



Case Number:	Environment and Land Case 80 of 2017 (Formerly Nakuru ELC 258 of 2014)
Date Delivered:	22 Mar 2022
Case Class:	Civil
Court:	Environment and Land Court at Narok
Case Action:	Judgment
Judge:	Charles Gitonga Mbogo
Citation:	Shaawa Enole Koriata & another v Stephen Kaitet Koriata & 2 others [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Narok
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application ordered
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CASE NO. 80 OF 2017

FORMERLY NAKURU ELC NO. 258 OF 2014

SHAAWA ENOLE KORIATA & ANOTHER

Suing as the widows, next of kin & Legal Representatives of the Estate of Karino Ole Koriata.....PLAINTIFF

VERSUS

STEPHEN KAITET

KORIATA.....1ST DEFENDANT

**THE DISTRICT LAND REGISTRAR, NAROK.....2ND
DEFENDANT**

THE ATTORNEY

GENERAL.....3RD DEFENDANT

JUDGEMENT

1. The present suit was initially filed in Nakuru ELC court vide a Plaint dated 12th September, 2014. Upon its transfer to this court, the Plaintiffs amended their Plaint on 14th October, 2020 and filed it on 19th October, 2020. In the course of proceedings, the Plaintiff passed on and was replaced by his legal representatives who prosecuted the suit to its conclusion.

2. The Plaintiff averred that he is the registered owner of the parcel of land known as **CISMARA/LEMEK/137** (hereinafter referred to as the “**suit property**”) which was later sub-divided into **CISMARA/LEMEK/3920** and **CISMARA/LEMEK/3921**. According to the Plaintiff, on 7th November, 2012, the 1st Defendant in cohort with his two sons, Lesalon ole Koriata and Fred Koriata, fraudulently, illegally, intentionally and without his express consent, deceived/dupped him into signing a land sale agreement wherein he sold off fifty (50) acres of the suit property to the 1st Defendant.

3. It was also the Plaintiff’s case that his sons knew that the suit property was in a strategic place for purposes of constructing a lodge, and that the Plaintiff wanted to lease out the suit property to a foreign investor, one Mr. Johnson Robinson. The Plaintiff pleaded that the 1st Defendant together with his two sons, Lesalon Koriata and Fred Koriata fraudulently, illegally, intentionally and without his express consent, deceived/dupped him that they had found a foreign investor, Mr. Johnson Robinson, who wanted to lease out the suit property for purposes of constructing a tourist lodge and that he would only pay after signing a lease agreement.

4. The Plaintiff further stated that the 1st Defendant appointed the firm of Lel & Associates to draft the lease agreement, and that the 1st Defendant had revealed that he had received one hundred thousand shillings (Kshs. 100,000/-), and that he had been authorized to oversee the signing of the lease agreement by the foreign investor. It is said that the 1st Defendant went to the firm of Lel & Associates and came back with a document, which the Plaintiff avers he was told that the same was a lease agreement which he was told to sign even though he could not read or understand nor were the contents thereof read and translated to him.

5. According to the Plaintiff, the 1st Defendant gave him Kshs. 100,000/- which he said was given to him by the foreign investor, and that since there was a balance and which amount the Plaintiff stated he did not know and neither was he informed, he gave the 1st Defendant his bank account details so that the balance can be deposited in the said account. The Plaintiff averred that he left his original title deed at the firm of Lel & Assocites for safe keeping. Thereafter, the Plaintiff stated that the he, 1st Defendant and his

two sons drove to Kenol Petrol Station, Narok where he was introduced to a white man who was said to be the aforesaid foreign investor.

6. The Plaintiff stated that he had never met the white man before, and never negotiated with him and that during the meeting, the discussions were done in English language which was not translated to him, hence, he could not understand what was being said. The 1st Defendant is said to have informed that the Plaintiff that the foreign investor had promised to pay the balance through the Plaintiff's bank account although the actual amount was apparently never disclosed to the Plaintiff.

