



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Okayo & another v Okindo & 6 others (Environment & Land Case
1140 of 2016) [2023] KEELC 18442 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18442 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1140 OF 2016**

**JM ONYANGO, J
JUNE 29, 2023**

BETWEEN

**RICHARD JUMA OKAYO 1ST PLAINTIFF
KIAMOKAMA FARMERS CO-OPERATIVE SOCIETY LIMITED 2ND
PLAINTIFF**

AND

**PHILIP ONYANDO OKINDO 1ST DEFENDANT
FLORENCE KWAMBOKA OTIENO 2ND DEFENDANT
MARY MOKEIRA NYAKONO 3RD DEFENDANT
LUTAFALI RAJWAN T/A QUASAR LIMITED, VISHA BROTHERS LIMITED,
KISII PETROLEUM PRODUCTS LIMITED 4TH DEFENDANT
VISHA BROTHERS LIMITED 5TH DEFENDANT
PRIME BANK LIMITED 6TH DEFENDANT
KISII PETROLEUM PRODUCTS LIMITED 7TH DEFENDANT**

JUDGMENT

1. By a Plaint dated 13th July, 2004 and amended severally culminating in the amendment dated 28th August, 2018 the Plaintiffs filed suit against the Defendants claiming that the 1st, 2nd and 3rd defendants had on 30th August, 2001 without any lawful authority from the 2nd plaintiff's members, illegally, fraudulently and through collusion sold the 2nd plaintiff's land parcel known as L.R No. Kisii Town Block 11/23 (hereinafter referred to as the suit property) together with the developments thereon to the 4th defendant. The suit property was subsequently and through collusion registered in the name of the 5th defendant. The plaintiffs aver that the defendants in an attempt to mystify the transaction



caused the suit property to be registered under the names of different companies associated with the 4th Defendant. The 6th Defendant has since charged the suit property to the 7th defendant for a loan of Kshs.15,000,000/=.

2. The plaintiff therefore seeks the following reliefs:
 - a. A declaration that the sale of land parcel No. Kisii Town Block 11/23 by the 1st, 2nd and 3rd defendants to the 4th defendant and subsequently registered in the name of the 5th defendant and subsequently the 6th Defendant is null and void and should be cancelled and that land parcel No. KISII TOWN BLOCK 11/23 reverts to the 2nd Plaintiff herein.
 - b. A declaration that the encumbrances on the title No.kisii Town Block 11/23 placed by the 6th Defendant to the 7th defendant for a loan facility amounting to Kshs.15,000,000 be declared null and void and the same be ordered to be serviced by the Applicant (6th Defendant) of the charge encumbrances (sic).
 - c. An order of permanent injunction restraining the 6th defendant by himself or through his servants, agents or employees from entering, occupying, selling, offering for sale to any third party, leasing, charging, interfering with land parcel No.KISII TOWN BLOCK 11/23 evicting the Plaintiff form or in any other way interfering with the 2nd plaintiff 's occupation and enjoyment of the suit property (sic).
 - d. An order of eviction of the 6th Defendant, his agents, servants and/all workers from land parcel No.Kisii Town Block 11/23.
 - e. Costs of the suit.
 - f. Any other relief that this honourable court may deem fit to grant.
3. The 1st – 4th defendants filed a Statement of Defence dated 6th August 2004 denying the plaintiffs' claim. They denied the particulars of fraud attributed to them and stated that they sold the suit property lawfully.
4. The 6th Defendant filed a Statement of Defence dated 18th February 2019 denying that the 4th defendant trades as Visha Brothers Limited and stated that it has no affiliation with the person called Lutafali Rajwani.
5. The 6th defendant further denied that the 2nd Defendant was the registered proprietor of the property known as Kisii Town Block 11/23 and stated that it is the registered owner and entitled to exclusive possession of the said property having purchased it sometimes in May 2008 for good value and without notice of any claim or defect in the title. The 6th defendant denied that it illegally charged the suit property to the 7th defendant and alleged that it obtained a loan to purchase the said property as the 7th defendant's customer and after due diligence was carried out. The 7th defendant then charged the suit property as security for the advances given to the 6th defendant. It therefore averred that the charges registered against the said title are valid and create lawful encumbrances against the said title in favour of the 7th defendant.
6. The 6th defendant denied that it was party to the previous transfers of the suit property and stated that the sale and transfer of the suit property to itself was proper.
7. The 6th defendant stated that the suit against it was time-barred under the provisions of the Limitation of Actions Act Cap 22 of the Laws of Kenya and that the suit was therefore bad in law.



8. The 7th defendant filed a Statement of Defence dated 15th January 2019. The 7th Defendant stated that it was aware that land parcel no. Kisii Town Block 11/23 was registered in the name of the 6th Defendant who charged it to the 7th Defendant to secure certain banking facilities and that the charges registered against the said titles were valid.
9. The 7th Defendant stated that it was a stranger to the allegations of fraud contained in the Plaintiff and denied that it was party to any conspiracy to defraud the plaintiff.
10. It further alleged that the suit against it was time-barred and that it was fatally defective and bad in law.
11. After considerable delay brought about by various applications coupled with the controversial withdrawal of the suit by the plaintiff's former advocate, the suit was subsequently reinstated and fixed for hearing on various dates between 3rd March, 2022 and 26th July, 2022. In the meantime, the 1st and 4th Defendants died during the pendency of the suit and the case against them abated.

