



REPUBLIC OF KENYA



Macharia & 52 others v Lelayet Court Developers Ltd & another (Environment and Land Case Civil Suit 423 of 2008) [2024] KEELC 5273 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5273 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 423 OF 2008**

OA ANGOTE, J

JULY 11, 2024

BETWEEN

JOSPAT MACHARIA 1ST PLAINTIFF
CHARLES MACHARIA GAKENGE 2ND PLAINTIFF
PETER AZEI 3RD PLAINTIFF
MILTON N. MAHUGU 4TH PLAINTIFF
JAMES MAINA MUTUATO 5TH PLAINTIFF
ADANGA AGISU 6TH PLAINTIFF
OBIRI MORARA 7TH PLAINTIFF
EVANS MUSHEGA MUGILWA 8TH PLAINTIFF
SAMUEL KIBE KIARIE 9TH PLAINTIFF
CHRISTOPHER OKEMWA 10TH PLAINTIFF
PATRICK ANDAYI 11TH PLAINTIFF
STEPHEN M. WAIRE 12TH PLAINTIFF
CHARLES NJAGI KIBABAI 13TH PLAINTIFF
GERALD KIMARI 14TH PLAINTIFF
JOSECH THUO NGETA 15TH PLAINTIFF
ROBINSON K. OLAKI 16TH PLAINTIFF
MAURICE ONYANGO ODHIAMBO 17TH PLAINTIFF
JOHN MBUGUA K. ABUCHO 18TH PLAINTIFF
TITUS SAMWEL KASWAILI 19TH PLAINTIFF



TITUS AGISU MBEVA	20 TH PLAINTIFF
DAVID KITANGALA AGISU	21 ST PLAINTIFF
STARBON ONACHA AGISU	22 ND PLAINTIFF
GEOFFREY HENRY WANDABWA	23 RD PLAINTIFF
LEVI OYUGI MUGILWA	24 TH PLAINTIFF
PATRICK KINYOLO MBITHI	25 TH PLAINTIFF
ANSELM NJOGU KIGOMO	26 TH PLAINTIFF
FREDRICK NDUGIRE MWANGI	27 TH PLAINTIFF
KENNEDY MULANDI MALINDA	28 TH PLAINTIFF
WINSTON WINNER SASATI	29 TH PLAINTIFF
JAMES OWONDO RATTA	30 TH PLAINTIFF
SIMON MUTELA JUDAH	31 ST PLAINTIFF
JOSEPH MACHARIA RUKU	32 ND PLAINTIFF
LAWRENCE MUTUA MWIKIA	33 RD PLAINTIFF
SAMSON K. KIMOTHO	34 TH PLAINTIFF
MR & MRS MIKE NDAWA MWIKYA	35 TH PLAINTIFF
SOLOMON KIRUMBA	36 TH PLAINTIFF
WILLIAM ITAMBI	37 TH PLAINTIFF
GORDON R. WANDIO	38 TH PLAINTIFF
LEONIDAS KAMENDE	39 TH PLAINTIFF
MUENI KAMENDE	40 TH PLAINTIFF
GRACE MUTHONI CHEGE	41 ST PLAINTIFF
REGINA WAMBUI KAARA	42 ND PLAINTIFF
ROSE MUTHONI THUO	43 RD PLAINTIFF
JULIA WMBURA KINAI	44 TH PLAINTIFF
EVA WANJIKU WAMBUGU	45 TH PLAINTIFF
CHRISTINE MBINDU MUSYOKA	46 TH PLAINTIFF
FRIDAN WANDI KABUI	47 TH PLAINTIFF
ALICE NALIKA ASHITAMBASI	48 TH PLAINTIFF
BETH WANJIKU G	49 TH PLAINTIFF
MUSUNGU AND HARUN KABUKI	50 TH PLAINTIFF
ZEBEDEE NDENGA ALITSI	51 ST PLAINTIFF



ABSALOM HABIL LAMKA 52ND PLAINTIFF

PAMELA ADOYO 53RD PLAINTIFF

AND

LELTAYET COURT DEVELOPERS LTD 1ST DEFENDANT

FUELEX KENYA LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs have through an Amended Complaint dated 8th March 2021, sought for the following reliefs:
 - a. A permanent injunction order restraining the Defendants jointly whether by themselves or through their agents, servants and/or workers from trespassing, harassing, eviction, disposing off, selling and/or in any other manner interfering with the Plaintiffs' quiet use, possession and occupation of their respective Plots in Land Reference No. 209/22143.
 - b. A declaration that the Defendants are jointly under a duty to give effect and to transfer the suit premises to the various Plaintiffs and all others in proportion to the Plot each acquired.
 - c. An order directing the 2nd Defendant to give consent for the transfer of the suit premises to the various Plaintiffs and all other subsequent buyers so as each to obtain his/her respective title.
 - d. In the alternative to Prayer C above, an order authorizing the Deputy Registrar of this Honourable Court to execute all the necessary consents and conveyance documents to give force to the effectual transfer of the suit premises and registration of each plot in the names of if its respective purchaser.
 - e. Costs of the suit and interests thereof.
 - f. Any other relief that the Honourable Court may deem fit to grant.
2. The Plaintiffs' case is that at all material times, the 1st Defendant was the beneficial and equitable owner of the suit property, known as Land Reference No. 209/22143 Kayole Nairobi by way of a lease to it by the City Council of Nairobi dated 27th July 1993 and that the suit property was subsequently acquired by the 2nd Defendant.
3. The Plaintiffs assert that the 1st Defendant agreed to sell the suit property to the 2nd Defendant through a sale agreement dated 9th September 1998 and at a consideration of KShs. 8,000,000; that the 2nd Defendant paid a deposit of KShs. 4,000,000 to the 1st Defendant and proceeded to obtain registration in its name even before completion of the transaction and that the 2nd Defendant was unable to complete the transaction and there was an undertaking that the 2nd Defendant re-transfers the suit premises to the 1st Defendant, who was to refund the deposit.
4. It was averred by the Plaintiffs in the Complaint that the terms of the undertaking were that the 1st Defendant's Advocates were to hold the title documents upon their professional undertaking to effect the re-transfer after refund of the said deposit.
5. The Plaintiffs averred in the Complaint that the 1st Defendant proceeded with the authority of the 2nd Defendant contained in its letter dated 29th July 1999 to sub-divide the suit property into about 200 plots and proceeded to sell them to them and others.



