay until they got titles to the suit land.
87. The said letter was in essence notifying the 1<sup>st</sup> defendant that the suit plot had been sold and transferred to the 2<sup>nd</sup> defendant. It is this letter that the 2<sup>nd</sup> defendant clutches upon as evidence that the deceased transferred the suit plots to it.
88. Reading the said letter in the context of the evidence given herein, I'm of the view that the 2<sup>nd</sup> defendant had indeed declined to pay the balance until a transfer was effected. This evidence that the 2<sup>nd</sup> defendant refused to pay the balance is also supported by the deceased's letter dated 31.5.1996 at page 21 of



the plaintiff's consolidated bundle dated 4.3.2021. The letter accompanied the cheque of ksh.17,500/= which was actually paid to the 2<sup>nd</sup> defendant as per the statement of accounts at page 23 of the same bundle where at entry no. 9, it shows that the cheque was cleared on 10.6.1996. Dw1 offered no rebuttal evidence on this piece of evidence. Instead, he stated during cross examination that;

“I have not availed such a bank statement to show that the cheque was not credited into our account”.

89. Even DW2 stated in cross examination that “I cautioned them about paying before their names were in the SACCO register” which further buttresses plaintiff's averment that Nashon's fall out with the 2<sup>nd</sup> defendant was because it had declined to pay the purchase price before the transfer of the suit lands to it.
90. PW1 produced a sale agreement entered into between her and the deceased on 8.3.1996 which indicates that the deceased sold to her the suit plots at ksh. 404,000/= out of which she paid ksh.174,000/= to the 1<sup>st</sup> defendant and the balance to the deceased in tranches. The original receipt No. 39825 for the said sum of ksh.174,000/= issued to Wanjir by the 1<sup>st</sup> defendant at page 72 of the plaintiff's consolidated bundle is paid the same day of the sale agreement between the plaintiff and the deceased (8.3.1996), reinforcing the contention by PW3 that part of the purchase price was actually paid to the 1<sup>st</sup> defendant. This date is again in tandem with the date on the Power of Attorney at page 37 of plaintiff's bundle.
91. On 2.4.1996, (letter at page 19 of plaintiff's bundle) the deceased wrote to the 1<sup>st</sup> defendant informing it that his address had changed to that of John Obara, at Cairo which happens to be the address of plaintiff's husband. This evidence is consistent with plaintiff's claim that she was based in Cairo Egypt where her husband was working at the Kenyan Embassy. These changes were noted by the 1<sup>st</sup> defendant vide its letter dated 31.8.1996 and they were communicated after the deceased had made the refund to the 2<sup>nd</sup> defendant and entered into an agreement with the plaintiff. This indicates that the deceased clearly communicated to the 1<sup>st</sup> defendant that he had sold the suit plots to the plaintiff.
92. It is also worthy to note that the nature of rights and interests held by Nashon in the suit parcels are clearly captured in the letter of allotment dated 18.8.1994 (page 43 of plaintiffs bundle). The said letter is original containing such encumbrances as infrastructure fees. The said letter forms the core of the bundle of rights and interest which Nashon was capable of transferring, of which the said rights and interests were rooted to and intricately woven into 1<sup>st</sup> defendants ownership of the land. PW3 was able to give a credible account that she paid the sum of Sh. 174,000 directly to 1<sup>st</sup> defendant to clear the aforementioned encumbrance.
93. This far, it is clear that the plaintiff has given a consistent account of her claim to the suit land, thereby discharging the burden of proof. Have the defendants surmounted sufficient evidence to dislodge the evidence proffered by the plaintiff?.
94. DW1 claims that the 2<sup>nd</sup> defendant paid the deceased ksh.240,000/= initially paying the 10% deposit on 20.5.1996 and later paid sh. 216,000. There is no evidence of when and how the said payments were made.
95. DW1 further contends that the payment of Ksh 216,000 was acknowledged as per their document dated 20.5.1996 (page 11 of their bundle). He however stated that the said document was drafted by the company and he only heard that Otieno had come there severally, yet DW1 has appended his signature on the said document. The 2<sup>nd</sup> defendant was therefore unable to prove that it paid the deceased the alleged balance of the purchase price.



96. DW1 also averred that the deceased just took them to the 1<sup>st</sup> defendant without writing anything to introduce them. It is also curious that the 1<sup>st</sup> defendant was processing a title to the 2<sup>nd</sup> defendant who only had a copy of the letter of allotment while he Plaintiff had been given the original allotment at page 43 of the plaintiff's consolidated bundle by the deceased.
97. Curiously, the copy of allotment to Nashon is dated 18.5.1995 a date totally different from the original letter of allotment to Nashon, the one dated 18.8.1994. The said letter of 18.5.1995 has no provision of acceptance by the beneficiary (Nashon), unlike the one availed by the plaintiff indicating that Nashon accepted the offer on 17.10.1994.
98. This far it is quite apparent that the nature and extent of rights and interests of Nashon cannot be ascertained in so far as the allotment availed by 2<sup>nd</sup> & 3<sup>rd</sup> defendant is concerned. Yet allotment would contain the bundle of rights and interests in the two suit plots which were expected to mature to rights of proprietorship in a title. In essence, the defendants have not been able to establish the root of their claim or title for that matter.
99. It is also worthy to note that both DW1 & 2 have clearly admitted that Nashon, the seller never signed any agreement in their presence.
100. I hold the view that the plaintiff has demonstrated that the deceased (Nashon Wanjir) had made it known to the 1<sup>st</sup> defendant that he had transferred the suit parcel to the plaintiff. The plaintiff has also demonstrated that the 2<sup>nd</sup> defendant was refunded by the deceased the sums paid to the tune of Ksh. 17,000, and that she is the one who paid the full purchase price of the suit properties. It was therefore very in - genuine of the 1<sup>st</sup> defendant to have acted in cahoots with the 2<sup>nd</sup> defendant to process a title using unscrupulous documents.
101. The court is persuaded by the holding in the case of Alice Chemutai Too (Suing in her capacity as the personal representative of Kipkoech Tele (Deceased) v Nickson Kipkurui Korir, Attorney General (Sued on behalf of the Chief Land Registrar) & Consolidated Bank of Kenya (Environment & Land Case 51 of 2014) [2015] KEELC 151 (KLR) (30 October 2015) (Judgment) where the court stated that;
- “I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists”
102. To this end I find that the plaintiff has proved her case on a balance of probabilities. I therefore enter judgement for the plaintiff against the defendants jointly and severally as follows;
- i. A declaration is hereby issued to the effect that the plaintiff is the lawful owner of properties known as LR No. Nairobi Block 82/4915 and Nairobi Block 82/4918.
  - ii. An order is hereby issued cancelling any title issued to the 2<sup>nd</sup> defendant in respect of parcel LR No. Nairobi Block 82/4915 and Nairobi Block 82/4918, and instead, the said parcels are to be registered in the name of the plaintiff.
  - iii. An order of injunction is hereby issued restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, their servants or agents from developing, transferring, charging, alienating, occupying or in any other manner howsoever interfering with the properties comprised in LR No. Nairobi Block 82/4915 and Nairobi Block 82/4918.



- iv. The plaintiff is awarded costs of the suit as against the defendants jointly and severally. The plaintiff is also awarded interests on costs at court rates. Court may deem fit and expedient to grant in the circumstances of this case.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>th</sup> DAY OF DECEMBER 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:

Ongegu for Plaintiff

Waweru holding brief for Chege for 1<sup>st</sup> Defendant

M/s Mwendwa for 2<sup>nd</sup> and 3<sup>rd</sup> Defendant

Court Assistant: Vena