7. The Plaintiff further stated that the 1st Defendant had told him that the foreign investor wanted the suit property sub-divided into two portions so that it can have his titles, and that the 1st Defendant told the Plaintiff to appear before the area Land Control Board so that he can give his consent for sub-division of the suit property. The 1st Defendant is said to be a board member of the Land Control Board. The Plaintiff's five wives are said not have given their consent for the sub-division of the suit property, and that save for the Plaintiff's said two sons who are said to be party to the fraud, the Plaintiff's other children did not give their consent for the sub-division of the suit property.

8. The 1st Defendant was also said to have given the Plaintiff some documents to sign which the Plaintiff later came to learn were transfer documents which he signed without knowledge as to their contents since the same was not explained to him. Subsequently, the Plaintiff stated that the 1st Defendant with the help of the 2nd and 3rd Defendants managed to fraudulently, illegally, and without the Plaintiff's consent transfer fifty (50) acres of the suit property to his name. The Plaintiff then enumerated the particulars of fraud as against the Defendants in paragraph 22(aa) to (i) of his Amended Plaintiff.

9. When he learnt of the fraud, the Plaintiff avers that he called a public baraza to try and solve the issue because they were close relatives, and that at the baraza, it was concluded that the 1st Defendant had fraudulently and without cause transferred the aforesaid 50 acres without the Plaintiff's consent, and that the 1st Defendant was told to transfer back the 50 acres to the Plaintiff which he has apparently refused to do so.

10. Owing to the foregoing, the Plaintiff stated that he has been unable to take out a title deed to the suit property, and that he has been deprived the right to enjoy quiet possession of his property which has resulted in him suffering irreparable loss and damage. Accordingly, the Plaintiff prayed for judgment against the Defendant for:

a) A permanent injunction restraining the Defendant whether by himself, his servants and/or agents from interfering in any manner whatsoever with the Plaintiff's right to possession and quiet enjoyment of the property known as CISMARA/LEMEK/3921;

b) Cancellation of the title for CISMARA/LEMEK/3921 fraudulently obtained by the 1st Defendant and ownership returned to the Plaintiff;

c) Vacant possession and order of eviction; and

d) Costs of this suit.

11. To prove his case and discharge his evidentiary burden, the Plaintiff called three (3) witnesses. Shaawa Enole Koriata (PW1), testified that she is the legal representative of the estate of the late Karino Ole Kasura (deceased) whom she said was her husband, and the original Plaintiff in the case before his demise. She adopted her witness statement dated 30th September, 2019 wherein she reiterated that the suit property was fraudulently and illegally acquired. It was her testimony that there was no sale agreement between her late husband and the 1st Defendant.

12. It was also PW1's testimony that she did not know what the purchase price of the suit property was, and that her consent and that of her co-wives was never sought before the purported sale was done. On cross-examination, PW1 maintained that she did not know that her late husband had sold the suit property, and that he had informed her that he had leased it out although she did not know how much was paid for the lease. It was also her testimony that she did not know whether her husband attended the Land Control Board, and she further averred that her husband kept complaining that he had been misled over the land sale agreement. PW1 further testified that her husband was also misled by two of their children into selling the suit property.

13. Lesalon Ole Koriata (PW2), adopted his witness statement dated 30th September, 2019 wherein he testified that he is the biological son of the original plaintiff in this case, the late Karino Ole Koriata. It was his testimony that on 7th November, 2012 together with his step brother, Fred Kaitikei Ole Koriata and his cousin, Stephen Koriata, they intentionally deceived their deceased father into signing a contract for sale of 50 acres of the suit property.

14. According to PW2, they made an intricate scheme designed by one Stephen Kaitet Ole Koriata tricking the late Karino Ole Koriata into signing a document for sale of his parcel of land. He stated that he highly regrets what he did. In a nutshell, PW2 basically confirmed all the averments made in the Amended Plaint to the effect that the late Karino Ole Koriata was misled into signing the sale agreement for the sale of the suit property.