6. According to the Plaintiffs, vide sale agreements with the 1st Defendant, they are *bona fide* purchasers for value without notice; that they have also developed the said properties and made investments on the same and that to date, the titles to the plots they bought are yet to be transferred to them.
7. The Plaintiffs averred that they are owners and purchasers of various plots within the suit premises as follows:
 - a. 1st Plaintiff- Plot Nos. 154 and 155
 - b. 2nd Plaintiff – Plot No. 9
 - c. 3rd Plaintiff- Plot No. 158
 - d. 4th Plaintiff- Plot No. 22
 - e. 5th Plaintiff- Plot no. 162
 - f. 6th Plaintiff- Plot No. 32, 65, 168 & 169
 - g. 7th Plaintiff– Plot No. 96
 - h. 8th Plaintiff- Plot No. 44
 - i. 9th Plaintiff- Plot No. 112
 - j. 10th Plaintiff- Plot No. 35 & 36
 - k. 11th Plaintiff- Plot No. 156 & 157
 - l. 12th Plaintiff- Plot No. 8
 - m. 13th Plaintiff- Plot No. 177
 - n. 14th Plaintiff- Plot No. 107 & 108
 - o. 15th Plaintiff- Plot No. 01
 - p. 16th Plaintiff- Plot No. 160
 - q. 17th Plaintiff- Plot No. 47
 - r. 18th Plaintiff- Plot No. 123
 - s. 19th Plaintiff- Plot No. 66
 - t. 20th Plaintiff- Plot No. 67
 - u. 21st Plaintiff- Plot No. 32
 - v. 22nd Plaintiff- Plot No. 156
 - w. 23rd Plaintiff- Plot No. 55
 - x. 24th Plaintiff- Plot No. 65
 - y. 25th Plaintiff- Plot No. 60 & 61
 - z. 26th Plaintiff- Plot No. 111
 - aa. 27th Plaintiff- Plot No. 46



- ab. 28th Plaintiff- Plot No. 37
- ac. 29th Plaintiff- Plot No. 175
- ad. 30th Plaintiff- Plot No. 63
- ae. 31st Plaintiff- Plot No. 90& 91
- af. 32nd Plaintiff- Plot No. 99 & 100
- ag. 33rd Plaintiff- Plot No. 21
- ah. 34th Plaintiff- Plot No. 54
- ai. 35th Plaintiff- Plot No. 144
- aj. 36th Plaintiff- Plot No. 60& 61
- ak. 37th Plaintiff- Plot No. 80
- al. 38th Plaintiff- Plot No. 142
- am. 18th & 39th Plaintiffs- Plot No. 50
- an. 19th & 40th Plaintiffs- Plot No. 43
- ao. 20th & 41st Plaintiffs- Plot No. 40
- ap. 42nd Plaintiff- Plot No. 141
- aq. 43rd Plaintiff- Plot No. 129
- ar. 44th Plaintiff- Plot No. 117 & 118
- as. 45th Plaintiff- Plot No. 45
- at. 46th Plaintiff- Plot No. 42
- au. 47th Plaintiff- Plot No. 41
- av. 48th Plaintiff- Plot No. 72, 73 & 172
- aw. 49th Plaintiff- Plot No. 59
- ax. 50th Plaintiff- Plot No. 1 acre on the West of Spine Road
- ay. 51st Plaintiff- Plot No. 139
- az. 52nd Plaintiff- Plot No. 140
- ba. 53rd Plaintiff- Plot No. 151

8. The Plaintiffs assert that the particulars of estoppel and malice on the 2nd Defendant's part include giving express authority to the 1st Defendant to sub-divide the suit premises vide the letter dated 29th July 1999; allowing the 1st Defendant to dispose of the premises to them and threatening them with eviction knowing that they bought the plots for value and consideration.
9. They urge that the only recourse that the 2nd Defendant has is recovery of its money from the 1st Defendant, and that they should not suffer for a mistake which was not of their own making.