Plaintiff's Case

12. Richard Juma Okayo, the 1st Plaintiff testified as PW1. He testified that he was appointed as the Chairman of Kiamokama Farmers' Cooperative Society (hereinafter referred to as the society) on 22.3.2002. He stated that the Society bought a developed plot in Kisii town known as Kisii Town Block 11/23 measuring 0.3727 Hectares from one Lutafali Rajwani (4th Defendant) in 1973. The Management Committee subsequently rented the plot to the 4th Defendant after which they fraudulently sold it to him in 2001. The society reported the matter to the Ministry of Cooperatives who instituted investigations into the sale and an Inquiry Report was prepared.
13. He told the court that the Inquiry Report recommended that the plot be given back to the society. The Ministry of Cooperatives wrote a letter to the 4th defendant demanding an explanation about the sale of the suit property. In 2002, the 4th defendant and its company Chief Petroleum Products sold the suit property to the 5th Defendant who in turn transferred it to the 6th Defendant. The 6th Defendant then charged the suit property to the 7th Defendant to secure a loan of Kshs.15 million. He stated that the society had never occupied the suit property although they had obtained a temporary injunction restraining the 4th defendant from interfering with the suit property. Despite the existence of the injunction, the 4th defendant demolished the house on the suit property and converted it into a bus terminus.
14. The plaintiff stated that there was no society resolution authorizing the sale of the suit property. He denied that there was a Special General Meeting on 9.8.2001 where it was resolved that the suit property be sold to pay the society's debts. He stated that there was a resolution of the society authorizing him to file this suit, though he did not produce it. He produced the documents in the plaintiff's list of documents as his exhibits.
15. In cross-examination, he told the court that the society's Management Committee consisted of 7 members who included the 1st, 2nd and 3rd defendants. The 1st defendant has since died. He stated that they filed this case in 2004 when they discovered that the society's property had been sold illegally. By the time the suit was filed, the suit property was registered in the name of the 5th Defendant. He stated that the 1st, 2nd and 3rd defendants are the ones who passed a resolution for the sale of the suit property. He stated that he was not a member of the Management Committee before 2002.
16. Daniel Muchira Turubo, the Book keeper of Masaba Union which is one of the member organizations of the society testified as PW2. He stated that while examining the society's books he came across minutes of a Special General Meeting which indicated that he had attended the meeting on 9th August,



2001, yet he had not attended the said meeting. He also came across the names of two other persons recorded as having attended the SGM yet he was aware that they had attended no such meeting. He told the court that when they found out that the former chairman of the society was falsifying minutes, they requested the society to conduct elections where a new chairman was elected.

17. In cross-examination, Mr. Muchira stated that he had been a Book-Keeper for 26 years. He stated that when the society holds a meeting there must be a representative from the Union but he had not attended any meeting of the society on 9.8.2001.
18. Nyambane Sagini who introduced himself as the Vice Chairman of the Society stated that he had been a member of the society for 50 years. He told the court that he learnt that the Executive Committee of the society had sold the society's land to one Lutafali Rajwani without the member's authority. He stated that during the period when the land was sold, the chairman was one Philip Onyango Okindo (1st Defendant). He stated the report of the Commission of Inquiry recommended that the suit property be given back to society.

Defendants' Case

19. The 2nd, 3rd and 8th Defendants did not participate in the case and only the 5th, 6th and 7th Defendants called their witnesses. Umeshkumar Chandaria a director of Visha Brothers Ltd (6th Defendant) testified as DW1 and relied on his witness statement. He denied that the 6th defendant conspired with the other defendants to acquire the suit property.
20. He stated that the 6th defendant purchased the suit property from Prime Bank on 18.7.2007. He explained that the suit property had been charged to the said bank by Quasar Ltd (5th defendant) to secure a loan. He told the court that Visha Brothers Limited obtained a loan from Prime Bank to purchase the suit property.
21. He told the court that he signed the sale agreement as a director of the 6th defendant. It was his evidence that at the time he signed the agreement, he was not aware that there was a court case in relation to the suit property. He stated that he had visited the suit property and it had a small house on it. He said that they conducted due diligence and established that there was no caution on the property. He stated that Lutafali Rajwani did not disclose to them that he had been sued over the suit property and he had no notice of any defect in the title.
22. He emphasized that the suit property was sold to them by Quasar Limited and not Lutafali Rajwani. He denied that he was party to any fraud and stated that he was an innocent purchaser and he was not aware that Rajwani's title was tainted.
23. In cross-examination he stated that he was not a director of Quasar Limited and that Visha Brothers Limited was not affiliated to Quasar Limited. He stated that Visha Brothers Limited was joined to this suit in 2008. He stated that before they bought the suit property, he did not know Lutafali Rajwani.
24. George Wachira Mathui an in-house counsel with Prime Bank Limited (7th Defendant) testified as DW2. He relied on his witness statement dated 14.3.20 and produced the documents in the 7th defendant's List of Documents. He denied that the bank had conspired with the other defendants to deprive the 2nd plaintiff of its land. He stated that the suit property was first charged to the bank in 2007 and had been charged 3 times between 2007 and 2018.
25. He stated that before the suit property was charged to the bank, due diligence was conducted and no caution was registered against the title. He stated that the bank was not aware of any proceedings in relation to the suit property.