15. On cross-examination, PW2 stated together with his brothers, they misled their father to sign the sale agreement. He stated that he is now saved, and that he was only interested in money. He said that he got the money after misleading his late father. It was also his testimony that they appeared before Lel & Associates who acted as they instructed. He further testified that he did not know how much money his late father was paid, although he signed the transfer forms after he was paid.

16. On re-examination, PW2 reiterated that they misled their father into selling the suit property and that they did not disclose what they had done to the Advocate who drafted the agreement.

17. Fred Kaitikei Ole Koriata (PW3), equally adopted his witness statement dated 30th September, 2019 wherein he testified that he is the biological son of the original plaintiff in this case, the late Karino Ole Koriata. PW3's testimony was identical to that of PW2. In a nutshell, PW3 basically confirmed all the averments made in the Amended Plaint to the effect that the late Karino Ole Koriata was misled into signing the sale agreement for the sale of the suit property.

18. On cross-examination, PW3 confirmed that they misled their father into selling the suit property. He was adamant that he is ready to face the consequences of his actions, and that they were only interested in getting money. He stated that they told their late father that he was signing a lease agreement for the suit property, and that he did not know how much he was paid.

19. The Plaintiffs then closed their case after calling their three (3) witnesses.

20. The 1st Defendant opposed the Plaintiffs' suit vide his amended statement of defence dated 16th November, 2020 wherein he vehemently denied the allegations of fraud on his part. According to the 1st Defendant, by a sale of agreement dated 7th November, 2012, he agreed to purchase the suit property measuring 50 acres at an agreed price of Kshs. 25,000/- per acre making the total purchase price to be a sum of Kshs. 1,250,000/-.

21. Pursuant to the aforesaid sale agreement, the Plaintiff who was an uncle to the 1st Defendant is said to have voluntarily applied for the requisite Land Control Board consent for sub-division and transfer of the suit property. The Plaintiff and two of his sons were said to have attended the Land Control Board meeting where the Board is said to have given consent for the sub-division and transfer of the suit property.

22. According to the 1st Defendant, the Plaintiff was at all times present when the suit property was being surveyed for purposes of sub-division and transfer in favour of the 1st Defendant, and that he allowed the 1st Defendant to take possession of his portion. The 1st Defendant also averred that he paid the Plaintiff a sum of Kshs. 100,000/- as deposit of the purchase price and that the balance being the sum of Kshs. 1,150,000/- was paid to the Plaintiff through his bank account while part of it was paid to the Plaintiff's sons who are said to be the 1st Defendant's cousins.

23. After the 1st Defendant had gotten title to the suit property, the 1st Defendant avers that the Plaintiff attempted to renege from the agreement alleging that his signature on the sale agreement had been forged. It was the 1st Defendant's case that the Plaintiff reported the alleged fraud and forgery to the Directorate of Criminal Investigation (DCI) and that after consideration by the Office of the Director of Public Prosecution (ODPP) and DCI, the 1st Defendant was apparently exonerated of any wrong doing. According to the 1st Defendant, the present suit is part of the efforts on the part of the Plaintiff and his sons and wives to have the agreement which the deceased Plaintiff is said to have willingly signed set aside so that he can now sell the suit property to a third party at a higher price.

24. The 1st Defendant contended that he is the absolute proprietor of the suit property since he is an innocent purchaser for value,

hence, he argued that his title cannot be challenged as the same is protected by the Constitution, the Land Act and the Land Registration Act. The Defendant thus prayed that the suit be dismissed with costs.

25. The 2nd and 3rd Defendants opposed the suit vide their statement of defence dated 24th September, 2014 wherein they simply denied the averments in the Plaintiff.