10. The 1st Defendant, through its Defence and Counterclaim dated 8th March 2012, averred that it has at all times been the registered owner of the suit property by way of Lease from the City Council of Nairobi dated 27th July 1993. It asserts that the transfer of the suit property to the 2nd Defendant was done contrary to a professional undertaking by the 2nd Defendant's lawyer not to transfer the land until the 2nd Defendant had paid the full purchase price.
11. According to the 1st Defendant, the 2nd Defendant received through its advocates on record the deposit and that the subdivision was done with the 2nd Defendant's consent and the 1st Defendant bore the costs of water and sewage reticulation and connection to the suit property.
12. It was averred by the 1st Defendant that the 2nd Defendant cannot have a good title to the land as it had already received back the deposit he paid and that the failure to process titles in favour of the Plaintiffs is as a result of the 2nd Defendant's failure to re-transfer the suit property to it as per the professional undertaking given by the 2nd Defendant's advocates.
13. In its Counterclaim, the 1st Defendant asserted that it entered into a sale agreement with the 2nd Defendant dated 9th September 1998 for the sale of the suit property at Kshs. 8 million; that the 2nd Defendant paid Kshs. 4 million and the balance was to be paid before completion of the sale and that the 2nd Defendant transferred title to the suit property to itself before paying the full purchase price.
14. The 1st Defendant averred that it agreed with the 2nd Defendant to sub-divide the suit property into several plots and offer them for sale for it to refund the deposit paid by the 2nd Defendant and that the 2nd Defendant in the counterclaim received the deposit but has refused to re-transfer the land to it. The 1st Defendant has therefore sought for the following orders:
 - a. An order directing the 2nd Defendant to give consent for the transfer of the suit premises to the 1st Defendant or in the alternative;
 - b. An order directing the 2nd Defendant to give consent for the transfer of the suit premises to the various Plaintiffs and all other subsequent buyers so as each to obtain their respective title;
 - c. Costs.
 - d. Any other relief the honourable court may deem fit to grant.
15. In their Further Amended Statement of Defence and Counterclaim dated 9th June 2021, the 2nd Defendant averred that it is the registered owner of the suit property, which it purchased from the 1st Defendant for valuable consideration through a sale agreement dated 9th September 1998; that there has never been privity of contract between the Plaintiffs and itself, and that the Plaintiffs have without any justifications and without the consent and authority, trespassed into the suit property.
16. The 2nd Defendant argued that the Plaintiffs have illegally occupied its land and refused to vacate despite notice and that the Plaintiffs' only available remedy in law and equity lies in damages against the 1st Defendant.
17. In their Counterclaim, the 2nd Defendant averred that the Plaintiffs' wrongful entry and taking of possession of the suit property has caused it to suffer loss and damage and has sought for the following reliefs:
 - a. A declaration that the 2nd Defendant is entitled to exclusive and unimpeded right of possession and occupation of the suit property.



- b. A declaration that the Plaintiffs, whether by themselves or their servants or agents or otherwise howsoever, are wrongfully in occupation of the suit property and are accordingly trespassers on the same.
- c. A declaration that the Plaintiffs, whether by themselves or their servants or agents or otherwise howsoever, are not entitled to remain on the suit property.
- d. A permanent injunction restraining the Plaintiffs, whether by themselves or their servants or agents or otherwise howsoever, from restraining on or continuing in occupation of the suit property.
- e. Vacant possession of the suit property.
- f. General damages for trespass.
- g. Costs of this suit and any other relief that this court may deem fit.

Hearing and Evidence

The Plaintiff's witnesses

18. The Plaintiffs adduced the testimony of four witnesses. Their first witness (PW1) was Charles Macharia Gakenge, who is the 2nd Plaintiff in this suit, and who relied on his statement dated 25th May 2012 as his evidence in chief. In his statement, PW1 averred that he is the owner of Plot No. 009 on the suit property, which he acquired from the 1st Defendant through a sale agreement dated 14th May 1999. It was his evidence that he paid Kshs. 350,000 for the said plot and constructed a permanent building on which he operates his business and has tenants.
19. He asserted that he was not given title to the land he bought but saw no harm in purchasing the land because he had been told of the events leading up to the sale. It is his claim that in 2008, the 2nd Defendant's agents began harassing his family and other plot owners and threatened to evict them and that he is a bona fide purchaser for value and was not aware of the complications between the Defendants.
20. PW1 testified in court that he bought the property after it was advertised in the newspapers; that he approached the 1st Defendant who told him that the title was with his lawyers, M/S Muthoga Gaturu & Co. Advocates and that the title was at that time in the name of the 2nd Defendant.
21. PW1 clarified that there were 182 plots on the ground, all of which were developed; that he was shown a sub-division scheme; that he did not look at the agreements between the 1st and 2nd Defendants; that the agreement between him and the 1st Defendant was not registered; that he did not get approval from the city county to put up his structure and that the 2nd Defendant knew that they were on the suit property.
22. PW2 was Josephat Macharia, who is the 1st Plaintiff. PW2 relied on his statement dated 25th May 2012, in which he averred that in 1999, he saw an advertisement and billboards for the sale of plots on the suit property by the 1st Defendant; that he thereafter entered into an agreement for the purchase of Plot Nos 154 and 155; that he was to pay Kshs. 120,0000/- for each plot but paid a total of Kshs. 350,000 and that he is in occupation of the suit properties and has constructed a family home which he has lived in for four years.
23. PW2 stated that although he was not given title to the properties, he was aware of the events that led to the sale; that the 2nd Defendant threatened his family and other plot owners in 2008 with eviction



from the suit premises and that he was a bona fide purchaser and was not aware of the complications between the Defendants.