26. Upon cross-examination he said that he was not aware that by 2015, Visha Brothers Ltd were not the registered owners of the suit property as per the official search certificate dated 3rd October, 2015. He stated that they conducted due diligence through their external lawyers. He told the court that Visha Brothers Ltd charged the suit property to Prime bank in 2007. Before that year, it had been charged to the bank by Quasar Limited (5th Defendant). He said they were not aware of any court case touching on the suit property.
27. It was Mr. Mathui's testimony that the plaintiffs failed to act diligently as they did not register a caution over the suit property. He stated that he did not know Lutafali Rajwani personally though he knew that he was a director of Quasar Limited.
28. He stated that Prime Bank discharged the charge to Quasar limited before charging the title in favour of Visha Brothers Limited although he did not produce the Discharge of Charge by Quasar Ltd.
29. Azim Lutafali Jiwa Rajwani testified as DW3. He stated that he was a director of Quasar Limited (5th Defendant). He said his father Lutafali Rajwani (4th Defendant) died in 2016. He told the court that the suit property was registered in the name of Quasar Limited on 20th February, 2002. It was then charged to Prime Bank Limited to secure an initial sum of Kshs.6 million. By a further Charge dated 9.8.2005, the amount was increased to Kshs 52 million. The suit property was transferred to Visha Brothers Limited on 6.5.2008.
30. He stated that according to the green card, the suit property was transferred to his father by Kiamokama Farmers Cooperative on 17th March, 1973. His parents then took possession of the property and stayed in the house thereon. He stated that he was not aware of the dealings between his late father and Kiamokoma Farmers Cooperative as he was 10 years old in 1973 when the suit property was transferred to his father.
31. In cross examination he stated that he knew the companies known as Kisii Petroleum Company Limited and Chief Petroleum Company Limited as they belonged to his family. He stated that the companies had two common directors but different shareholders. He informed the court that Kisii Petroleum Company (8th Defendant) was wound up in 2005. Upon being shown the green card in respect of the suit property, he stated that he was aware that the 2nd Plaintiff sold the suit property to his late father and he was not aware that there was an inquiry by the Ministry of Cooperatives in respect of the manner in which the suit property had been sold. He further stated that at the time the suit property was sold to Kisii Petroleum Products in 2001, he was not directly involved in the company as his father was still alive.
32. With that evidence the Defendants closed their case after which the parties were granted time to file their final submissions.

Plaintiff's Submissions.

33. Learned counsel for the Plaintiff framed 5 issues for determination as follows:
 - i. Whether the purported sale of the suit land Kisii Town Block11/ from the 2nd Plaintiff to the 8th Plaintiff and its ultimate registration in the name of the 8th defendant was regular and/or proper;
 - ii. Whether subsequent transfers by the 8th Defendant to the 5th defendant and subsequent transfer from the 5th Defendant to the 6th Defendant were lawful and/or procedural;



- iii. Whether the charges registered against the suit land in favour of the 7th Defendant herein arising after the 8th Defendant's purported proprietorship in relation to the suit land Kisii Town Block11/23 were lawful or procedural;
 - iv. Whether the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Defendants herein concertedly engaged in fraud or at all in relation to the suit land Kisii Town Block11/23;
 - v. Whether the 1st and 2nd Plaintiffs herein are entitled to the reliefs sought herein.
34. With regards to the first issue, counsel submitted that the purported proprietorship of the suit land by the 8th Defendant, Kisii Petroleum Limited through the aid of the 4th Defendant herein Lutafali Rajwani (Deceased) after the 4th Defendant had sold the same to the 2nd Plaintiff, Kiamokama Farmers Cooperative Society Limited was tainted with fraud. He relied on the evidence of PW1- Richard Juma Okayo, the current chairman of the 2nd Plaintiff who took over from Charles Ombachi Onsarigo. PW1 produced a Certificate of Registration indicating that the 2nd Plaintiff was duly registered as the owner of the suit land on the 21st day of July 1959. It was his submission that PW1 indicated in his statement that the suit property had a residential house where the 4th Defendant used to stay before he sold it to the 2nd Plaintiff. At the time the 4th Defendant was trading as Quasar Limited, the 5th Defendant herein.
35. The 4th Defendant subsequently conspired with the 1st, 2nd and 3rd defendants who were the Chairman, Secretary and Treasurer of the 2nd Plaintiff to so tell the suit property to the 8th Defendant. According to the Inquiry report produced as Plaintiff's exhibit 1, the 1st, 2nd and 3rd Defendants purported to have held a Special General Meeting on 9th August, 2001 where a resolution was passed to sell the suit property. The Inquiry Report revealed that infact the said Special General meeting did not take place. This was confirmed by the evidence of DW2 who stated that when he went through the books of the 2nd Plaintiff he discovered that the minutes of the SGM were fabricated as some of the persons who are alleged to have attended the meeting denied having been in the said meeting.
36. It is the counsel's contention that DW3's admission that his late father had several family companies including Chief Petroleum Limited and Kisii Petroleum Limited (8th Defendant) shows that the 4th Defendant had a stake in the 8th Defendant as a director. He therefore contends that since the sale of the suit property by the 2nd Plaintiff to the 8th defendant was not sanctioned by the members who in accordance with the By-laws of the 2nd Plaintiff are the supreme decision making organ of the 2nd Plaintiff, the 8th Defendant did not acquire a good title to the suit property.
37. On the question as to whether subsequent transfers by the 8th Defendant to the 5th defendant and later to the 6th defendant were lawful and/or procedural, counsel submitted that the said transfers were unprocedural and unlawful as the 8th Defendant did not have a good title. Furthermore, counsel contended that there was insufficient documentation to show how the property moved from the 8th Defendant to the 5th Defendant. He submitted that apart from the 10th entry on the green card which shows that the 5th Defendant was registered as the proprietor of the suit property after the 8th Defendant, there is no indication of the consideration paid, nor are there any documents supporting the sale.



38. He relied on the case of *Daudi Kiptugen v Commissioner of Lands & 4 Others* (2015) eKLR where the court held as follows:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title.”

