



Mwangi v Southern Credit Banking Corporation & 2 others (Environment & Land Case 9 of 2023) [2025] KEELC 3305 (KLR) (23 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 9 OF 2023**

JO MBOYA, J

APRIL 23, 2025

BETWEEN

SIMON P. MWANGI PLAINTIFF

AND

SOUTHERN CREDIT BANKING CORPORATION 1ST DEFENDANT

**JOSEPH G. MUTURI T/A MUGA AUCTIONEERS & GENERAL
MERCHANT 2ND DEFENDANT**

RORETE ESTATE LIMITED 3RD DEFENDANT

JUDGMENT

1. The Plaintiff approached the court vide Plaintiff dated 14th October 2009; and wherein the Plaintiff sought various reliefs. The Plaintiff under reference was subsequently amended vide Amended Plaintiff dated 20th April 2009 and wherein the Plaintiff sought the following reliefs:
 - i. A declaration that the suit premises L.R No. 209/10721/90 belongs to the Plaintiff;
 - ii. An order for injunction restraining the Defendants whether by themselves, their agents, servants, employees or whomsoever from auctioning, selling, disposing, trespassing, entering and/or interfering in any way with the Plaintiff's property known as L. R 209/10721/90 situate in Halai Estate South C Nairobi
 - iii. Costs of the suit.
 - iv. Any other relief that the court may deem fit to grant.
2. The 1st and 2nd Defendants duly entered appearance and thereafter filed a Joint Statement of Defence dated 8th June 2009. The 1st and 2nd Defendants denied the claims by the Plaintiff. Furthermore, the 1st Defendant contended that the property known as L.R No. 209/12892 was duly charged to and in



favour of the 2nd Defendant to secure a banking facility that was granted at the instance and request of the 3rd Defendant.

3. The 3rd Defendant also entered appearance and filed a Statement of Defence dated 2nd December 2009. Vide the Statement of Defence, the 3rd Defendant contended that the suit property namely L.R No. 209/10721/90 [now L.R No. 209/12892] was lawfully allocated to the 3rd Defendant by the Commissioner of Lands [now defunct] and thereafter same was duly issued with a Certificate of Lease.
4. In this regard, the 3rd Defendant contended that the suit property lawfully belongs to and is registered in the name of the 3rd Defendant.
5. The subject suit proceeded for hearing before the High Court up to and including the conclusion thereof. Furthermore, when the matter was due for judgement, the learned judge of the High Court returned a verdict that same was unable to craft and deliver a judgement in respect of the instant matter. To this end, the learned judge of the High Court made an order on 10th November 2023 that the matter herein touches on and concerned a claim to title to and ownership of land.
6. Arising from the foregoing, the instant file was placed before the Presiding Judge of the High Court [Commercial and Tax Division] on 27th November 2023. Thereafter, the presiding judge of the High Court [Commercial and Tax Division] ordered that the file be transferred to the Environment and Land Court at Milimani.
7. For the sake of completeness, the file was indeed transferred to the Environment and Land Court and same was placed before the Presiding Judge of the Environment and Land Court on 13th December 2023. In this respect, various directions were thereafter issued including the issuance of a new case number, namely; Milimani ELC LC No. 9 of 2023.
8. Be that as it may, even though the file bears serial number Milimani ELC LC No. 9 of 2023, the dispute beforehand has been in the corridors of [Sic] justice since the year 2008. Quite clearly, this is yet another of those matters that calls into question the efficacy of the justice system.
9. The hearing of the instant matter commenced on 18th March 2024 and wherein the Plaintiff's case was heard. For good measure, the Plaintiff's case is anchored on the evidence of two witnesses, namely; Simon P. Mwangi and Richard Kinuthia. Same testified as PW1 and PW2 respectively.
10. It was the testimony of PW1 [Simon P. Mwangi] that same is the Plaintiff. Furthermore, the witness averred that by virtue of being the Plaintiff same is conversant with and knowledgeable of the facts of the case.
11. Additionally, the witness testified that same has since recorded two sets of witness statements. The first set of the witness statement is dated 3rd October 2012 and which witness statement, the witness sought to adopt and rely on as his evidence in chief. To this end, the witness statement under reference was duly admitted and adopted as the evidence in chief of the witness.
12. Moreover, the witness also adverted to the witness statement dated 16th March 2019 and which witness statement the witness sought to adopt and rely on as his further evidence in chief. Suffice it to state that the witness statement dated 16th March 2019 was similarly adopted and constituted as further evidence in chief of the witness.
13. The witness also testified that same has also filed various Lists and Bundles of Documents. In this regard, the witness highlighted the List and Bundle of Documents dated 25th January 2011, containing sixteen documents and which documents the witness sought to tender and produce before the court.



There being no objection to the production of the documents under reference, same were duly produced and marked as Exhibits P1-16, respectively.