24. PW2 testified that he was directed to Muthoga Gaturu & Co. Advocates by the 1st Defendant; that it is the said law firm that conducted due diligence; that before any of the Plaintiffs started construction, all social amenities were put in place and that the county government has never stopped them from constructing.
25. In Cross-examination, he asserted that he did not sign the sale agreement, as it was signed between his wife and the 1st Defendant; that when he went to the 2nd Defendant's office, he was not shown a copy of the title; that he did not conduct a search to establish the owner of the suit property and that he did not get any approvals as the plots did not have titles.
26. PW3, Isaac Wamutie Kesili, the 51st Plaintiff, relied on his witness statement dated 25th May 2012. PW3 asserted that in 2000, they saw the property advertised in the newspaper, and went to the offices of the 1st Defendant; that they thereafter entered into an agreement with the 1st Defendant and bought one hectare at Kshs. 1.5 million, which they paid in instalments and that the final payment was made on 17th November 2006.
27. PW3 stated that upon completion of payment, he took possession of the suit property, but was never issued with a title and that he has put up a temporary building and was in the process of developing a permanent one.
28. In his testimony, PW3 stated that they were referred to an Advocate named Mutungi, who was the 1st Defendant's advocate who prepared the sale agreement. He stated that he has been in occupation of a quarter of an acre since June 2000 to date and that he completed paying for the land and took possession of the entire land in 2006.
29. PW3 asserted that they were not aware of the dispute concerning the land; that they did not conduct a search but only saw a copy of the title. Additionally, he asserted that he did not see the agreement between the 1st and 2nd Defendants but he saw the correspondences between the parties. He stated that he took plans to the Council for approval.
30. The fourth witness, PW4, relied on his witness statement dated 8th March 2021 and produced a bundle of documents as PEXB3, which contained the agreement between the 1st Defendant and the 51st and 52nd Plaintiffs.
31. He testified that he bought the land in April 2000 from the 1st Defendant and that he has since developed it. It was the evidence of PW4 that he has been living in the flats he built since 2002 and has let out some of the apartments. He averred that he did not conduct a search when he bought the land.

The Defendant's witnesses

32. The 2nd Defendant adduced the evidence of two witnesses. DW1, a project manager of Fuelex Company Limited, the 2nd Defendant, relied on his witness statement dated 2nd September 2015 and his documents dated 18th October 2013 which he produced as DEXB1.
33. DW1 averred that the land belongs to the 2nd Defendant and that he does not know how the Plaintiffs got on the land, because he found them on the suit property when he went to fence the land.
34. DW1 conceded that the 2nd Defendant did not pay Kshs. 8 million as indicated in the transfer of lease, but paid only Kshs. 4 million as per the sale agreement and that the balance was to be paid upon giving vacant possession of the land to the 2nd Defendant.



35. Despite the undertaking between the parties, DW1 stated that the 1st Defendant is yet to pay back the deposit and that they have not returned the documents. He averred that the land has never been subdivided.
36. The 2nd Defendant's second witness, DW2, was Fredrick Otieno Okeyo, an advocate of the 2nd Defendant, who relied on his statement dated 13th June 2016. It was the evidence of DW2 that he practiced in the firm of Owino Okeyo Advocates which represented the 2nd Defendant in the transaction.
37. He asserted that the sale agreement was prepared by the firm of Kiarie Nduta for the 2nd Defendant whereas Muchuni & Co. Advocates acted for the 1st Defendant and that he later on came on board and asked the 1st Defendant to forward to him the title.
38. DW2 stated that the instructions he received was to put the 2nd Defendant into possession and pay the 1st Defendant the balance of the purchase price as per the agreements between the parties; that there was nothing unlawful about the transfer of the suit property to the 2nd Defendant and that the transfer of the property was on 5th October 1998 while the sale agreement is dated 9th September 1998.
39. DW2 informed the court that his client (the 2nd Defendant) told him that he had agreed to re-transfer the suit property; that he was not privy to the agreement to subdivide the land to raise Kshs. 4 million, as he only had instructions to receive the Kshs. 4 million; that he did not enforce the undertaking because he still had the title in his possession and that there have not been any proceedings that have sought to impeach the transfer.
40. DW2 denied knowledge of any subdivision of the land as it was not part of the instructions given to him; that he did not know where the 1st Defendant got the money from; that he only received money that Mr. Chege was refunding over and above the purchase price; that the re-transfer has never taken place and that the title was returned to the 2nd Defendant when the transaction failed.

Submissions

41. Counsel for the 1st-50th Plaintiffs submitted that the Plaintiffs are bona fide purchasers for value as there was an agreement between the 1st and 2nd Defendants for the 1st Defendant to sell the land and refund the KShs. 4 million paid to the 1st Defendant; that correspondences between the parties are evidence of this agreement and that the Plaintiffs purchased the land from the 1st Defendant and are bona fide purchasers of the suit property for value.
42. Counsel submitted that the 2nd Defendant did not acquire good title to the suit property for want of payment of the full consideration as set out in the sale agreement. Counsel relied on Section 26 of the [*Land Registration Act*](#).
43. Counsel's submission was that the land was sold to the Plaintiffs with the 2nd Defendant's consent and knowledge, as evidenced in the letter dated 15th October 1999, and the letters at page 75-79 of the 2nd Defendant's list of documents.
44. Counsel for the 51st-53rd Plaintiffs submitted that the process through which the 2nd Defendant acquired title to the suit property was questionable. He relied on the case of *Herbert L. Martin & 2 Others v Margaret J Kamar & 5 Others* (2016) eKLR, where the court held that when a person's title is called into question, such proprietor has to show the root of his ownership.