39. Counsel faulted the 6th defendant for failing to conduct proper due diligence before purchasing the suit property from the 5th defendant as the Certificate of Official Search produced by DW1, the 6th Defendant’s witness indicates that the search was conducted after the sale had taken place. He relied on the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* (2015) eKLR where the Court observed that:

“For a purchaser who claims that due diligence was carried out at all stages, we find it difficult to believe that there was no explanation sought from the Registrar of Titles about the mysterious disappearance of the original title from the strong room of the Land Registry. It was common knowledge and well- documented at the time that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima Market....”

40. He submitted that the 6th Defendant did not go an extra mile to ascertain the history of the land or satisfy himself that the suit land was free from encumbrances as he merely relied on the Certificates of official Search. For that reason, he was of the view that the title was impeachable. He relied on the case of *Daniel Kipruto Metto v Chase Bank Limited* (2018) eKLR.

41. As to whether the 6th Defendant was a bona fide purchaser for value without notice, counsel relied on the definition in the Ugandan case of *Katende v Haridar & Company Limited* (2008) 2E.A 173 where a bona fide purchaser is described as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. He submitted that the 6th Defendant did not fall within that definition as he had failed to carry out sufficient due diligence and thus failed to discover that this case was pending in court.

42. Counsel submitted that a person cannot pass a better title than he has and if the title is defective as a result of fraud, what is passed on is also defective regardless of whether the person acquiring the said title contributed to the fraud. He relied on the case of *Zachary Omondi Odongo v Bernard Stephen Omondi & 2 Others* (2022) eKLR.

43. It was counsel’s contention that the charges registered against land parcel No. Kisii Municipality Block 11/23 in favour of the 7th Defendant were unlawful as the same were registered while this case was pending in court. It was his further contention that Geroge Wachira Mathui, the in-house counsel for the 7th Defendant who testified as DW2 was unable to confirm whether there were any Discharge of Charge documents before the various charges in respect of the suit property were registered. He relied on the case of *Daniel Kipruto Metto v Chase Bank (Kenya) Limited* (2018) eKLR where the Court restated the position in the case of *Esther Ndegi Niiru & Another v Leonard Gatei* (2014) eKLR as follows:

“The rampant case of fraudulent transactions involving title to land has rendered it necessary for legal practitioners to carry out due diligence that goes beyond merely obtaining a Certificate of Official Search. Section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility on purchasers of title to ascertain the status of the property



beyond carrying out an official search. In this era when there are many cases of what has been described as grabbed lands, it is essential to endeavour to ascertain the history and/or root of the title.”

44. On whether all the defendants engaged in fraud in relation to the suit property, counsel submitted that there were concerted acts of fraud by the defendants beginning with the fraudulent sale of the suit property that took place on 9th August 2001 between the 2nd Plaintiff and the 8th Defendant with the participation of the deceased 4th Defendant. He was of the view that all subsequent transactions relating to the suit property were tainted with fraud and are therefore invalid.
45. Counsel submitted that the Plaintiffs pleaded and adduced sufficient evidence to prove fraud. It was his contention that the Inquiry Report which was produced as Plaintiff's exhibit 1 indicated that the minutes of meeting that sanctioned the sale of the suit property were found to be a contrived invention of the 1st, 2nd and 3rd defendants. According to the said report, the Management Committee met on 30th July and discussed the society's debts. They subsequently came up with minutes of a Special General Meeting allegedly held on 9th August 2001 where the sale of the suit property was purportedly approved. This is because they realized that the disposal of the house could only be done pursuant to a resolution by the members. The report points out that no such meeting took place as the order of discussing this agenda could have started with a meeting of the management committee to come up with a proposal which would have been presented for discussion and approval at the General Meeting. In this case, the members had met on 2nd July 2001 to discuss the issue followed by the Management Committee meeting on 30th July hence the fabricated minutes of a purported Special General Meeting on 9th August, 2001.
46. It was therefore counsel's submission that the decision by the 1st, 2nd and 3rd defendants to sell the suit property to the 8th Defendant without following the 2nd Plaintiff's By-laws was irregular and fraudulent.
47. Counsel further submitted that the manner in which the suit property was transferred from the 8th Defendant to the 5th defendant was also fraudulent as the green card which was produced as Plaintiff's exhibit 5 has no details regarding the consideration that was paid. It is his contention that since the title was illegally transferred from the 2nd Plaintiff to the 8th Defendant, the subsequent transfer to the 5th defendant was also illegal. He referred to the case of Daudi Kiptugen v Commissioner of Lands and 4 Others (supra) for the proposition that where a Certificate of lease held by an individual was improperly acquired, the holder thereof must demonstrate through evidence that the Certificate of Lease held by him was properly acquired. It was his submission that since the 5th defendant did not offer any evidence to show that it acquired a good title, the said title must be held to be improper.
48. Counsel submitted that the transfer of the title from the 5th Defendant to the 6th Defendant was also not adequately explained as the only documents produced by the 6th defendant were the sale agreement and Certificate of Title. It was his further submission that the 7th defendant did not carry out comprehensive due diligence before charging the title in favour of the 6th defendant.
49. He concluded that the 1st, 2nd and 3rd defendants conspired with the 4th defendant to deprive the 2nd defendant of its property after which it was taken through a route infused with fraud upto the time it was registered in the 6th Defendant's name. Consequently, the 6th defendant's title is impeachable and it does not enjoy the protection of the law. He was therefore of the view that the plaintiffs are entitled to the reliefs sought.