26. To prove his case and discharge his evidentiary burden, the 1st Defendant called two (2) witnesses. Ken Kiprop Kilele (DW1), testified that he practices under the name of Lelei & Associates Advocates and that was previously practicing under the name of Lel Associates. He confirmed drawing the sale agreement for the suit property involving Karino Ole Koriata and the 1st Defendant. It was his testimony that what was being offered for sale was 50 acres of the suit property with the agreed price being Kshs. 25,000/- per acre.

27. According to DW1, a deposit of Kshs. 100,000/- was paid upon execution of the sale agreement. It was his testimony that he explained the contents and terms of the agreement to the parties, and after confirming that the parties understood the terms of the agreement they executed the agreement whereafter he also signed on his part. According to DW1, the other steps were to be taken by the parties including application for Land Control Board for sub-division and transfer, and that they were also in agreement on how they would pay themselves the balance of the purchase price.

28. On cross-examination, DW1 confirmed that he drafted the sale agreement and that the purchase price for the suit property was Kshs. 1,250,000/-. It was also his testimony that he did not witness payment of the balance of the purchase price. DW1 also confirmed that he did not prepare spousal consent in respect of the sale agreement and that he was not aware of any opposition by the Plaintiff's family members.

29. Further, it was the testimony of DW1 that he had no information whether the full purchase price was ever paid. It was also his evidence that the parties never went back to him for altering of the agreement, and that he was not aware of any altering of the agreement.

30. The 1st Defendant, Stephen Kaitet Koriata, adopted his witness statement dated 1st October, 2014 as his evidence before court. It was his testimony that he did not misrepresent to the Plaintiff that they were signing a lease, and that he cleared the balance of the purchase price by paying through electronic transfer. He testified that he also paid part of the balance of the purchase price to the sons of the Plaintiff.

31. The Plaintiff is said to have signed the completion documents before going to the Land Control Board. Before the Plaintiff died, the 1st Defendant avers that he filed the present suit claiming that he was only paid Kshs.100,000/-, and that after seeing the electronic transaction, he changed his mind and alleged that the transaction was only a lease agreement. He therefore urged the court to dismiss the Plaintiff's suit with costs.

32. On cross-examination, DW2 stated that he relies on the terms of the sale agreement. He confirmed that he was a member of the Land Control Board for the entire County. He stated that the Plaintiff had been paid a deposit of Kshs. 100,000/-, and that the suit property was to be transferred to him after he had finished paying the purchase price. He further testified that he paid one Jackson Kippingot Koriata part of the purchase price being a sum of Kshs. 478,000/- although there was no agreement for him to be paid the said sum.

33. DW2 confirmed that the said Jackson Kippingot Koriata was not a joint owner of the suit property. He confirmed that Jackson had died and that he saw an affidavit which he swore stating that he did not receive any payment from the 1st Defendant. The 1st Defendant also confirmed that he did not respond to the said affidavit.

34. According to DW2, he paid the Plaintiff through electronic transfer, and that he did not have a court order directing him to apply for the Plaintiff's Bank Statements. He further stated that he did not have any statement from the bank manager or of any of its employee to show that they are the ones who gave him the bank statements. It was also his testimony that he did not have a bank statement to prove that the balance of the purchase price was paid to the Plaintiff through electronic transfer.

35. The Plaintiff was also said to have attended the Land Control Board although the 1st Defendant did not produce the minutes of the meeting by the Board. He further stated that the Plaintiff had many wives and that none of them gave their consent. It was also

his testimony that the application for consent of Land Control Board was undated and that the same did not show when he and the Plaintiff signed it. He also stated that he had not attached any transfer form, and that the application for consent from the Land Control Board belonged to the Plaintiff and that his thumb print had not been marked by DCI.

36. On re-examination, DW2 stated that he was the one who prepared the document which the said Jackson acknowledged receiving the sum of Kshs. 478,000/- and that he thumb printed the same. It was also his evidence that the Plaintiff was not supposed to hand over the completion documents to him without receiving the full purchase price.