45. It was Counsel's assertion that the Plaintiffs and the 1st Defendant have established by evidence that the 2nd Defendant had not completed the sale of the suit property, which fact the 2nd Defendant confirmed to this court.
46. It was submitted that there was no express or implied provision that allowed the 2nd Defendant to register the property in its favour before clearing the balance; that the 2nd Defendant's registration of the title in its name is illegal and unlawful and that the 2nd Defendant has not shown that valuation was ever done or stamp duty paid.
47. Counsel relied on the case of *J.T.M Construction & Equipment v Circle B. Farms Ltd*, claim Number 2007 HCR 05110 where it was held that failure to complete by the date set is a breach of contract. He also relied on case of *Karanja Mbugua & Another v Marybin Holding Co. Ltd* (2014) eKLR on the effect of rescission of a sale agreement, and *Lakeview Investments Ltd v Ian Magara Bwosiemo & 2 Others* [2017] eKLR.
48. Counsel for the 2nd Defendant submitted that the 2nd Defendant is the rightful owner of the suit property having purchased it from the 1st Defendant, and hold a legal title to the suit property and that this court should safeguard, protect and uphold its right to property under Article 40 of the *Constitution*. Counsel relied on Section 26 of the *Land Registration Act* and the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR.
49. Counsel submitted that DW2, Fredrick Okeyo, established that the 1st Defendant received more than KShs. 4 million being part of the property's purchase price. Further, that the 1st Defendant has never counterclaimed against the 2nd Defendant for the balance of the purchase price or retransfer of the suit property.
50. Counsel for the 2nd Defendant submitted that the Plaintiffs were not privy to the agreement between the Defendants and cannot seek to enforce the agreement. Counsel relied on the cases of *Agricultural Finance Corporation v Lengetia Limited and Jack Mwangi* [1985] eKLR and *Benjamin Macfoy v United Africa Co. Limited* ([1961] 3 All E.R. 1169) as cited in *Kawaljeet Singh Rekhi v Peter Wainaina Kamau & 2 Others* [2016] eKLR.
51. It was counsel's submission that the 1st Defendant had no title to pass to the Plaintiffs and the purported sale between the 1st Defendant and the Plaintiffs is a nullity and cannot accrue legality and that the issue of payment of the purchase price in full should be resolved between the Defendants. Counsel relied on the case of *Aienah Likuyani Njirah v Aga Khan Health Services* [2013] eKLR.
52. Counsel urged that the sale agreement was a contractual agreement and the court should not interfere with the Defendants' contractual freedoms. They relied on the case of *Josphat Njuguna v Highrise Self Groups* [2014] eKLR.
53. It was Counsel's submission that the Plaintiffs were not bona fide purchasers for value without notice of the suit property; that by their own testimony, they failed in their duty to carry out due diligence prior to purchasing the property as they did not conduct a search of the property to ascertain ownership. Counsel relied on the case of *Falcon Global Logistics Co. Limited v Management Committee of Eldama Ravine Boarding Primary School* [2018] eKLR.

Analysis and Determination

54. Upon consideration of the pleadings, evidence and submissions by the parties, the issues for determination by this court are as follows:



- a. Whether the 2nd Defendant obtained good title to the suit property.
 - b. Whether the Plaintiffs are bona fide purchasers of their respective plots.
 - c. Whether the Plaintiffs have established their claim.
 - d. Whether the 2nd Defendant has established its counterclaim.
55. The genesis of this dispute stems from the sale agreement between the 1st and 2nd Defendants. The undisputed facts are that the 1st Defendant agreed to sell the suit property to the 2nd Defendant through a sale agreement dated 9th September 1998, at a consideration of Kshs. 8,000,000.
56. The 2nd Defendant paid a deposit of Kshs. 4,000,000 and proceeded to obtain registration of the title in its name. The agreement stipulated that the 2nd Defendant/Purchaser's advocate ought to have given a professional undertaking to release the balance of the purchase price.
57. It is the 2nd Defendant's case that it failed to pay the balance of Kshs. 4 million of the purchase price because the payment was contingent on the 1st Defendant giving vacant possession of the suit property. It asserts that this was a term of the sale agreement. In its defence, the 1st Defendant denies that there was any impediment to the 2nd Defendant taking possession of the suit property.
58. Following this stalemate, the parties negotiated through correspondences between their advocates. It was then agreed that the 1st Defendant would refund to the 2nd Defendant the deposit paid of Kshs. 4 million in exchange for the retransfer of the suit property to the 1st Defendant. It was on this basis that a professional undertaking was made by the 1st Defendant's advocate for the refund of the deposit and retransfer of the suit property to the 1st Defendant within 90 days.
59. It is the 1st Defendant's contention in the Defence that with the consent of the 2nd Defendant, it sold subplots of the suit property to the Plaintiffs in order to raise the Kshs. 4 million which was to be refunded to the 2nd Defendant. They also contend that the 2nd Defendant cannot have a good title to the land as it had already received back the deposit it paid.
60. The 1st Defendant has asserted in the Defence that the transfer of the suit property to the 2nd Defendant was done contrary to a professional undertaking by the 2nd Defendant's lawyer; that the 2nd Defendant received through its advocates on record the deposit that they had paid but has refused to re-transfer the land to the 1st Defendant and that the subdivision and sale of the plots to the Plaintiff was done with the 2nd Defendant's consent.
61. In the suit, the Plaintiffs assert that they are bona fide purchasers of the respective plots on the suit property and that the 2nd Defendant has threatened to evict them from the said land. They have consequently sought for orders of permanent injunction against the Defendants; a declaration that the Defendants are under a duty to give effect to the transfer of the suit property to them and an order directing the 2nd Defendant to give consent for the transfer of the suit premises to them.
62. The 2nd Defendant denies that it assented to the subdivision and sell of the suit property to the Plaintiffs. It asserts that the Plaintiffs are not bona fide purchasers, but are trespassers; that the 1st Defendant had no title to pass to the Plaintiffs; that it is the lawful registered proprietor of the suit property and that this is a contractual dispute between the Defendants which should be resolved in a separate forum.