Defendants' Submissions

50. On his part, learned counsel for the 5th defendant drew the court's attention to the fact that the 1st, 2nd and 4th defendants had died during the pendency of the suit and were never substituted while the 3rd defendant was never traced nor did she participate in the proceedings. Owing to the absence of the 1st, 2nd, 3rd and 4th defendants counsel submitted that the plaintiffs have trained their guns on the 5th, 6th and 7th defendants whom he considers as secondary defendants as they never participated in the impugned sale and transfer of the suit property from the 2nd plaintiff.
51. Counsel framed the following issues for determination: -
- i. Whether the plaintiff's allegation of fraud by the defendant were sufficiently proven;
 - ii. What is the implication of the absence of the 1st to 4th defendants who are party to the impugned sale now alleged to have been fraudulent and whose responsibility it was to substitute deceased defendants;
 - iii. Whether the 5th, 6th and 8th defendants were innocent purchasers for value without notice.
 - iv. Whether the prayer for cancellation of registration /transfer would be available.
52. Counsel submitted that the gravamen of this suit is that the 1st to 8th defendants conspired to deprive the 2nd plaintiff of the suit property through some acts of fraud. It was counsel's contention that fraud was not properly pleaded. He relied on the case of *Kampala Bottlers Limited v Damanico (U) Limited* cited in *John Mbugua Gitae v Simon Parkoyiet Mokare & 6 Others (2014) eKLR* where the Court observed as follows:
- In the first place I strongly depreciate the manner in which the respondent alleged fraud in his written statement of defence. Fraud is a very serious allegation to make and it is as always wise to abide by the Civil Procedure Rules Orders VI Rule 2 3and plead fraud properly giving particulars of the fraud alleged.
53. He referred to the Amended Plaintiff dated 22nd March 2016 at paragraph 8 where the particulars of fraud are pleaded in paragraph 8(a) to (f) and submitted that the same does not sufficiently raise any instance of fraud. With regard to paragraph 8(a)- where it is alleged that 1st and 3rd defendants purported to act on behalf of the 2nd Plaintiff when in effect they had no authority to do so' -Counsel submitted that 1st and 3rd Defendants in their capacity as the officials of the 2nd Plaintiff had the authority to see to it that the suit property was sold and the fact that they did not properly convene the meeting to approve the sale is an internal procedure which the 4th defendant and all other subsequent purchasers had no business interrogating.
54. With regard paragraph (b)- where it is pleaded that the 1st, 2nd and 3rd Defendants prepared and presented false minutes of a purported General Meeting that was never held- he submitted that the Special General meeting was not necessary as a General meeting had been held where the proposal to sell the suit property had been mooted and approved and it was left to the Management Committee chaired by the 1st Defendant to deal with nuts and bolts of the sale. He added that in the absence of the 1st, 2nd and 3rd defendants it was not possible for the court to determine whether the allegations of forgery are true.
55. Under paragraph (c) where it is alleged that " the 4th Defendant being a tenant in the 2nd Plaintiff 's premises hatched and executed a design to acquire the 2nd Plaintiff's premises fraudulently which



- is now registered in the name of the 5th defendant- he submitted that no evidence was adduced to substantiate the allegations apart from the green card which shows that the 4th Defendant purchased the suit property from the 2nd Plaintiff.
56. With regard to paragraph (d) – where it is alleged that the 5th Defendant has transferred the property to the 6th Defendant which is now registered in its name- counsel submitted that the mere transfer of the suit property from the 5th to the 6th defendant does not lead to a conclusion that there was fraud.
 57. As to paragraph (e) where it is alleged that all the defendants conspired to defraud the 2nd plaintiff by understanding (sic) the actual value of the premises for their mutual benefit- counsel submitted that this was a meritless claim as the plaintiffs were unable to place all the defendants at the same site at the same time. He contended that apart from the 1st, 2nd and 3rd defendants who had a meeting for purposes of transferring the suit property, the other defendants only interacted with the property completely unaware and oblivious of the manner in which the impugned sale had been conducted. It was therefore his submission that the allegations of a conspiracy were baseless.
 58. With regard to paragraph (f) where it was alleged that the entire transaction was shady, fictitious and totally in secrecy and it smacks of underhand deals which in effect defrauded the 2nd Plaintiff's members of their property, counsel submitted that the said allegations remained unsubstantiated as the only evidence presented by the plaintiffs was the Inquiry Report which observed that the transaction took place without convening a general meeting. He maintained that the failure to hold the meeting did not stop the authorized officials of the 2nd plaintiff from proceeding with the sale and it did not invalidate the sale.
 59. Counsel relied on the case of *aws Ltd v Othaya Farmers Cooperative Society Ltd (1977)* eKLR where the Court held that the rules of the Society were concerned with internal management and administration and were not intended to protect the society from the consequences of its own maladministration against innocent third parties.
 60. He concluded that the plaintiffs had not pleaded sufficient particulars of fraud to enable the court make a finding that there was fraud. He faulted the Inquiry Report stating that it could not be used to prove fraud. He submitted that although the Inquiry Report proved that the plaintiff's property was sold by its recognized officials, the 2nd Plaintiff wanted to renegotiate an otherwise bad bargain entered into by its officials
 61. Counsel criticized the Inquiry Report for suggesting that Kisii Petroleum, Chief Petroleum Products and Quasar Limited is the same company that has been changing names and that the owner of the plot was Lutafali Rajwani. He submitted that though the companies had a common director/ shareholder in Mr. Lutafali Rajwani, the companies were separate juristic persons with separate liability and no basis had been laid for lifting their corporate veils.
 62. It was counsel's contention that the plaintiffs having alleged fraud on the part of the defendants had the burden to prove the same. However, they had failed to prove fraud to the required standard which is higher than on a balance of probabilities. He relied on the case of *John Mbugua Gitau v Simon Parkoyiet Mokare & 6 Others (2014)* eKLR.
 63. Counsel submitted that the fact that the 1st, 2nd and 4th Defendant are reported to have died more than a year before the case was heard, yet they were not substituted in accordance with Order 24 Rule 4(1) and (2) of the Civil Procedure Rules meant that the suit against the said defendants abated. He relied on the case of *Nicholas Kombe Pembe v Kenga Kombe & 3 others (2017)* eKLR where the court set aside orders that had been issued against deceased defendants.