37. The Plaintiff is said to have referred the matter to DCI for investigations, and according to the Plaintiff after investigations were carried out he was not found to be at fault. He reiterated that if given time, he can produce the transfer documents.

38. The 1st Defendant subsequently closed his case. The 2nd and 3rd Defendants on the other hand did not call witnesses in the case.

39. The plaintiffs' filed their written submissions on 1st February, 2022 wherein they submitted as per **section 26(1)** of the **Land Registration Act**, the title of a registered owner remains indefeasible unless it is shown that the same was obtained by fraud or misrepresentation to which the title holder is proved to have been a party to. They further submitted that under **section 80** of the said **Act**, the court has power to revoke and cancel a title that is proved to have been illegally acquired.

40. It was the Plaintiffs' submission that although **section 26** of the **Land Registration Act** provides that a title is prima facie evidence that the holder is the proprietor of the land, the same can be challenged where the title was acquired fraudulently or unprocedurally. According to the Plaintiff, 1st Defendant knew about the fraud and fully and actively participated as a central party to the scheme.

41. On the issue of the bank statement relied on by the 1st Defendant, the Plaintiffs contended that the same was inadmissible since it was contended that it falls short of the conditions set in **section 106(B)** of the **Evidence Act**. The Plaintiffs therefore urged that they had demonstrated that the 1st Defendant hatched an elaborate scheme to defraud the Plaintiff of his land. The court was thus urged to enter judgment against the Defendant with costs to the Plaintiffs.

42. Reliance was placed on the cases of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another [2013]eKLR*, *Republic vs Minister of Transport & Communication & 5 Others Ex-Parte Waa Ship Garbage Collector & 15 Others* cited in approval in *Kenya National Highway Authority vs Shallen Masood Mughai & 5 Others [2017]eKLR*, *Alberta Mae Gacci vs Attorney General & 4 Others [2006]eKLR*, and the case of *County Assembly of Kisumu & 2 Others vs Kisumu County Assembly Services Board & 6 Others [2015]eKLR*.

43. The 1st Defendant filed his submissions on 4th February, 2022 wherein he contended that he is the legitimate and registered owner of the suit property, and thus he prayed that the suit be dismissed with costs. The 1st Defendant relied on the impugned sale agreement dated 7th November, 2012 to assert his claim over the suit property. In essence, the 1st Defendant defended the transaction which saw him acquire the suit property from the deceased Plaintiff. According to the Defendant, he acquired the suit property for value and the Plaintiff willingly sold the suit property to him, thus, the allegation of fraud was denied.

44. It was further submitted by the 1st Defendant that the Plaintiff had failed to discharge his burden of proving the allegation of fraud. To the 1st Defendant, fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.

45. Further, the 1st Defendant contended that there was no basis for the argument that the Plaintiff did not know the document that he was executing since the contents and terms of the sale agreement were explained to both parties by the advocate who drafted the sale agreement. The 1st Defendant therefore maintained that the Plaintiff was aware of the nature of the transaction that he was engaged in.

46. The Plaintiff's wives were also said to have been aware of the transaction since they never raised an objection to the transaction. The court was therefore urged to find that the Plaintiff had not discharged his burden of proof, and accordingly proceed to dismiss the suit with costs.

47. To buttress his submissions, the 1st Defendant relied on the cases of *Independent Electoral and Boundaries Commission &*

Another vs Stephen Mutinda Mule & Others Civil Appeal No 219 of 2013, Kibiro Wagoro Makumi vs Francis Nduati Macharia & Another [2018]eKLR, Insurance Company of East Africa vs The Attorney General & 3 Others HCCC No 135 of 1998, Athi Highway Developers Limited vs West End Butchery Limited & Others Civil Appeal No 246 of 2013, and the case of Dr Joseph Arap Ngok vs Justice Moijo Ole Keiwua & 5 Others Civil Appeal No Nai 60 of 1997.