63. The 2nd Defendant further averred that it has never been privy to the contract between the 1st Defendant and the Plaintiffs; that the Plaintiffs have illegally occupied its land and refused to vacate despite notice and that the Plaintiffs' only available remedy in law and equity lies in damages against the 1st Defendant.
64. The central issue raised in the 1st Defendant's counterclaim is that the 2nd Defendant unlawfully transferred title to itself before completing the transaction.
65. Before considering the Plaintiffs' claim to the suit property, it is necessary for this court to first expend with the question as to the validity of the registration of the 2nd Defendant's title to the suit property.
66. It is the 2nd Defendant's case that they lawfully acquired title to the suit property for valuable consideration from the 1st Defendant, through the sale agreement dated 9th September 1998. The 1st Defendant, in its Defence contend that the transfer of the suit property to the 2nd Defendant was done contrary to a professional undertaking by the 2nd Defendant's lawyer not to transfer the land until the 2nd Defendant had paid the full purchase price.
67. In considering the rights and obligations between the Defendants, this court is bound to give effect to the contract between the parties. It is therefore necessary for this court to interpret the contract between the 1st and 2nd Defendants and to make a finding on the parties' respective rights and obligations. This is because a court cannot rewrite a contract between parties. The Court of Appeal in the case of *National Bank of Kenya Ltd v 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 parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”
68. Similarly, in *Jeremiah Mucheru Ndibui v David Gichure* [2019] eKLR, the court held that:
- “A party cannot run away from the terms of its agreement. It has often been stated that the Court's function is to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements.”
69. In this case, the sale agreement provides in clause 3 that the agreed purchase price for the suit property was Kshs. 8 million. Clause 4 of the contract thereafter stipulated as follows:
- “Upon execution of the sale agreement herein and the payment of the said sum of Kenya Shillings Four Million to the Vendors Advocate, the Vendors Advocate shall release to the Purchasers advocates the following documents:
- a. The original lease
 - b. Receipts from Nairobi City Council confirming that all outstanding rates have been paid
 - c. The Rates Clearance Certificate
 - d. Receipts confirming that all the outstanding land rent has been paid
 - e. The Land Rent Clearance Certificate
 - f. The Transfer instrument duly executed by the vendor and the City Council of Nairobi.



Upon the Purchaser advocates professional undertaking to release the balance of the purchase price, that is to say Kshs. 4million upon registration of the transfer.”

70. The Special Conditions of the Contract further stated as follows:
 - a. that the completion date of the contract would be 30th September 1998, time being of the essence.
 - b. On the completion date, the Purchasers Advocates shall pay to the Vendors Advocates the balance of the purchase price amounting to Kshs. 4 million by bankers cheque.
 - c. The purchaser would take immediate possession on the payment of the sum stipulated in clause 3.
71. The sale agreement also provided under Clause 4 that the 1st Defendant’s advocate would release to the 2nd Defendant’s advocates the completion documents of the contract, upon a professional undertaking by the 2nd Defendant’s advocate to release the balance of the purchase price upon registration of the transfer. The contract further incorporates the terms of the Law Society of Kenya Conditions, 1989.
72. While the agreement provided for the issuance of a professional undertaking by the 2nd Defendant’s advocates prior to the completion of the transaction, such undertaking was not adduced before this court for its consideration.
73. Its existence is alluded to through the letter from the 1st Defendant’s advocate, Muchui & Co. Advocates to M/S Nduta Kiarie & Co dated 24th August 1999, which releases the latter from their undertaking to deliver the outstanding balance of Kshs. 4 million.
74. However, in the absence of the undertaking, and the evidence of the 1st Defendant on the same, this court cannot make a determination as to whether the registration of the suit property in the 2nd Defendant’s favor before payment of the full purchase price was in breach of its advocates’ professional undertaking.
75. That notwithstanding, a plain reading of Clause 4 of the contract and Special Condition (b) would lead one to conclude that these are contradictory clauses as to when the purchaser’s advocates were to release the purchase price to the vendor’s advocate.
76. Clause 4 stipulates that such payment shall be paid upon a professional undertaking by the purchaser’s advocate to release the balance upon the registration of the transfer, while Special condition (b) provides that it was to be paid on the completion date, being 30th September 1998.
77. There then lies the question as to whether, if at all, the 1st Defendant or the 2nd Defendant was in breach of the contract. It is the 2nd Defendant’s contention that the 1st Defendant failed to accord it vacant possession upon payment of the deposit, which was an express term under Clause 3.
78. The 1st Defendant however asserts in its Defence that vacant possession was to be given after full payment of the purchase price. This issue is dependent on the interpretation of Special Condition (c) as read with Clause 3.
79. The Agreement does not contain any default clauses and the consequences thereof. In that case, the 1989 Law Society of Kenya Condition of Sale adopted by the parties are applicable in case of any breach.
80. The LSK Conditions, particularly, Clause 4, provides for the issuance of a 21- day completion notice if, on the completion date, the sale has not been completed. It provides that for this period, time shall



be of the essence. The LSK Conditions stipulate that if the purchaser fails to comply with the notice, the purchaser shall return all documents to the vendor and procure cancellation of the register at his own expense.