14. In addition, the witness also adverted to the List and Bundle of Documents dated 11th April 2017 and containing three documents. Similarly, the witness sought to tender and produce the documents as further exhibits. There being no objection to the production, the documents under reference were produced as Exhibits P17-19, respectively.
15. Other than the foregoing, the witness also sought to tender and produce before the court a copy of his retirement letter which was not attached to any list of documents. Nevertheless, there being no objection to the production of the letter, same was adopted and constituted as exhibit P20.
16. The witness also sought to produce another letter dated 3rd August 2005. Suffice it to state that the production of the letter under reference was not objected to and same was thus constituted as exhibit P21.
17. It was the further testimony of the witness that same has also filed an Amended Plaintiff dated 20th April 2009. To this end, the witness sought to adopt and rely on the contents of the Amended Plaintiff. Besides, the witness sought the reliefs highlighted thereunder.
18. On cross-examination by learned counsel for the 1st and 2nd Defendants, the witness averred that same purchased the suit property in the year 1997. Furthermore, the witness averred that same purchased the suit property from Halai Properties Limited. Besides, the witness averred that prior to and before purchasing the suit property, same undertook due diligence.
19. While still under cross-examination, the witness averred that same relied on the advice of his advocates towards the purchase and acquisition of the suit property. In particular, the witness averred that it is the advocate who advised same that the land in question was available. In this regard, the witness testified that same proceeded to and purchased the suit property. Besides, the witness added that same thereafter constructed on the suit property.
20. It was the further testimony of the witness that same does not have an original title to the suit property. Moreover, the witness admitted that same has no certificate of title over the suit property. In addition, the witness conceded that same does not have the transfer documents relative to the suit property.
21. On further cross-examination, the witness testified that same does not pay rates to and in respect of the suit property. In any event, the witness stated that the only document that same has as pertains to the suit property is the sale agreement and nothing else. For good measure, the witness averred that same does not have any certificate of title over the suit property.
22. It was the further testimony of the witness that same contends that the certificate of title issued to the 3rd Defendant in respect of the suit property is a fraud. However, the witness conceded that same does not have any evidence to confirm that the certificate of title is a fraud.
23. It was the further testimony of the witness that same has seen a letter from the advocates for Halai Developers Limited. However, the witness confirmed that the letter was seeking for consent from Halai Developers Limited to develop the two shops on the plot.
24. On cross-examination by learned counsel for the 3rd Defendant, the witness averred that same entered into a sale agreement with Halai Developers Limited. Furthermore, the witness averred that the sale agreement was duly executed by both the vendor and the purchaser, respectively. Furthermore, the witness testified that same complied with clauses 1-9 of the sale agreement.



25. It was the further testimony of the witness that it is him [witness] who built the house standing on the suit property. At any rate, the witness testified that the title of the suit property was encumbered, namely; that the title was charged.
26. Additionally, it was the testimony of the witness that same had never seen the certificate of title of the plot which is alluded to in the sale agreement. Furthermore, the witness averred that he did not see the certificate of title prior to the execution of the sale agreement.
27. While still under cross-examination, the witness testified that the letter which same has produced before the court relates to purchase of shop number [No] 94 and not the land. Nevertheless, the witness added that same paid the entire purchase price in respect of the suit property.
28. However, when pressed further, the witness stated that same did not pay the sum of KShs. 700,000/-. Moreover, the witness conceded that same has not produced any receipt[s] to demonstrate payment of the sum of KShs. 700,000/- only. At any rate, the witness clarified, that same did not pay the sum of KShs. 700,000/-.
29. It was the further testimony of the witness that Halai Developers Limited was placed in receivership. However, the witness contended that same did not know exactly when Halai Developers Limited was placed in receivership.
30. It was the further testimony of the witness that same subsequently received correspondence from Deloitte and Touche Limited and that the correspondence was talking about the purchase price in respect of the house. Furthermore, the witness intimated that the letter was also requesting for payments. Be that as it may, the witness conceded that he did not make any payments on account of the demand before the court.
31. The witness further testified that the original parcel of land which was registered in the name of Halai Developers Limited was subjected to sub-division. Furthermore, the witness averred that the land was subjected to sub-division and thereafter same created sixty-five plots. Nevertheless, the witness averred that the mother title contains various entries up to 136.
32. It was the further testimony of the witness that a caveat was registered as pertains to plot number 209/10721/90. Besides, the witness stated that the caveat was in existence as at the time same was entering into the sale agreement. For good measure, the witness conceded that the caveat had not been removed by the time of execution of the sale agreement.
33. On further cross-examination, the witness testified that same does not have any certificate of title to and in respect of the suit property. In particular, the witness maintained that same only has the sale agreement as testament to his claim of ownership of the land.
34. While still under cross-examination, the witness has also tendered and produced a copy of the letter of allotment. However, the witness averred that the letter of allotment in question relates to an allotment in favour of the 3rd Defendant. Besides, the witness averred that the letter of allotment also alludes to various payments on the face thereof. Nevertheless, the witness averred that same does not know whether the letter of allotment was fake or fictitious.
35. Moreover, the witness testified that same has also seen a letter from the Commissioner of Lands and which was addressed to the 3rd Defendant. For good measure, the witness testified that the letter relates to the suit property. In any event, the witness added that the letter confirms that the suit property was duly issued to and in favour of the 3rd Defendant. Nevertheless, the witness maintained that same is claiming ownership of the suit property.