48. Having carefully studied all of the materials presented in respect of the case herein, the court is of the opinion that the following are the issues that arise for determination in the case:

- i) Whether the transfer of the suit land to the 1st Defendant was fraudulent; and*
 - ii) Whether the title deed for CISMARA/LEMEK/3921 issued in the name of the 1st Defendant should be cancelled.*
- (I) Whether the transfer of the suit land to the 1st defendant was fraudulent:*

49. It is common ground that the Plaintiffs' suit is founded on the tort of fraud as a cause of action. The Black's Law Dictionary defines fraud as follows:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

50. Further, J.G. Kemei, J in *Gichinga Kibutha v Caroline Nduku [2018]eKLR* held in part as follows on the subject of fraud:

“Fraud is essentially a common law tort of deceit and its essentials are:-

- a) false representation of an existing fact;*
- b) with the intention that the other party should act upon it;*
- c) the other party did act on it; and*
- d) the party suffered damage.*

With respect to a contract, fraud means and includes any of the acts set out below committed by a party to a contract, or with his connivance or by his agent with the intent to deceive another party thereto or his agent or to induce him to contract:-

- a) the suggestion as a fact, of that which is not true by one who does not believe it to be true;*
- b) the active concealment of a fact by one having knowledge or belief of the fact;*
- c) a promise made without intention of performing it;*
- d) any other act fitted to deceive; and*
- e) any such act or omission or the law declares to be fraudulent.”*

51. With respect to standard of proof in cases of fraud, the Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau [2015]eKLR* had the following to say:

It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo (2008) 1 KLR (G&F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases....”

In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

52. With the above in mind, the court must then determine whether the transfer of the suit land to the 1st Defendant was fraudulent as alleged by the Plaintiff. The Plaintiff's case is that the transaction which led to the suit land being transferred to the 1st Defendant was laced with acts of fraud. According to the Plaintiff, he was misled into signing a sale agreement while his intention was not to sell the suit land but only to lease the same. His contention was that he did not understand the nature of the document (sale agreement) that he signed since the contents thereof were not explained to his understanding.

53. The 1st Defendant defended the transaction contending that the Plaintiff fully understood the nature of the transaction and the document (sale agreement) that he had signed. According to the 1st Defendant, the sale and transfer of the suit property in his favour was not fraudulent as alleged by the Plaintiff. It was the 1st Defendant's case that he paid the purchase price being the sum of Kshs. 1,250,000/-.

54. The main issue in the case is whether the Plaintiff understood the nature of the document that he executed. The Plaintiff did not dispute signing the sale agreement. His main contention was that he was misled into signing the sale agreement when he thought that he was signing a lease agreement. PW2 and PW3, sons to the Plaintiff confirmed that they misled their father into signing the sale agreement, and that he did not understand what he was appending his signature to.

55. In analyzing the evidence by the parties in this case, I have taken into account the Court of Appeal's decision in **Josephine Mwikali Kikenye v Omar Abdalla Kombo & another [2018] eKLR** where the court held in part that:

Our understanding from the pleadings and evidence led at the trial court is that the appellant only admitted to executing the sale agreement... it is common ground that the onus lies on the party repudiating the signed document to establish the necessary ingredients of *non est factum*.

There are basic tenets that a party relying on such a defence ought to establish. First, he/she must establish that there is a difference with regard to the nature of the document signed from that which he/she intended to sign... The degree of difference which must exist will depend on the circumstances of each case... A mistake as to the contents of a deed or document does not give rise to the defence. This much was demonstrated in the case of *Sood vs. Sood & others [2002] All ER (D) 07 (Jan)*:

“A simple lack of understanding is insufficient to establish a claim of non est factum; what must be proven is an understanding of the document's effect that is fundamentally different from its true effect.”

Secondly, a person who signs a document may not be permitted to raise the defence where he/she has been careless or guilty of negligence in appending his/her signature. See *Gallie vs. Lee and Another (supra)*.