81. On the other hand, if the vendor does not comply with a completion notice, the purchaser may give notice to refund the deposit within four days and the purchaser shall not be entitled to specific performance of the contract.
82. Despite the allegation by the 1st Defendant that the 2nd Defendant failed to pay the balance of the purchase price, the 1st Defendant did not issue a completion notice to the 2nd Defendant and did not exercise the remedy of rescission which was available to it.
83. This court notes that while the 1st Defendant entered appearance in this matter and duly filed their defence and counterclaim, they failed to give evidence in support of their averments. The consequences of this failure is that the 1st Defendant's pleadings remain unsubstantiated.
84. In *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* (2012) eKLR, Odunga, J (as he was then) held as follows on the consequences of failure by a party to call evidence: -

“What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited v. Gopitex Knitwear Mills Limited Nairobi* (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of *Autar Singh Bahra and Another v. Raju Govindji*, HCCC No. 548 of 1998 stated:-

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

85. A further consequence is that with respect to the legality of the transfer of title IN the 2nd Defendant's favor, the 2nd Defendant's case remains uncontroverted.
86. It is not in dispute that the 2nd Defendant is the registered proprietor of the suit property, under regime of the Registration of Titles Act. Section 23 (1) of the Registration of Titles Act prescribes that a certificate of title issued by the registrar is conclusive evidence that the person named as proprietor is the absolute and indefeasible owner.
87. The section provides that such title can only be impeached on grounds of fraud or misrepresentation to which such proprietor is party to. It provides:
 - (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”



88. It is trite that the standard of proof where fraud is alleged is higher than that required in ordinary civil cases. This was held in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR where the court stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo v Ndolo* (2008)1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the 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 case where fraud is alleged it is not enough to simply infer fraud from the facts.”

89. No evidence has been adduced nor has it been established by the 1st Defendant that there was any fraud on the part of the 2nd Defendant or misrepresentation on its part resulting in the registration of the suit property in its name. The burden of proof to establish such fraud or misrepresentation in the contract squarely rested upon the shoulders of the 1st Defendant, which it wholly failed to discharge. As already stated, the 1st Defendant did not testify.

90. The Plaintiffs herein have no standing to challenge the rights and obligations of the 2nd Defendant under the sale agreement dated 9th September 1998, as they were not parties to it.

91. Indeed, a contract cannot be enforced either by or against a third party, except in certain cases. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

92. The 1st Defendant having failed to discharge its burden of proof, this court finds its counterclaim unmerited and the same is dismissed. Indeed, this court has found in the affirmative, that the 2nd Defendant lawfully obtained title to the suit property, the LSK Conditions of sale having not been complied with by the 1st Defendant in so far as rescission of the contract is concerned.

93. So, are the Plaintiffs entitled to the order of specific performance? The initial contract between the Defendants herein having being frustrated, from the correspondences between the Defendants, the parties entered into a subsequent agreement to rescind the sale agreement and have the property re-transferred to the 1st Defendant. The rescission was to be effected upon a professional undertaking which was to be issued by the 1st Defendant’s advocates.

94. It is trite that a professional undertaking must be clear and unequivocal by its nature. This was the position taken by the Court of Appeal in *Warubiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited* [2016] eKLR where it stated as follows:

“Our answer is that a professional undertaking is an unequivocal promise made by a party to another either to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party, to which liability may attach.”



95. The Court of Appeal further held that a professional undertaking is a binding contract which is triggered by its offer and acceptance:

“The professional undertaking is a smooth and binding contract between the donor and the donee who are the advocates. It should be adhered to with a standard of ethics higher than that of the marketplace. Professional undertakings to lawyers by colleagues are like a religion and are the underpinning of the relationship that governs the activities, transactions and actions between them. A professional undertaking embodies and manifests the practice of the legal profession in a characteristically methodical, courteous and ethical manner. That is why the immediate offer and acceptance of a professional undertaking triggers a monumental transaction and huge financial relationship which must be observed by both sides. In our view, that is the basis of professional undertakings in the legal profession. In fact, the conditions, terms and implications must be strictly adhered to for the legal profession to thrive, and for advocates to deal with each other freely and openly.”

96. In this matter, the 1st Defendant’s advocate, Muthoga, Gaturu & Company Advocates issued a professional undertaking in the letter dated 15th October 1999 to the 2nd Defendant’s Advocate, Owino Okeyo & Company Advocates, which contained the following terms, that:

- a. The 1st Defendant’s Advocates shall, once the 2nd Defendant’s Advocates release the title document to them, hold the same on their order returnable to them on demand, and that the 1st Defendant’s Advocates shall utilise the same only for the purposes of retransferring of the title to the 1st Defendant.
- b. To effect the retransfer against 1st Defendant’s advocates professional undertaking to pay to 2nd Defendant’s advocates the sum of Kshs. 4.1 million within 90 days from the date they released the title to document to them.
- c. In the event the retransfer transaction is not completed within 90 days of the release of the title document to the 1st Defendant’s advocate, they shall return the said title to the 2nd Defendant’s advocate in the same good condition it was released to them.
- d. The 1st Defendant’s advocate shall not part with the title document to any third party without their written consent to them to do so.”

