



Case Number:	Environment and Land Case 522 of 2017
Date Delivered:	20 Jan 2022
Case Class:	Civil
Court:	Environment and Land Court at Thika
Case Action:	Judgment
Judge:	Lucy Nyambura Gacheru
Citation:	James Karogo Njau v Walter Njau Muchunu & 6 others [2022] eKLR
Advocates:	Mr Mungai for the Plaintiff/Applicant
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kiambu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Originating Summons dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 522 OF 2017**

**JAMES KAROGO NJAU.....APPLICANT/PLAINTIFF**

**-VERSUS-**

**WALTER NJAU MUCHUNU.....1<sup>ST</sup> RESPONDENT/ DEFENDANT**

**EPHANTUS NJAU MUCHUNU.....2<sup>ND</sup> RESPONDENT/ DEFENDANT**

**PERPETUA WANJIRU.....3<sup>RD</sup> RESPONDENT/ DEFENDANT**

**JOSEPH NJOROGE MBURU**

**ESTHER NJERI NJOROGE.....4<sup>TH</sup> RESPONDENT/ DEFENDANT**

**JANE MUTHIRA MURIITHI.....5<sup>TH</sup> RESPONDENT/ DEFENDANT**

**LAND REGISTRAR KIAMBU.....6<sup>TH</sup> RESPONDENT/ DEFENDANT**

**JUDGMENT**

By Originating Summons dated **28<sup>th</sup> May, 2014** the Plaintiff/Applicant sought for orders:

**1. That title deeds issued to WALTER NJAU MUCHUNU, EPHANTUS NJAU MUCHUNU, PERPETUA WANJIRU, JOSEPH NJOROGE MBURU, JANE MUTHIRA MURIITHI or any other subsequent transfer be cancelled and/ or revoked and the land do revert to its original title NDUMBERI/ RIABAI/ 2157.**

**2. Land NDUMBERI/ RIABA/ 2157, be subdivided according to Law of Succession Act Cap 160.**

**3. Costs be provided for.**

The Originating Summons is premised on five **GROUND**s stated thereon and a Supporting Affidavit sworn by the Plaintiff/Applicant dated **26<sup>th</sup> May, 2014**. It is the Applicant's averments that he is the son of **Walter Njau Ironjo (deceased)** who was the original owner of all that parcel of land **NDUMBERI/ RIABAI/ 2157**. That one **John Muchunu Njau (deceased)** caused the title to be unlawfully and illegally registered in his name at the exclusion of the Plaintiff/Applicant who is also a beneficiary.

The Applicant deponds that before his demise, **Walter Njau Ironjo** had left the original title deed with **Lucia Mwhaki Njau (granddaughter)** since his wife was too old. That after the demise of their father, **John Muchunu Njau** demanded to be given the title deed to take out letters of administration over their father's estate. That **John Muchunu Njau** passed on and the Applicant with intentions to take over the succession carried out a search and discovered that the land had been registered in the name of **John Muchunu** on **28<sup>th</sup> March, 2007**.

On **2<sup>nd</sup> April 2007**, the Applicant caused a restriction to be registered on the land, but the said restriction was subsequently removed on **24<sup>th</sup> April, 2007**. On **25<sup>th</sup> April, 2007**, the land was subdivided into **NDUMBERI/ RIABAI/ 3596** and **NDUMBERI/ RIABAI/ 3595**. On **3<sup>rd</sup> May, 2007** the later was subsequently subdivided into four other parcels of land and registered in the name of **John**

**Muchunu.** There was a further subdivision of plot **3615** registered in **John Muchunu's** name.

Further, that the 3<sup>rd</sup> Respondent took out Letter of Administration for the Estate of **John Muchunu Njau** and was issued with a Certificate of Confirmation of Grant. Armed with it, the 3<sup>rd</sup> Respondent transferred the land to the 1<sup>st</sup>- 5<sup>th</sup> Respondents herein who have commenced developments thereon. It is the Plaintiff's/Applicant's contention that he has always lived on the suit property and he constructed his house on the said parcel of land that is now registered in the name of the 2<sup>nd</sup> Respondent.

That further, the deceased **John Muchunu Njau** fraudulently transferred the land to his name, yet succession in respect of their father's estate was not completed. That the deceased's actions defrauded other beneficiaries entitled to inherit the Estate and it remains unknown how he orchestrated the process. The Applicant contends that he is exposed to risk of eviction and his family will suffer irreparable harm.