64. On whether the 5th, 6th and 8th defendants were innocent purchasers for value without notice, counsel submitted that the 5th and 8th defendants were not aware of any defect in the title to suit property at the time of their respective purchase and they were therefore innocent purchasers for value without notice. He submitted that the only notice that the 5th defendant may have been aware of was that there was a contest with respect to ownership but this only goes to the doctrine of lis pendens. It was his submission that the death of the 4th defendant deprived the court of the opportunity to hear his side of the story as he is the one who would have explained why the suit property changed hands from the 4th to the 8th then the 5th defendants before it was finally sold to the 6th defendant.
65. He maintained that as secondary defendants, the 5th, 6th and 8th defendants were not party to the impugned sale and they were not aware of any fraud, hence they should not bear any adverse consequences of the impugned sale and transfer.
66. He submitted that the plaintiffs had failed to meet the evidential threshold for fraud and the reliefs sought should not be granted. He maintained that the 4th defendant obtained a good title which he transferred to the 8th defendant and the subsequent transfers to the 5th and 6th defendants were proper.
67. Learned counsel for the 7th Defendant submitted that the 2nd Plaintiff being a body corporate registered under the Cooperative Societies Act has capacity to sue and be sued in its name and the fact that the 1st Plaintiff filed this suit on its behalf renders the suit bad in law and that the same should be struck out.
68. Counsel further submitted that the suit which is based on fraud is time-barred as the alleged acts of fraud took place in 2001 while the suit was filed in 2004. She submitted that the 6th and 7th Defendants were joined to the suit in 2018 whereas the suit property was transferred to them on May 2008 hence the suit against the 6th and 7th defendants which is based on fraud is time-barred. She relied on section 4(2) of the Limitation of Actions Act which provides that an action founded on tort may not be brought after the end of 3 years from the date when the cause of action arose. She also relied on section 26(c) which provides that in an action based on fraud, the period of limitation does not begin to run until the fraud or mistake could with reasonable diligence have discovered it.
69. She was of the view that the Plaintiffs were aware of the transfer of the suit property from the 4th to the 5th Defendant and from the 5th to the 6th defendant. She relied on the case of Gathoni v Cooperative Creameries Ltd (1882) KLR for the proposition that when a suit is time barred the court cannot grant the remedy or relief.
70. With regards to the allegations of fraud against the 6th and 7th defendants, counsel submitted that the plaintiffs had failed to adduce any evidence to prove that the 6th and 7th defendants conspired and fraudulently transferred the suit property as the 6th and 7th Defendants were not known to the 1st, 2nd, 3rd and 4th defendants in 2001 when the suit property was sold to the 4th Defendant. She relied on the case of Moses Parantai & Peris Wanjiku Mukuru suing as the legal representative of the estate of Sospeter Mukuru Mbeere (Deceased) v Stephen Njoroge Macharia (2020) eKLR where the Court of Appeal laid down the test for determining whether fraud has been proved.
71. It was further submitted that the plaintiffs had not proved that the sale of the suit property to the 4th defendant was fraudulent. It was counsel's contention that the Inquiry Report produced by the Plaintiffs shows that the 2nd plaintiff intended to sell the suit property and discussions were held concerning the impending sale. The suit property was subsequently sold by the Management Committee but some of the members were dissatisfied with the sale prompting them to make a complaint to the District Cooperative Officer.



72. She submitted that it was strange that the plaintiffs did not make any complaint to the police. She further submitted that it was not clear whether the complaint to the District Cooperative officer was based on the process of the sale or the purchase price as one of the allegations in the Amended Plaintiff was that the suit property was sold at an under value as a result of which the 2nd plaintiff lost Kshs. 822,751. She submitted that since the 2nd Defendant did not produce the Bye-Laws under which the 2nd Plaintiff was operating, it was not possible to know if the Management lacked the authority to sell the suit property.
73. She faulted the plaintiffs for having failed to call the Land Registrar to confirm if the sale was irregular and wondered why no inhibition was registered on the title to prevent any further dealings, or why no report was made to the police regarding the irregular sale. It was counsel's contention that the 6th defendant's title was properly acquired as they purchased it for valuable consideration from the 5th defendant. She submitted that the 6th defendant had demonstrated that it is a bona fide purchaser for value without notice as defined in the case of *Katende v Haridar & Company Limited* (supra).

Analysis And Determination

74. I have considered the pleadings, evidence on record and the parties' submissions. I have also perused the exhibits and considered the decisions cited by the parties. The following issues arise for determination: -
- i. What is the implication of the death of the 1st and 4th defendants and the failure to substitute them?
 - ii. Whether the Plaintiffs proved the allegations of fraud against the defendants?
 - iii. Whether the transfer of the suit property from the 8th defendant to the 5th defendant and ultimately to the 6th defendant was procedural.
 - iv. Whether the 5th, 6th and 8th defendants were innocent purchasers for value without notice.
 - v. Whether the charge held by the 7th defendant is valid.
 - vi. Whether the plaintiffs are entitled to the reliefs sought.
75. I will begin with the question relating to the implication of the death of the 1st and 4th defendants as this will determine the course of the other issues:
76. It is not in dispute that the 1st and 4th defendants passed away before the suit was set down for hearing and none of them was substituted. Although it is not clear when the 1st defendant died, the 4th Defendant died on 18th February 2016 and the suit against him therefore abated on 18th February 2017. Order 24 rule 4 of the Civil Procedure Rules provides as follows: -
- (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
 - (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.