36. On further cross-examination the witness averred that same has never been issued with any grant/certificate of title. Moreover, the witness conceded that same does not have any documents from the Chief Land Registrar to show that he [witness] owns the suit property. Nevertheless, the witness testified that it is him who is in occupation of the suit property.
37. The second witness who testified was Richard Kinuthia. Same testified as PW2.
38. It was the testimony of the witness that same is a quantity surveyor by profession. Furthermore, the witness averred that same graduated in 1975. Besides, the witness testified that as a quantity surveyor, same is engaged in construction/buildings. Furthermore, the witness averred that same has since recorded a witness statement dated 3rd October 2012 and which witness statement the witness sought to adopt and rely on as his evidence in chief. For good measure, the witness statement was duly adopted and constituted as the evidence in chief of the witness.
39. It was the further testimony of the witness that same was retained and engaged by the Plaintiff to undertake construction on the suit property. In this regard, the witness averred that same indeed undertook construction on the suit property. Moreover, the witness averred that it took him nine months to conclude the engagement.
40. On cross-examination by learned counsel for the 1st and 2nd Defendants, the witness averred that same is a quantity surveyor. Nevertheless, the witness admitted that same has not tendered or produced any professional certificates to confirm that he is a quantity surveyor. Besides, the witness admitted that same has also not tendered any drawings and/or plans relative to the building that same was constructing on behalf of the Plaintiff.
41. On cross-examination by learned counsel for the 3rd Defendant, the witness averred that even though same [witness] was instructed by the Plaintiff, he [Witness] did not confirm whether the Plaintiff had a certificate of title to the land. Nevertheless, the witness averred that he constructed the building on the suit plot.
42. It was the further testimony of the witness that same used building plans and drawing[s]. However, the witness acknowledged that the drawings have not been produced before the court.
43. While still under cross-examination, the witness averred that he has not tendered any contract or letter of instructions. In any event, the witness stated that same was contracted orally.
44. It was the further testimony of the witness that same did not see any certificate of title. Nevertheless, the witness averred that he believed that the land belonged to the Plaintiff.
45. With the foregoing testimony, the Plaintiff's case was closed.
46. The 1st and 2nd Defendants' case is premised on the evidence of one witness, namely; Mercy Mwombobia. Same testified as DW1.
47. It was the testimony of the witness that same is an employee of the 1st Defendant. Furthermore, the witness averred that same is currently the debt recovery manager. In this regard, the witness testified that by virtue of her portfolio, same is conversant with and knowledgeable of the facts of this matter.
48. Additionally, the witness averred that same has since recorded three witness statements dated 18th September 2019, 18th February 2019, 10th May 2019 and 20th May 2024 and which witness statements the witness sought to adopt and rely on as her evidence in chief. To this end, the witness statements under reference were duly admitted and constituted as her evidence in chief.



49. Moreover, the witness adverted to a List and Bundle of Documents dated 5th September 2010 containing thirteen [13] documents and which documents the witness sought to tender and produce before the court. Instructively, the documents were duly produced and admitted in evidence as exhibits D1-D13 respectively.
50. Furthermore, the witness also highlighted the Further List and Bundle of Documents dated 10th May 2019 containing five [5] documents and which the witness sought to tender and produce as further exhibits on behalf of the 1st and 2nd Defendants. There being no objection to the production of the documents under reference, same was duly admitted and constituted as exhibits D14-D18 respectively.
51. Additionally, the witness alluded to a further List and Bundle of Documents dated 20th May 2024 containing thirteen documents and which documents the witness sought to tender and produce before the court as further exhibits on behalf of the 1st and 2nd Defendants. Suffice it to state that the said documents were produced and marked as exhibit D19 -D37 respectively.
52. Other than the foregoing, the witness averred that the banking facility which was secured by the title of the suit property remains in arrears. In particular, the witness averred that the loan account is in debit to the tune of KShs. 10,009,081/- only.
53. On cross-examination by learned counsel for the 3rd Defendant, the witness averred that same has recorded three [3] sets of witness statements. Furthermore, the witness averred that the contents of the witness statements are correct. Furthermore, the witness testified that the suit property was deployed to secure a banking facility/borrowing on behalf of one namely Yussuf.
54. It was the further testimony of the witness that the banking facility under reference was applied for in November 2005. Besides, the witness averred that the 1st Defendant appraised the application and thereafter granted the banking facility in favour of the applicant.
55. It was the further testimony of the witness that the banking facility was secured by a charge registered against the certificate of title in respect of the suit property. Furthermore, the witness averred that the borrower also signed and executed a guarantee in favour of the bank.
56. While still under cross-examination, the witness averred that prior to and before the disbursement of the banking facility, the 1st Defendant undertook due diligence. In particular, the witness averred that the 1st Defendant procured and obtained a certificate of official search in respect of L.R No. 209/12892. Besides, the witness also averred that the 1st Defendant also undertook valuation over the suit property. To this end, the witness referenced the two sets of valuation reports which have been tendered and produced before the court.
57. It was the further testimony of the witness that at the time of undertaking the due diligence, the suit property was registered in favour of the 3rd Defendant. Moreover, the witness referenced the Grant bearing the name of the 3rd Defendant.
58. On further cross-examination, the witness averred that the certificate of title in respect of the suit property was legal and lawful. Furthermore, the witness added that the title is still charged to the 1st Defendant.
59. On cross-examination by learned counsel for the Plaintiff, the witness testified that the 1st Defendant undertook due diligence over and in respect of the suit property. In particular, the witness clarified that the due diligence included obtaining a certificate of official search over the suit property. In addition, the witness averred that the 1st Defendant also undertook valuation of the suit property.