In contesting the **Originating Summons**, the 1<sup>st</sup>-3<sup>rd</sup> Respondents swore a joint Replying Affidavit. It is their averments that they are the sons and wife of the deceased, **John Muchunu Njau**, who was the registered proprietor of the suit land. That upon their father/husband's demise, they took out Letter of Administration and shared out the land. That they are strangers to the allegations of fraud made by the Plaintiff/Applicant, who did not object to the Succession proceedings in respect of their father/ husband's Estate.

Moreover, the Respondents contended that they have put up homes on the suit property and would be greatly prejudiced by any revocation of titles. Further, that the Applicant had brought a claim over the parcel of land with the elders and his claim was dismissed. The Respondents deponed that the Applicant was left with a land in **Njoro**, while their father/ husband was left with the suit property.

The 4<sup>th</sup> Respondents put in a joint Replying Affidavit. They contend that they bought the land without notice of any fraud. That in **March, 2007**, they entered into a sale agreement with **John Muchunu**, deceased, for the purchase of a **75 by 100 ft** share of land to be hived from **Ndumberi/ Riabai/ 2157**, for a consideration of Kshs. **50,000/=**. That a title was issued to them and they took possession and occupation of the land and put up a matrimonial home where they have lived up to date. In the end, they averred that they are bona fide purchasers for value without notice of any fraud and it would be prejudicial to take away land from them yet they were not party to the fraud.

The 5<sup>th</sup> Respondent filed a Replying Affidavit contesting the Originating Summons on the strength that she was a **bona fide purchaser for value** without **notice** of fraud. She deponed that in **January, 2008**, she entered into a sale agreement with **John Muchunu Njau**, deceased, for the purchase of a **40 by 90 ft** share of land to be hived from **Ndumberi/ Riabai/ 2157**, for a consideration of **Kshs. 290,000/=**. That upon payment, she was issued with title and she took possession and occupation of the land and has put up a home. That she is a stranger to the allegations of fraud and it would be prejudicial to take away the land from her.

The 6<sup>th</sup> Respondent opposed the summons vide an Affidavit sworn by **Winfred N Muguro**. The 6<sup>th</sup> Respondent denied all the allegations made in the Applicant's Affidavit and put him to strict proof thereof. She averred that the land was registered in the name of **John Muchunu Njau** as a fulfillment of the requirements for registration as enumerated in paragraph 4 of the Affidavit. That in a letter dated **2<sup>nd</sup> April, 2007**, the District Commissioner, Kiambu, as it then was, informed their office of a dispute between the 1<sup>st</sup> Respondent and his father where the former was claiming beneficial interest on **Ndumberi/ Riabai/ 2157**.

Further, that the DC later informed the office that the dispute had been resolved and a restriction placed be lifted. That any dealing in respect of the suit property has been in accordance with the law and the suit against them ought to be dismissed.

The Applicant called two witnesses. **PW1 HANNAH MUTHONI KAROGO**, who adopted her witness statement and testified that she was the wife of **KAROGO NJAU**. She further testified that she lives on the suit land which belonged to her deceased father-in-law. That her father-in-law never subdivided the land and the title to the land was held by **Lucy Mwhaki**, who is her niece. That her brother-in-law sold the land without the consent of other beneficiaries as succession in respect of her father-in-law's estate was never done.

Further that the father-in-law died on **25<sup>th</sup> November, 1998** and in **2007**, one of the purchasers took occupation of the land, fenced it and build a house. She told the Court that they never registered any caution, but the District Commissioner(DC) did, but the said caution was subsequently removed without their consent. She urged the Court to cancel the **subsequent title deeds** and direct that

land be shared among other beneficiaries. On cross-examination, she told the Court that she was not living in **Njoro**, but the husband was. That her father-in-law did not own any land in Njoro. That her husband and his brother did not go to the Chief in 2008 concerning a dispute on the parcel of land, and that her husband was buried in Njabini. In re-exam she explained that her husband died on **17<sup>th</sup> November 2017**, and was buried in Njabini because of the Respondents' hostility.

**PW2- LUCY MWIHAKI NJAU** adopted her written statement. She testified that she lives on the suit property which belonged to her grandfather. That she had the title to the suit property since **1997**, after being given by her grandfather. That **John Muchunu**, deceased, who is her uncle had requested for the title deed to enable him take out Letters of Administration in respect of her grandfather's estate. That no Succession Cause was filed and the title deed was never given back to her. That she is a beneficiary and was not involved in any sub-division of the land and that this Court should allow their claim.