77. The courts have had occasion to deal with the effect of abatement of suits as a result of failure to substitute parties who have died within the requisite period of one year. In the case of *Mary Wacigi Kiarie v Samson Muiruri Gathingu & Another* (2021) eKLR the court held as follows:

“Abatement of a suit means that the suit is extinguished; it is no more. The Black’s Law Dictionary, 11th Edition defines abatement as ‘the defeat of a pending action for a reason unrelated to the merits of the claim’. So, when the suit by the Plaintiff against the 1st Defendant abated, it meant that the suit and the claim against the 1st Defendant was extinguished or defeated for a reason unrelated to the merits of the Plaintiff’s case. This to my understanding had very serious ramifications on the suit by the plaintiff as against the 1st defendant and consequently on the 2nd Defendant as well. The only nexus between the Plaintiff and the 2nd Defendant was the 1st Defendant. This is something that should have worried the plaintiff greatly.”

78. Similarly, in the case of *Lawrence Muriithi M’thika v Munyi Murwanthika & 3 others* (2021) eKLR the court observed as follows:

“It seems clear to me that the plaintiffs did not appreciate fully the consequences of not substituting the deceased 1st defendant. Their case against 2nd defendant was so much interwoven with that of the 1st defendant that the fate of one had also to be the fate of the other. The abatement of the suit against the 1st defendant meant that the plaintiffs did not prove that the land was held in trust for them. It also meant that no fraud was proved against that defendant. The logical consequence of all this is that there was nothing wrong with the 1st defendant exchanging the land or even selling it to the 2nd defendant. It has to be appreciated that the 2nd defendant has denied that there was trust attached to the land or that there was breach if any such trust if it existed. He has also denied fraud. Failure to prove trust or fraud against 1st defendant meant that the 2nd defendant’s denial assumes the value or force of cogency. It was a fatal blunder on the part of the plaintiffs to allow their case against the 1st defendant to rest at the stage of abatement.”

79. The fact that the case against the 1st and 4th defendants had abated by the time the case came up for hearing means that the court cannot rely on the evidence adduced against them as the case against them has been extinguished and it no longer exists.

80. The second issue for determination is whether the plaintiffs proved the allegations of fraud against the defendants.

81. It is trite law that fraud is a serious allegation that must be pleaded, particularized and proved to a standard higher than on a balance of probabilities. In the case of *Koinange & 13 Others V. Charles Karuga Koinange* 1986 KLR at page 23 Justice Amin citing the case of *Ratilal Patel Makanji* (1957) EA 314 observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”



82. Furthermore in the case of *Vijay Morjaria .v. Nansingh Madhusingh Darbar& another* [2000]eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:-

“...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

83. This decision was upheld by the Court of Appeal in Nairobi in the case of *Kinyanjui Kamau .v. George Kamau Njoroge* [2015] eKLR(Civil Appeal No 132 of 2005) where it was stated that to succeed in the claim for fraud, the appellant needed to not only plead and particularize fraud, but also lay a basis by way of evidence, upon which the court would make a finding.

84. The Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR in considering the issue of fraud observed as follows:-

“It is common ground that 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. One of the authorities produced before us has this passage from *Bullen & Leake & Jacobs, Precedent of pleadings* 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

see *Insurance Company of East Africa vs. The Attorney General &3 Others* Hccc135/1998.

85. The gist of the plaintiff’s case is captured at paragraph 9 of the plaint which I shall reproduce here for its full effect:

“Para 9. That on or about the 30th August 2001 the 1st, 2nd and 3rd defendants without lawful authority or approval of the members who constitute 3500 people and a general meeting notwithstanding , illegally, fraudulently and through collusion sold the 2nd plaintiff’s plot and building comprised of Kisii Municipality Block 11/23 to the 4th defendant and fraudulently and in conspiracy with the other defendants registered the said suit property in the name of the 5th defendant and subsequently to the 6th defendant.