60. On further cross-examination, it was the testimony of the witness that the valuation in respect of the suit property was procured on the instructions of the advocates for the bank. It was the further testimony of the witness that same has also tendered and produced a copy of the survey plan. Besides, the witness clarified that the survey plan in question only shows one plot. In any event, the witness averred that the property/plot is L.R No. 209/12892.
61. It was the further testimony of the witness that the property in question is duly shown on the survey plan. However, the witness admitted that there is a cancellation reflected and captured on the survey plan relating to the suit property. Moreover, the witness averred that where a property that is already registered in cancelled, the title is to be surrendered.
62. Furthermore, it was the testimony of the witness that same is also aware of L.R No. 2019/10721/90. The witness averred that the said property is a subdivision of L.R No. 209/10721. Nevertheless, the witness added that same does not know when and how L.R No. 209/ 10721 was sub-divided.
63. While still under cross-examination, the witness testified that same has tendered and produced document number 8 which is a letter from the Commissioner of Lands. The witness added that the letter under reference confirms that the suit property emanated from L.R No. 209/10721. In any event, the witness testified that there was a Deed Plan relating to L.R No. 209/10721.
64. It was the further testimony of the witness that same has also seen a letter of allotment to and in favour of the 3rd Defendant. Furthermore, the witness averred that the 3rd Defendant was also issued with a certificate of lease/grant in respect of the suit property.
65. It was the further testimony of the witness that same has also tendered and produced a copy of the letter dated 5th November 1999. Furthermore, the witness averred that the letter under reference emanated from the director of survey and same is addressed to the Commissioner of Land. In addition, the witness testified that the letter speaks to and concerns L.R No. 209/10721/90.
66. Other than the foregoing, the witness testified that the letter from the Directorate of Survey also alludes to a Deed Plan. Furthermore, the witness averred that the letter confirms that the Deed Plan was duly registered culminating into a new grant being issued in respect of the suit property.
67. It was the further testimony of the witness that the suit property is situated in Halai Estate in South C. However, the witness averred that same is not conversant with the ground position of the suit property.
68. It was the further testimony of the witness that the suit property was valued at the request and instance of the 1st Defendant. In particular, the witness testified that the valuation reports have been tendered and produced before the court. Furthermore, the witness averred that the valuation reports before the court relate to L.R. No. 209/12892 (Original No. 2019/10721/90).
69. With the foregoing testimony, the 1st and 2nd Defendants' case was closed.
70. The 3rd Defendant's case is premised on the evidence of one witness namely Gideon Yator Chebii. Same testified as DW2.
71. It was the testimony of the witness that same is a director of the 3rd Defendant. Furthermore, the witness averred that the 3rd Defendant is engaged in estate management and land brokerage.
72. It was the further testimony of the witness that by virtue of his portfolio in the 3rd Defendant, same is conversant with the facts of the case. In any event, the witness averred that same has since recorded a witness statement dated 10th May 2019 and which witness statement the witness sought to adopt and



rely on as his evidence in chief. To this end, the witness statement was duly adopted and constituted as the evidence in chief of the witness.