On cross-examination, she testified that she did not know her father and she has a brother who lives with his father. That she was born in **1949**, and her mother was married when she was young and she died in 1962. She affirmed that she was given the title deed by her grandfather in **1997**, for safe keeping and **John Muchunu** took it in **2005**. She reiterated on re-exam that she was given the title deed by her grandfather and that she separated with her husband in **1972** and has never gone back.

### **DEFENCE CASE**

The Defendant called three witnesses. **DW1- EPHANTUS NJAU MUCHUNU**, adopted his Affidavit as evidence and produced the annexures attached thereto as exhibits. On cross-examination, he testified that the suit property belonged to his grandfather. He also testified that **James Karogo Njau** the Plaintiff herein was his father's elder brother, but was introduced to him in 1997, when he came back from Njoro after the tribal clashes. He further told the Court that the land that was subject of subdivision belonged to his grandfather, whom no Succession Cause ever filed. That he is a beneficiary of his father's land and he came into possession before his father died. That his grandfather had transferred title to his father before he died and the Plaintiff/Applicant came into occupation since **1997**.

**DW2- JOSEPH NJOROGI MBURU** adopted his Affidavit as evidence and produced the annexures attached thereto as exhibits. On cross-examination, he testified that he bought land from **John Muchunu Njau** vide a sale agreement dated **16<sup>th</sup> March, 2007**. He further told the Court that at the time of the Sale Agreement, **John Muchunu Njau** did not have title deed and that the original owner was **Walter Njau**. That he talked to the wife of **Walter Njau** who informed her that the land was left to **John Muchunu Njau** and that the Applicant had been given land in Njoro. Further that he did not have evidence to buttress his testimony but confirmed the land belonged to **Walter Njau** and **John Muchunu** was entitled to a portion thereof.

**DW3- JANE MUTHIRA MURIITHI** adopted her Affidavit as evidence and produced the annexures attached thereto as exhibits. She affirmed that she bought the suit property and title was issued to her on **28<sup>th</sup> May, 2008**. That she conducted a search which search was satisfactory.

The attendance of the Land Registrar was not secured but her Replying Affidavit and documents thereto were adopted as her testimony. The Respondents closed their case.

Parties were directed to file and exchange their written submissions. The Applicant in his written submissions reiterated the testimonies and enumerated five issues for determination by this Court. The Applicant also pointed out the issues that remain uncontroverted in the testimony. On fraudulent transfer, the Applicant submitted that the transfer took place without a **Succession Cause** having been filed hence transmission did not occur. That the transfer documents indicating that their father **Walter Njau** transferred land to **John Muchunu** is questionable, as it was signed in **1998**, about 15 days to his death, but presented to the Land Registrar in 2007, **Nine (9)** years later, and the reasons for the delay were not given.

The Applicant further submitted on the irregularities that he alluded to in the transfer forms. That the action of attaching passport photo of the transferee and not the transferor is an issue that ought to be investigated. Further that the Land Registrar failed to adhere to the provisions of **Section 45** of the **Land Registration Act** which required that the transferor be availed. That the Valuation Requisition for Stamp Duty Form indicates there was sale between **Walter Njau** and **John Muchunu**, yet the form does not indicate the consideration. Further that there is no evidence of **Walter Njau** receiving monies from **John Muchunu**, for the purported sale. The Applicant also submitted on the haste in which **consent, transfer and issuance of title** was made.

It was also submitted that at the time of **Walter Njau's** demise, the land had not been transferred and was thus a part of his estate. Therefore, **John Muchunu** was in breach of **Section 45 of Law of Succession Act**. Reliance was placed on the case of **Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others (2015) eKLR**.

On whether the 4<sup>th</sup> and 5<sup>th</sup> Respondents obtained good title, the Applicant submitted that at the time of the sale, the Vendor did not have title to land and there is no way he could transfer what he did not have. He further submitted that the Respondents' title is not under protection of the provisions of case of **Section 26 of the Land Registration Act**. On the 5<sup>th</sup> Respondent, the Applicant submitted that a sale agreement is not adequate to demonstrate she was a bona fide purchaser. The Applicant relied on the case of **Samuel Odhiambo Oludhe's & 2 Others vs Jubilee Jumbo Hardware Ltd & Another (2018) eKLR** and urged this Court to find that Respondents' did not acquire good titles to the suit land.