Conspiracy On The Part Of The Defendants



- a. The 1st and 3rd defendants purporting to act on behalf of the 2nd Plaintiff when in effect they had no authority to do so.
 - b. Preparing and presenting false minutes of a purported General Meeting that was never held.
 - c. The 4th Defendant being a tenant in the 2nd Plaintiff's premises hatched and executed a design to acquire the 2nd Plaintiff's premises fraudulently which is now registered in the name of the 5th defendant
 - d. That the 5th Defendant has transferred the property to the 6th Defendant which is now registered in its name
 - e. That all the defendants conspired to defraud the 2nd plaintiff by understanding (sic) the actual value of the premises for their mutual benefit.
 - f. That the entire transaction was shady, fictitious and totally in secrecy and it smacks of underhand deals which in effect defrauded the 2nd Plaintiff's members of their property
86. It is further pleaded that consequent to the said illegal sale, the 4th defendant in an attempt to mystify the whole transaction and caused the plot to be under the names of different companies (sic) Kisii Petroleum Products, all companies associated with the 4th Defendant.
87. The plaintiffs' claim is that there was a conspiracy between the 1st, 2nd 3rd and 4th defendants to sell the plaintiff's land parcel No. Kisii Municipality Block 11/23 to Kisii Petroleum Products, the 8th Defendant herein, which is one of the companies in which the 4th defendant was a director. The 4th defendant had earlier sold the same plot to the 2nd plaintiff and stayed in the house thereon as a tenant. It is the Plaintiffs' case that the 4th defendant later hatched a plan to acquire the same plot from the plaintiffs. According to the Inquiry Report produced as Plaintiff's Exhibit 1, the 1st 2nd and 3rd Defendants who were the Chairman, Secretary and Treasurer of the 2nd Plaintiff were among the Committee members who initiated the idea of selling the plot ostensibly to pay off the society's debts. This was captured in the minutes of the Management Committee meeting held on 30th July, 2001. The 1st, 2nd and 3rd defendants then fabricated minutes of a Special General Meeting purportedly held on 9th August 2001 where a resolution was passed to sell the plot.
88. The Chairman of the 2nd Plaintiff who testified as PW1 informed the court that upon learning of the impugned sale, the 2nd Plaintiff filed a complaint with the District Cooperatives Officer who launched an inquiry into the affairs of the society. The Inquiry Report details the manner in which the plot was sold. What is clear from the report is that the Management Committee which consisted of the 1st, 2nd and 3rd defendants sold the suit property without the authority of the members. The report noted that the Management Committee did not negotiate the price (Kshs.3, 177,249.00) and the method of selling the plot was wrong. The plot being the members' property ought to have been sold through a tendering process. According to the By-Laws governing the operations of the society, a resolution ought to have been reached during a General meeting of the members as this was the supreme decision-making organ of the society. The said report recommended that the plot be returned to the society as it had been wrongfully sold to the 8th defendant.
89. During the hearing it became abundantly clear that it would be difficult to prove fraud against the defendants without mentioning the central role played by the 4th Defendant as he was involved in the initial sale of the suit property from the 2nd plaintiff to the 8th Defendant and the subsequent transfer of the suit property to the 5th defendant since he was a director in the 8th and 5th defendant companies. The 1st, 2nd and 3rd are alleged to have colluded with the 4th defendant to sell the 2nd Plaintiff's land to the



8th Defendant without the consent or authority of the 2nd Plaintiff's members. Since the case against the 1st and 4th Defendants abated within one year of their death, the allegations of collusion and fraud against the surviving Defendants cannot be proved.

90. Although the plaintiffs may be faulted for having failed to substitute the 1st and 4th defendants, I am of the considered view that substitution may not have come to the plaintiffs' aid, considering the cause of action in this suit. In the case of Fredrick Muroko Gituku v Josephine W.Kirika (2013) eKLR the court held that:

The claim is emanating from fraud. That kind of fraud was personal to Josephine Wamaitha Kirika and it is not the kind of action that survives the demise of the late Josephine Wamaitha Kirika.”

91. The third issue for determination is whether the transfer of the suit property from the 8th defendant to the 5th defendant and ultimately to the 6th defendant was procedural. Learned counsel for the Plaintiffs submitted that the 5th Defendant did not produce any documents to show how it acquired the suit property from the 8th defendant. It was his submission that the only document relied on by the 5th defendant was the green card (PEX-5) which shows that the 5th Defendant was registered as the proprietor of the suit property on 20th February 2002 although the consideration paid by the 5th defendant is not indicated. He submitted that no transfer documents were produced by the 5th Defendant. He relied on the case of Daudi Kiptugen (supra) for the proposition that the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It therefore follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title.
92. With regard to the 6th Defendant's title, counsel submitted that the same was defective as the 6th defendant could not have obtained a better title than what was passed to it. He faulted the 6th defendant for failing to carry out due diligence which would have revealed that the suit property was the subject of a court case. He submitted that the 6th defendant was not a bona fide purchaser for value without notice and its title was therefore impeachable. He relied on the case of Zachary Omondi Odongo v Bernard Stephen Omondi & 2 Others (supra) where the court held that the title of an innocent person is impeachable so long as it was obtained illegally, unprocedurally or through a corrupt scheme, even if the title holder did not contribute to the vitiating factors.
93. Although it is trite that one cannot pass a better title than what he has, the peculiar circumstances of this case have given rise to the court's finding that the plaintiffs were unable to prove fraud in the absence of the 1st and 4th defendants. By the same token, one cannot fault the transfer of the titles from the 8th to 5th and ultimately to the 6th defendants without mentioning the role of the 4th Defendant who was a director of both the 8th and 5th defendants. By default therefore, the transfers remain unchallenged.
94. The fourth and fifth issues for determination are whether the 5th, 6th and 8th defendants were innocent purchasers for value without notice and whether the charge held by the 7th defendant is valid.
95. Considering the unfortunate circumstances of this case, there would be no need to delve into the question as to whether the 5th, 6th and 8th defendants were innocent purchasers for value without notice and whether the charge held by the 7th defendant is valid. I say so because it would be impossible to answer these questions without calling into question the validity of the title and the role of the deceased 4th defendant in the transfer of the title to the 8th, 5th and 6th Defendants.
96. In the final analysis, I have to come to the conclusion that the plaintiffs' case cannot succeed not because it lacks merit but because the death of the 1st and 4th defendants robbed the plaintiffs of critical evidence



which may have assisted in proving fraud against the defendants to the required standard. The plaintiffs are therefore not entitled to the reliefs sought.

97. The upshot is that the plaintiff's case is dismissed. Considering the peculiar circumstances of this case, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JUNE, 2023.

J.M ONYANGO

JUDGE