73. The witness also adverted to the List and Bundle of Documents dated 10th May 2019 containing twelve [12] documents and which the witness sought to tender and produce before the court. There being no objection, the same was produced as exhibits D1-D12 on behalf of the 3rd Defendant.
74. Other than the foregoing, the witness highlighted the Statement of Defence dated 2nd December 2009 and thereafter same sought to adopt and rely on the contents thereof. In particular, the witness sought to have the Plaintiff's case dismissed with costs.
75. On cross-examination by learned counsel for the 1st and 2nd Defendants, the witness averred that the suit property lawfully belongs to and is registered in the name of the 3rd Defendant. Furthermore, the witness averred that the suit property is currently charged to and in favour of the 1st Defendant.
76. On cross-examination by learned counsel of the Plaintiff, the witness averred that same filed a Statement of Defence dated 3rd December 2009. Furthermore, the witness averred that at the foot of the Statement of Defence, same has posited that he bought the suit property from Halai Developer Limited. Besides, the witness testified that same has availed a copy of the sale agreement before the court.
77. While still under cross-examination, the witness averred that the purchase price in respect of the suit property was duly paid. Nevertheless, the witness conceded that same has not produced a copy of the receipt before the court.
78. It was the further testimony of the witness that prior to and before purchasing the suit property, same [witness] examined the survey map. However, the witness admitted that the suit plot was not captured in the survey plan.
79. On further cross-examination, the witness testified that the plot which was purchased by the 3rd Defendant is L.R No. 209/12892. Nevertheless, the witness averred that the land in question was not captured/reflected in the survey map. On the contrary, the witness admitted that the survey plan reflects L. R No. 209/10721/90.
80. While still under cross-examination, the witness averred that L.R No. 209/10721 was subjected to subdivision giving rise to inter alia L. R. No. 209/10721/90. However, the witness added that L.R No. 209/12892 was not in existence at the time of the said agreement.
81. It was the further testimony of the witness that Halai Developers Limited are the ones who constructed the two shops on the suit property. Furthermore, the witness averred that the house was completed. It was the further testimony of the witness that same thereafter took possession of the suit property around the year 1996/97.
82. Additionally, the witness testified that the Plaintiff herein trespassed onto and took possession of the house standing on the suit property. The witness averred that same has tried to recover the land from the Plaintiff but his [witness] attempts have not been successful. In any event, the witness averred that the Plaintiff remains in the house.
83. It was the further testimony of the witness that same has not filed any counter-claim. For good measure, the witness maintains that same has only filed a Statement of Defence.
84. While under further cross-examination, the witness averred that same is aware that Halai Developers Limited surrendered L.R No. 209/10721/1 to the government. In any event, the witness clarified that the said property was the only one that was surrendered.



85. It was the further testimony of the witness that same applied to the Commissioner of Lands to be allocated the plot that had been surrendered. In particular, the witness averred that the plot in question was L.R No. 209/10721/1. Nevertheless, the witness admitted that same has not tendered a copy of the application letter to the Commissioner of Lands.
86. It was the further testimony of the witness that same was duly issued with a letter of allotment dated 23rd October 1995. To this end, the witness averred that the letter of allotment related to L.R No. 209/10721/90. Besides, the witness testified that the area in question was subjected to re-planning and LR No. 209/10721/1 became known as L.R No. 209/10721/90. However, the witness stated that the same has not tendered and/or produced any evidence of re-planning of the estate.
87. While still under cross-examination, the witness averred that same has tendered before the court a letter from the Director of Survey addressed to the Commissioner of Land in respect of L.R No. 209/10721/90. Furthermore, the witness averred that it is the said parcel of land which was renumbered and became L.R No. 209/12892.
88. On further cross-examination, the witness averred that the suit property is currently charged to and in favour of the 1st Defendant. Furthermore, the witness added that the banking facility secured by the suit property remains in arrears.
89. It was the further testimony of the witness that the suit property was subjected to valuation by the 1st Defendant. Nevertheless, the witness averred that it is him who procured the valuation report. Furthermore, the witness averred that it is him who pointed out the suit property to the valuer.
90. While still under cross-examination, the witness averred that the valuer did not gain entry into the suit property. Nevertheless, the witness added that he does not know why the valuer was denied the right of entry. However, the witness clarified that it is the Plaintiff who denied the valuer the right of entry.
91. With the foregoing testimony, the 3rd Defendant's case was closed.
92. Upon the closure of the hearing, the advocates for the parties sought time to file and exchange written submissions. To this end, the court proceeded to and issued directions pertaining to the filing and exchange of the written submissions. Furthermore, the court also circumscribed the timelines for the filing of the written submissions.
93. The Plaintiff filed written submissions dated 13th December 2024 and wherein same has highlighted and canvassed three issues for consideration, namely which of the two titles namely L.R 209/10721/90 and L.R 209/12892 is genuine and which one does validly exist on the ground; who is the rightful owner of the suit premises; and was the charge created by the 3rd Defendant over title no. L.R No. 209/12892 valid.
94. The 1st and 2nd Defendants filed written submissions dated 26th February 2025 and wherein same have highlighted and canvassed three issues for consideration, namely, whether the bank conducted due diligence prior to issuance of the loan facility to borrower and 3rd Defendant; Whether the charge dated 31st January 1996 drawn in favour of the 1st Defendant is valid; and whether the surrender of the title extinguished any prior claims over the property.
95. The 3rd Defendant filed written submissions dated 4th April 2025 and wherein same has highlighted and canvassed three issues for consideration, namely, the validity of the allotment letters and the subsequent title derived therefrom; the validity of the sale agreement and the Plaintiff's resulting claim; and the evidentiary standard required to establish title to land and the Plaintiff's evidence.