On whether the titles should be cancelled and/or revoked, the Applicant submitted that the purchasers ought to have undertaken due diligence before purchasing the land. He urged this Court to be guided by the case of **Zacharia Wambugu Gathimu & Another vs John Ndungu Maina (2019) eKLR** and revoke the title. He urged the court to grant the prayers sought and the Respondents be compelled to pay costs.

The Respondents put in joint written submissions and crafted four issues for determination. The Respondents raised an issue with the testimony of the Applicant and the contents of their statement as well as the Original Summons. To the extent that while in testimony, the Applicant stated that five beneficiaries live on the suit land, in their statement they stated only one.

The Respondents further submitted that registration of title in the name of **John Muchunu Njau** was proper. They also submitted that the Applicant did not object to the production of the documents inferring the process of transfer of land from **Walter Njau to John Muchunu**. Further that there was no need to indicate the consideration when the land was a gift to **John Muchunu** from his father. That the Applicant was only given a house to live in by the deceased after being displaced during the tribal clashes and that the father did not give him any lien to claim the land.

On whether the 1<sup>st</sup>- 3<sup>rd</sup> Respondents are owners, the Respondents submitted that they became registered owners after taking out Succession Cause in respect of their father's Estate and were entitled to inherit. That the Applicant had within his knowledge of the registration and the subsequent sell and occupation of land by the 4<sup>th</sup> and 5<sup>th</sup> Respondents but waited for years before instituting the suit.

A perusal of the Court record and analysis of the evidence, pleadings and written submissions yield the uncontroverted facts that, the land was originally registered as **NDUMBERI/ RIABAI/ 2157**, in the name of **WALTER NJAU IRONJO**. Secondly that **JOHN MUCHUNU** and **JAMES KAROGO NJAU**, were brothers and children of **WALTER NJAU**, who are all deceased. Thirdly, the Applicants and the 1<sup>st</sup>-3<sup>rd</sup> Respondents are related and are by extension beneficiaries of the Estate of **WALTER NJAU IRONJO**. Fourthly, that no succession was filed in respect of the Estate of **WALTER NJAU IRONJO** and lastly, that the land has since been subdivided and registered in the names of the Respondents.

The issues for determination by this Court are

**I. Whether the allegations of fraud have been proved"**

**II. Whether the 4<sup>th</sup> and 5<sup>th</sup> Respondents were bona fide purchasers for value"**

**III. Whether title deeds issued should be cancelled/revoked"**

**IV. Who should pay costs"**

**(i) Whether the allegations of fraud have been proved"**

Allegations of fraud are grave and when stated, they must be specifically pleaded (*See CoA App' No. 329 of 2009:- Richard Akwesera Onditi v Kenya Commercial Finance Company Limited [2010] eKLR*). Further, Sections 107 to 109 of the Evidence Act

placed the onus of proving allegation of fraud on the Applicant. The Court of Appeal in **Mombasa Civil Appeal No. 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR** stated;

*“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.*

It is not enough for the Applicant to make allegations of fraud. Though the nature of Originating summons is to handle less complex and non-contentious matters, the Applicant had his day in Court to advance his allegation of fraud. In **Nakuru CoA App No. 123 of 2007:- John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR** the Court held

*“such a procedure is designed to deal with less complex and uncontentious matters. Where issues turn out to be complex and highly contentious, the Court has jurisdiction to covert an originating summons into a suit and allow parties to adduce “viva voce” evidence”*

The Applicant made lengthy submissions on the issue of fraud. That there was no Succession in respect of the Estate of the **Walter Njau Ironjo** and therefore there is no way his land could have been transferred without succession. It is trite that the land of a deceased person can only devolve to his dependants by way of transmission. The 1<sup>st</sup> – 4<sup>th</sup> Respondents agreed that no grant was taken in respect of the Estate of **Walter Njau Ironjo**.

Section 45 of the Law of Succession Act prohibits the intermeddling with the estate of a deceased person. Section 45(1) of CAP 160 provides:

*Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

There being no grant, it follows suit that the actions of transfer without express authority by the Act or other law amounted to intermeddling with the estate of the Deceased. Similarly, Section 55(1) spells out a mandatory requirement for issuance of grant that:

*No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in [section 71](#).*

The onus of proving the legality of transmission shifted to Respondents to demonstrate how transfer was effected. The 1<sup>st</sup> -3<sup>rd</sup> Respondents averred that they became owners of the suit property by dint of Succession over the Estate of **John Muchunu**, the registered owner. This Court has been invited by the Applicant to scrutinize the List of Documents by the 6<sup>th</sup> Respondent.