97. This court is satisfied that these terms of the professional undertaking by the 1st Defendant’s advocate were clear and unequivocal. The undertaking was accepted by the 2nd Defendant’s advocate through their letter dated 25th October 1999, in which the 2nd Defendant’s advocates indicated that their client had issued them instructions to release the title to the 1st Defendant’s advocates upon the professional undertaking. They attached on their letter the original lease of the suit property and transfer of lease.

98. However, from the evidence, the 1st Defendant’s advocate failed to remit the sum of Kshs. 4 million and failed to re-transfer the suit property within the 90 days agreed upon. Consequently, through the letter dated 8th February 2000, the 1st Defendant’s Counsel returned the original lease and transfer of lease to the 2nd Defendant’s counsel.

99. The agreement that was subject to this professional undertaking therefore stood rescinded, meaning that the 2nd Defendant continued being the registered proprietor of the suit property, including the period that the 1st Defendant sold the sub plots to the Plaintiffs.



100. The 2nd Defendant has vehemently denied that it gave its consent to the sale of the sub plots to the Plaintiffs in this case.
101. In the letter dated 28th July 1999, the 1st Defendant’s Counsel, M/S Muthoga Gaturu & Company Advocates, indicated that there was a discussion between the Defendants, in which the 1st Defendant sought to sub-divide the suit property and sell them to raise the sum of Kshs 4 million to refund the 2nd Defendant. In the letter, the 1st Defendant’s counsel sought confirmation that the arrangement is acceptable.
102. The 2nd Defendant responded to this letter through its letter dated 29th July 1999. It confirmed that the arrangements contained in the letter dated 28th July 1999 were acceptable to them.
103. However, this letter did not change the terms of the professional undertaking given by the 1st Defendant, that the balance of Kshs 4 million should be paid within 90 days from 25th October, 1999, the date when the title was released to the 1st Defendant’s advocate. Indeed, considering that the letter of 28th July, 1999 by the 2nd Defendant’s advocate came before the professional undertaking by the 1st Defendant’s advocate, nothing would have been harder than indicating that the payment of the refund was dependent on the sub-division of the land, and the sale of the same, the 90 days notwithstanding.
104. *Black’s law Dictionary* 8th Edition defines “*bona fide* purchaser” as;
- “One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”
105. While the Plaintiffs have contended that they are bona fide purchasers, they failed to satisfy the elements of the concept. To begin with, the Plaintiffs have not been issued with titles to the suit property. In fact, the subdivision of the suit property lacks legal tenor because the same has never been approved and authenticated by the county government and the Director of Surveys.
106. Further, the Plaintiffs did not establish that they indeed purchased the sub plots for valuable consideration, having not presented proof of payments of the purchase price of their respective properties. More importantly, the Plaintiffs who testified all denied having undertaken the necessary due diligence into the title of the property that they sought to purchase.
107. The Court of Appeal in *Kukan & Another (Administrators of the Estate of the Late Jason Kukan Lila) v Kibutha* [2023] KECA 742 (KLR) affirmed the standard of due diligence as laid down by Mutungi, J in the case *Esther Ndegi Njiru & Another v Leonard Gatei* [2014] eKLR as follows:
- “The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of the *Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of the *Constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the tile.”



108. This court has found that the 1st Defendant did not lawfully sell the suit property to the Plaintiffs, because it did not have title to the same, and it could not pass better title than it had. This scenario has been made worse by the failure of the 1st Defendant's officials to testify in this matter.
109. Indeed, an official search by the Plaintiffs would have shown that the suit property was registered in favour of the 2nd Defendant. Therefore, no good title could pass to the Plaintiffs without the 2nd Defendant's express consent.
110. The court has also established that there was no privity of contract between the Plaintiffs and the 2nd Defendant. They cannot therefore seek to enforce the agreement between the 1st Defendant and the 2nd Defendant. Consequently, the Plaintiffs' suit fails.
111. Having found that the 2nd Defendant is the lawfully registered proprietor of the suit property, and that it did not sell the suit property to the Plaintiffs, it is the finding of the court that the Plaintiffs are guilty of trespassing on the 2nd Defendant's property. However, in view of the circumstances of this court, I decline to award the 2nd Defendant damages for trespass.
112. In conclusion, the Plaintiffs' suit is hereby dismissed. The 2nd Defendant's counterclaim is merited and the following orders do issue:
- a. A declaration be and is hereby issued that the 2nd Defendant is entitled to exclusive and unimpeded right of possession and occupation of Land Reference No. 209/22143.
 - b. A declaration be and is hereby issued that the Plaintiffs, whether by themselves or their servants or agents or otherwise howsoever are unlawfully in occupation of the sub plots in Land Reference No. 209/22143.
 - c. A declaration be and is hereby issued that the Plaintiffs, whether by themselves or their servants or agents or otherwise howsoever, are not entitled to remain on the respective sub plots in Land Reference No. 209/22143.
 - d. A permanent injunction be and is hereby issued restraining the Plaintiffs, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the respective sub plots in Land Reference No. 209/22143.
 - e. That the Plaintiffs are hereby directed to give the 2nd Defendant vacant possession of the suit property, being Land Reference No. 209/22143 within 90 days of the delivery of this Judgement.
 - f. Costs of this suit and the counter claim to be borne by the 1st Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF JULY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Omondi for Gachie for Plaintiff

Mr. Munyororo for 2nd Defendant

Ms Waitere for 1st Defendant

Mr. Kegode for 51st – 53rd Plaintiffs



Court Assistant: Tracy