96. Having reviewed the pleadings filed by the parties; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the dispute beforehand turns on three salient issues, namely; whether the Plaintiff has established and proved his entitlement to (sic) L.R No. 209/10721/90 or otherwise; whether the title in respect of L. R No. 209/12892 [original no. L.R No. 209/10721/90] was procured by fraud or otherwise; and what reliefs, if any, ought to issue.
97. Regarding the first issue, namely, whether the Plaintiff has established and proved his entitlement to (sic) L.R No. 209/10721/90 or otherwise, it is important to recall and reiterate that it is the Plaintiff herein who has mounted the suit beforehand contending that same is the lawful owner and/or proprietor of the suit property. For good measure, the suit property which is claimed by the Plaintiff is L.R No. 209/10721/90.
98. To the extent that the Plaintiff claims to be the lawful owner and proprietor of the suit property, it was incumbent upon the Plaintiff to tender and place before the court plausible, cogent and credible evidence to demonstrate his entitlement to the suit property. Instructively, the Plaintiff was called upon to tender and produce not only a copy of the sale agreement but also evidence to demonstrate full payment of the purchase price. Furthermore, the Plaintiff was also obliged to tender and produce evidence that upon performing his part of the bargain, the vendor executed the transfer instrument, if at all, and thereafter that a certificate of title [certificate of lease] was issued in his [Plaintiff's] name.
99. Pertinently, the Plaintiff herein can only be heard to stake a claim to ownership of the suit property if and only if same [Plaintiff] procured the requisite certificate of title [Certificate of lease] over the suit property. For good measure, the Plaintiff herein cannot approach the court seeking to be declared as the owner of the suit property if same did not effectively perform his part of the bargain.
100. Moreover, it is not lost on this court that even though the Plaintiff is seeking to be declared as the owner of the suit property, the Plaintiff has neither impleaded the vendor of the suit property nor sought an order of specific performance. Notably, it is only an order of specific performance that would enable a purchaser to accrue title to a property which was the subject of contract. [See the holding in *Reliable Electrical Engineers (K) Ltd vMantrac Kenya Limited* [2006] eKLR].
101. Back to the question/issue as to whether the Plaintiff has proven his entitlement to the suit property. There is no gainsaying that the Plaintiff herein tendered and produced before the court a copy of the sale agreement dated 6th October 1997 entered into between Halai Developers Limited on one hand and the Plaintiff herein on the other hand. Furthermore, the said sale agreement is indicated to be in respect of L.R No. 209/10721/90.
102. Be that as it may, the Plaintiff herein tendered evidence and averred that even though same entered into and executed the sale agreement, same [Plaintiff] did not conclude/complete the payment of the purchase price. For good measure, it is instructive to recall the evidence of the Plaintiff [PW1] while under cross-examination by learned counsel for the 3rd Defendant.
103. For ease of appreciation, the Plaintiff testified as hereunder:
- "I do confirm that I paid the purchase price over and in respect of the suit property. I now wish to state that I did not pay the sum of KShs. 700,000 only. I have not produced the receipt for KShs. 700,000. I wish to clarify that I did not pay the sum of KShs. 700,000."
104. From the foregoing excerpt, what becomes apparent is that the Plaintiff himself did not complete the payment pertaining to and concerning the purchase of the suit property. The question that does arise



is whether the Plaintiff can be heard to seek a declaration as the owner of the suit property yet same [Plaintiff] admittedly failed to pay the full purchase price, or at all.

105. To my mind, without having paid the full purchase price over and in respect of the suit property, the Plaintiff's claim and/or plea of declaration is rendered illusory and legally untenable.

106. Moreover, it is also worthy to recall that even though the Plaintiff testified that same entered into and executed a sale agreement over and in respect of the suit property, the Plaintiff himself admitted and acknowledged that as at the time of entering into the sale agreement, same [Plaintiff] had not set sight on the certificate of title of the suit property which same was seeking to purchase.

107. Yet again, it is imperative to revert to the evidence of the Plaintiff [PW1] while under cross-examination by learned counsel for the 3rd Defendant.

108. Same [PW1] stated thus:

The title of the property was charged/encumbered. I don't have the title that I was purchasing. I have never seen the certificate of title alluded to in the sale agreement. I have never seen the title. I did not see the certificate of title prior to the execution of the sale agreement.