There is a transfer form dated **10<sup>th</sup> November 1998**, which indicates **Walter Njau Ironjo** transferred land to **John Muchunu Njau**. **Walter Njau** died on **25<sup>th</sup> November 1998**, and the cause of death being pneumonia. While transfer was done **15 days** prior to his death, there is nothing sinister to that. Unless it is proven that the deceased was not in his proper mental state, this Court makes an implied assumption that the deceased had the right legal capacity to transact. Relevantly, the signing officer indicated that the transferor was identified to him by his identification card, there has been adduced no evidence that the ID Card mentioned did not belong to the deceased **Walter Njau Ironjo**.

As rightly submitted by the Applicant, the requirement of passport came with the new land laws. Transfer happened before the **2012, Land laws**, and it is not fatal to include the passport photo. Also the Applicant has taken issues with the **Valuation Requisition** for Stamp Duty that it makes reference to a Vendor and purchaser, yet there was no sale agreement. This Court finds the issues not so relevant; the intention of parties to transfer can be deciphered from the transfer form.

This Court cannot draw a conclusion of fraud based on the style and drawing of documents. The transfer document depicts the normal conveyance occurrence and which were affirmed by the 6<sup>th</sup> Respondent. There is no evidence that the documents as drawn were not issued by the office of the Land Registrar or are fatally defective so as not to give effect to the intentions of the transacting parties.

Having found that the intention of the deceased can be drawn and with lack of evidence that the deceased was **coerced, misled, and not in proper state of mind**, this Court concludes that there is no evidence of fraud. (*see Eldoret ELC No. 411B of 2012 SAMMY SOME KOSGEI V GRACE JELEL BOIT[2013]eKLR*). Just because it took long to register the transfer does not invalidate the said transfer. The Applicant had his day to adduce evidence as to the mischief surrounding the delay. To this end, this Court finds that allegations of fraud were not proved to the satisfaction of this Court.

Further, this Court takes judicial notice of a chief's letter dated **10<sup>th</sup> November, 2008**. The Applicant did not object to its production and only submitted that no **Will** was produced to infer the intention of their father. While this Court appreciates that elders did not have the jurisdiction to determine the dispute herein. (*See Kisumu CoA no. 167 of 1996 Khayadi v Herbert Aganda [1988] eKLR*), it will make a conclusion that the Applicant had land in **Njoro**, while **John Muchunu** lived on the suit land. This Court takes cue from the testimonies that **John Muchunu** lived on the suit property even when the father was alive. Therefore, it follows that the father had the intentions of bequeathing the land to **John Muchunu** having dully signed the transfer forms. The Respondents submit that the land was a gift to **John Muchunu Njau** from his father, though the same has been objected by Applicant.

The High Court retains the jurisdiction to handle issues of gifts but this Court maintains the jurisdiction to determine the process of transfer of land from donor to donee. The gift herein was one on land and within the meaning of Section 13 of the **Environment and Land Court Act**. Therefore, this Court has the jurisdiction to handle the said issue. For a gift to be valid, the intentions of the party has to be completed. Having established that the deceased, **Walter Ironjo Njau** had the intentions of bequeathing land to **John Muchunu**, then it is evident that his intention was completed. The *Court of Appeal in Nyeri;- Civ App No. 21 of 2017Kagina v Kagina & 2 others (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR)* appreciated the sentiments of the learned Judge when it adopted the reasoning of Tanui J in *Gitau & 2 Others vs. Wandai & 5 Others [1989] JKR 231*, where the trial judge analyzed the impetus of section 45 of Law of Succession

*“... if a deceased person has during his life time sold, transferred, disposed or in any manner given out his properties either in exchange of consideration or as gifts inter vivos, such gifts or properties whether transfer had been registered or not do not form part of the deceased's estate. In fact, the Law of Succession in my view protects and preserves transactions made by the deceased during his life time.”*

The deceased **Walter John Ironjo** executed all the documents as stated above; and the fact that the same was not registered does not invalidate the gift. The *Court of Appeal in Nyeri in App No. 108 of 2002;- Registered Trustees Anglican Church of Kenya Mbeere Diocese v David Waweru Njoroge [2007] eKLR* replicated the authors writing in *In SNELL'S EQUITY 29<sup>th</sup> Edition, where the authors, stated at page 122 paragraph (3):-*