Expounding on the foregoing, Lord Wilberforce in *Saunders vs. Anglia Building Society (supra)* expressed:

*“How, then, ought the principle, on which a plea of non est factum is admissible, to be stated” In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, i.e. more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended... The law as to this is best stated in the words of the judgment in *Foster v Mackinnon (1869) LR 4 CP 704 at 711* where it is said that a signature obtained by fraud:*

“... is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not

accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.”

56. Applying the foregoing principles to the facts at hand, I find that the Plaintiff has proved his case. The evidence by the Plaintiff that he could neither read nor write at the time the sale agreement was executed was uncontroverted by the 1st Defendant. From the Plaintiff's evidence and the testimonies of PW1 and PW2, the Plaintiff was led to believe that he was executing a lease agreement, and not a sale agreement. In real sense, he had executed a sale agreement which was substantially different in nature. I have also taken cognizance of the fact that while the 1st Defendant argued that the purchase price for the suit property was agreed to be a sum of Kshs. 1,250,000/- there was no cogent evidence to show that the entire sum was paid to the Plaintiff.

57. Turning to the issue of spousal consent which also arose in the course of these proceedings, it is common ground that spousal consent was never sought and/or obtained. Both parties were in agreement that the Plaintiff's wives never gave their consent to the sale of the suit property. Spousal consent is now a pre-condition in sale agreements involving land and/or registration of charges. To underscore this element, the case of *Gladys Wanjiku Waititu Vs. Housing Finance Company Ltd & Another (2017)eKLR* is of particular relevance specifically where the court held that:

“The requirement of spousal consent was introduced by Section 79(3) of the Land Act 2012. The Act came into force on 2nd May 2012. Prior to that date there was no requirement for spousal consent and the second defendant did not need to obtain spousal consent prior to registration of the Charge instruments dated 28th October 2009 and 1st September 2010. Simultaneously with the Land Act, 2012, Parliament also enacted the Land Registration Act 2012 which also came into operation on 2nd May 2012. Section 109 of the Land Registration Act 2012 repealed the Registered Land Act. I am not alone in holding the view that there was no requirement for spousal consent prior to 2nd May 2012.

(II) *Whether the title deed for cismara/lemek/3921 issued in the name of the 1st defendant should be cancelled:*

58. Given the foregoing findings, I have no hesitation in holding that the transfer of the suit property to the 1st Defendant was fraudulent. Admittedly, spousal consent was also never sought and/or obtained before the impugned sale and transfer of the suit property to the 1st Defendant. As I have found that the Plaintiff has proved fraud in the sale and transfer of the suit property to the 1st Defendant, I am of the view that the title deed for Cismara/Lemek/3921 issued in the name of the 1st Defendant should be cancelled.

59. The upshot of the foregoing is that I find the Plaintiff has proved his case against the 1st Defendant. Accordingly, I make the following orders:

a) *A permanent injunction be and is hereby issued restraining the 1st Defendant whether by himself, his servants and/or agents from interfering in any manner whatsoever with the Plaintiff's right to possession and quiet enjoyment of the property known as CISMARA/LEMEK/3921;*

b) *An order be and is hereby issued directed at the 2nd Defendant to cancel the title deed for CISMARA/LEMEK/3921 in the name of the 1st Defendant and to re-issue the same in the name of the Plaintiff, Karino Ole Koriata;*

c) *An order be and is hereby issued directed at the 1st Defendant to vacate from parcel No CISMARA/LEMEK/3921 and surrender vacant possession thereof to the Plaintiff within thirty (30) days from the date of this judgment; and*

d) *The Plaintiff shall have costs of this suit plus interest at court rates.*

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 22ND DAY OF MARCH, 2022.

MBOGO C.G,

JUDGE

22/3/2022

IN THE PRESENCE OF:

CA:T.Chuma



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