109. What arises from the testimony of the Plaintiff [PW1] is to the effect that same entered into and executed a sale agreement over and in respect of a property which same had not seen the certificate of title to. Furthermore, it also emerges that the Plaintiff herein appears to have been purchasing a property which at the point in time was encumbered [read charged].

110. Pertinently, if the title of the property which was being purchased by the Plaintiff was admittedly charged, then it means that the vendor [Halai Developers Limited] did not have the capacity to enter into and/or execute any contract of sale. Certainly, not until the title was discharged.

111. The other perspective that also arises from the testimony of the Plaintiff relates to the evidence of the Plaintiff that the only document that the Plaintiff holds and which is being deployed to stake a claim to ownership of the suit property is the sale agreement. Nothing more.

112. Before interrogating whether or not a sale agreement per se can convey legal rights and title to the Plaintiff, it is important to return to the evidence that was tendered by the Plaintiff during cross examination by learned counsel for the 1st and 2nd Defendants.

113. For coherence, PW1 [Plaintiff] stated thus:

"I have no certificate of title over the suit property. I don't have any transfer document that relates to the suit property. I don't pay rates to and in respect of the suit property. The only document that I have is a sale agreement and nothing else. I don't have any certificate of title over the suit property."

114. Other than the foregoing, it is also imperative to take cognisance of the testimony of PW1 while under cross-examination by learned counsel for the 3rd Defendant.

115. Same testified thus:

"I did not pay any stamp duty over the suit property. I don't have any certificate of title. I only have a copy of the sale agreement. That is all that I have before the court. I have never been issued with any title over the suit property."



116. The foregoing testimony reflects the totality of the evidence tendered by the Plaintiff to underpin his claim to ownership of the suit property. The question that does arise is whether the Plaintiff herein has justified his claim to be declared as the owner of the suit property.
117. I have already pointed out that what is before the court is not a claim for specific performance as against the vendor. In any event, there is no gainsaying that the vendor has not been impleaded. Furthermore, evidence abound that the vendor was placed in receivership.
118. For good measure, the claim before the court is to the effect that the Plaintiff ought to be declared as the owner of the suit property. It is important to underscore that whereas a court of law is seized of the mandate and jurisdiction to issue a declaratory order, such an order can only issue where a credible basis has been proven and established. Suffice it to state that a declaratory order does not issue as of right; and/ or for the mere asking of a Party.
119. In any event, it is imperative to underscore that courts of law do not exist to give rights, including property rights to parties. In this regard, every person who approaches a court of law to be declared as the owner of a designated property must justify acquisition of the property in any manner provided for under the law. Suffice it to highlight that the acquisition maybe on the basis of purchase, gift, allotment, or transmission.
120. Simply put, the rights must have been acquired. For clarity, the rights must not be imaginary or illusory. However, in respect of the instant matter, I am at pains to discern the foundation upon which the Plaintiff seeks a declaratory order.
121. In my humble view, a declaratory order is a serious order and can therefore only issue in appropriate and deserving cases. In any event, before such an order can issue, the claimant must place before the court a plausible basis. [See Order 3 Rule 9 of the Civil Procedure Rules 2010].
122. Flowing from the foregoing analysis, my answer to issue number one is threefold. Firstly, the Plaintiff herein cannot seek to be declared as the lawful owner of the suit property merely on the basis of a sale agreement. In any event, it was admitted and acknowledged by the Plaintiff that same did not even complete the payment of the purchase price [consideration].
123. Secondly, the Plaintiff himself conceded that at the time when same was entering into and executing the sale agreement, the suit property which was (sic) being bought was encumbered. In this regard, no rights and/or interests could have passed to the Plaintiff.
124. Thirdly, the Plaintiff by himself has acknowledged that the only document which same holds to underpin his claim of ownership to the suit property is the sale agreement. To my mind, a sale agreement by and of itself cannot pass title to landed property.
125. Quite clearly, a sale agreement is a preliminary document establishing the contractual relationship between the parties pending execution of the requisite transfer instrument and the eventual issuance of the certificate of title/certificate of lease, whichever is apposite.
126. Next is the issue as to whether the title in respect of L. R No. 209/12892 [original no. L.R No. 209/10721/90] was procured by fraud or otherwise. Other than the plea by the Plaintiff for the issuance of a declaratory order, which has been addressed in the preceding paragraphs, the Plaintiff also contended that the 3rd Defendant's title was procured by fraud. To this end, the Plaintiff has indeed impleaded and particularised fraud at the foot of paragraph 6(d) of the Amended Plaint dated 20th April 2009.