*“..... where however the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person.”*

(ii) Whether the 4<sup>th</sup> and 5<sup>th</sup> Respondents were bona fide

Purchasers for value"

On whether the 4<sup>th</sup> -5<sup>th</sup> Respondents were bona fide purchasers for value, this Court relies on the decision of the Court of Appeal of Uganda in the case of **KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173** as quoted by the **Court of Appeal in Nakuru: CoA App No. 291 of 2013;- Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR** and held:

**“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:**

(a) He holds a certificate of title;

(b) He purchased the property in good faith;

- (c) He had no knowledge of the fraud;
- (d) He purchased for valuable consideration;
- (e) The vendors had apparent valid title;
- (f) He purchased without notice of any fraud;
- (g) He was not party to any fraud.”

The Respondents attached their respective Sale Agreements which this Court finds that they met the threshold of valid contracts within the provisions of **Section 3(3) of the Law of Contract Act**. At the time of selling the land to the 4<sup>th</sup> Respondents, the title was not in the name of the Vendor. There was however an express condition that the purchaser would be entitled to the land after Succession was completed.

The intentions of the deceased having been established above, it follows therefore that the subject matter of the sale was not subject to Succession process. **John Muchunu** had beneficial interests in the property awaiting registration and could therefore dispose it off.

There is no evidence that the Respondents bought the property in bad faith. The duty to demonstrate that the Respondents were bona fide purchasers for value rests with the Respondents. The 4<sup>th</sup> Respondent gave evidence that he visited the suit land to find out details of the land. No evidence of search was produced save for reliance on the visit. While the 5<sup>th</sup> Respondent testified to carrying out a search, no copy was availed to Court. The act of visiting the suit property was a means of conducting due diligence which this Court appreciates. This Court concurs with the sentiments of **Mutungi J in Nairobi ELC No. 128 of 2011 Esther Ndegi Njiru & another v Leonard Gatei [2014] eKLR**, where the learned judge held:

*“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.*

The Vendor had unregistered beneficial interest on the land at the time of sell and purchase by the Respondents. By entering into the sale agreement and putting the Respondents in possession, there was an implied trust that the vendor would transfer land to the Respondents. There was no **fraud** in the process of transfer. Based on the foregoing, this Court makes a finding that the Respondents were bona fide purchaser for value within the principles laid out in **Katende Case, supra**.

**Section 26** of the **Land Registration Act** provides that a certificate of title shall be prima facie evidence of ownership. It provides:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(iii) Whether title deeds issued should be cancelled/revoked”

This Court has belabored on the issue of fraud, and has found that there has been established **no fraud** or misrepresentation to warrant cancellation of title herein. This Court declines to make any such orders for cancellation of the titles as requested by the Plaintiff/Applicant herein.

Perhaps to mention, the Plaintiff/Applicant took close to **seven years** before filing this suit, and the reasons for the delay have not been presented to the Court. The 4<sup>th</sup> and 5<sup>th</sup> Respondents took possession of their respective parcels of land immediately. If the Plaintiff/Applicant was interested in equity, he ought to have acted expeditiously and not wait until the Respondents had well settled on the land and then this claim seeking for cancellation of their titles to their respective parcels of land.

*(iv) Who should pay costs*

This Court shall exercise the discretion granted under **Section 27** of the **Civil Procedure Act** and grant costs to the Respondents, since ordinarily costs do follow the event and is awarded to the successful litigant. The Plaintiff has lost his case and thus the Respondents are the successful litigants.

Having now carefully considered the available evidence, the exhibits produced in court, the Written Submissions and the relevant provisions of law, the court finds that the Plaintiff/Applicant has failed to prove his case in this **Originating Summons** on the required standard of balance of probabilities. For the above reasons, the court finds the said **Originating Summons** dated **28<sup>th</sup> May 2014**, is **not merited** and the same is dismissed entirely with costs to the Respondents herein.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20<sup>TH</sup> DAY OF JANUARY, 2022.**

**L. GACHERU**

**JUDGE**

**Delivered online:**

**In the presence of**

**Mr Mungai for the Plaintiff/Applicant**

**No Appearance for the 1<sup>st</sup> – 6<sup>th</sup> Respondents/Defendants**

**Kuiyaki - Court Assistant**

**L. GACHERU**

**JUDGE**



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