127. Having impleaded and particularised fraud, it was incumbent upon the Plaintiff to tender and adduce credible evidence to demonstrate that the certificate of title in favour of the 3rd Defendant was procured and obtained by fraud.
128. At any rate, it is worth recalling that an allegation of fraud requires to be strictly proven. Moreover, the standard of proof is above the ordinary standard that applies in civil matters. Pertinently, the plea of fraud must be proven to the intermediate standard, namely; the standard above the balance of probabilities but below beyond reasonable doubt.
129. What constitutes fraud was elaborated in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR. The Court of Appeal stated thus:

“

“52. According to Black’s Law Dictionary,

“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. As applied to contracts, it 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”.

Section 2 of RTA also defines “Fraud” as follows:

“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”

53. 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 v The Attorney General & 3 Others* Hccc 135/1998.

Whether there was fraud is, however, a matter of evidence.

130. The standard of proof applicable to matters pertaining to fraud was discussed and elaborated upon in the case of *Kuria Kiarie & 2 others v Sammy Magera* [2018] KECA 467 (KLR), where the Court of Appeal stated as hereunder:

25. The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

26. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows:

“...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.”

131. With the foregoing principle in mind, it is now appropriate to revert to the testimony of the Plaintiff and to discern whether the Plaintiff has indeed proven the plea of fraud to requisite standard or at all.

132. To begin with, the Plaintiff herein tendered evidence before the court and indicated that same had averred that the 3rd Defendant’s title to the suit property was procured by fraud. However, while under cross-examination by learned counsel for the 3rd Defendant, the Plaintiff [PW1] is on record stating as hereunder:

I am also aware that the commissioner of Lands wrote to the 3rd Defendant herein. The letter refers to the suit property. The letter before the court confirms that the suit property was duly issued to and in favour of the 3rd Defendant.

133. Furthermore, the Plaintiff [PW1] also testified thus:

“I don’t know whether the letter of allotment issued in favour of the 3rd Defendant was fake/fictitious. I also don’t know whether the receipts before the court are legitimate.”



134. Moreover, while under cross-examination by learned counsel for the 1st and 2nd Defendants, the witness testified as hereunder:

"I have contended that the certificate of title over the property is a fraud. However, I don't have any evidence to confirm that the certificate of title is a fraud. I wish to add that I don't have any title to the suit property."

135. To my mind, the nature of evidence that was tendered by and on behalf of the Plaintiff falls below the requisite standard for proving the plea of fraud. On the contrary, it is evident that the Plaintiff himself concedes that he has no evidence of fraud. If the Plaintiff himself has no evidence of fraud and yet same bore the burden of proof, then who else should be able to help the Plaintiff prove the plea of fraud. Instructively, the burden of proof rests on the Plaintiff and he was obliged to discharge the burden [See Sections 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya].

136. Other than the foregoing, it is not lost on the court that the Plaintiff himself testified about the letter that originated from the Directorate of Survey and which spoke to the fact that what was hitherto L.R No. 209/10721/90 was indeed renumbered and assigned a new L.R No, namely, L.R No. 209/12892. In any event, the letter under reference was duly tendered and produced before the court as exhibit D3 on behalf of the 3rd Defendant. ‘

137. Suffice it to state that the contents of the said letter dated 5th November 1999 was neither impugned nor invalidated. In any event, the letter under reference bears the certification at the foot thereof by the Commissioner of Lands [now defunct].

138. Irrespective of the angle that one looks at the plea of fraud, what becomes apparent is that L.R No. 209/10721/90 which was renumbered as L.R No. 209/12892 was lawfully allocated to and thereafter registered in the name of the 3rd Defendant.

139. Furthermore, it is also not lost on the court that even though the Plaintiff had contended that the allocation of the suit plot to an in favour of the 3rd Defendant was fraudulent and that the 3rd Defendant deceived the Commissioner of Lands [now defunct], the Commissioner of Lands [now defunct] was never sued and/or impleaded. Furthermore, it is also crystal clear that neither the National Land Commission [the body that took over the functions of the Commissioner of Lands] nor the Attorney General was sued.

140. My answer to issue number two is to the effect that the Plaintiff who bore the burden of proving fraud has failed to discharge the burden of proof. I am afraid that fraud cannot be proved by merely making generalised allegations and thereafter throwing same on the face of the court.

141. As pertains to the third issue, namely; what reliefs, if any, ought to issue, it is worthy to highlight that the Plaintiff herein had sought two primary reliefs. The reliefs that were sought by the Plaintiff include declaration of ownership of the suit property and an order of permanent injunction to bar the Defendants from inter alia interfering with the suit property.

142. While discussion issue number one elsewhere herein before, the court has found and held that the Plaintiff did not justify his claim to be declared as the owner of the suit property. Having failed to justify the claim for declaration, there is no gainsaying that such an order cannot issue.

143. In respect of the prayer for permanent injunction, it is important to outline that such an order would ordinarily issue to protect the rights and interests of the lawful owner of the designated property. [See *Moya Drift Farm Ltd v Theuri* 1973 E.A] 173. However, it is imperative to state that such an order



cannot be called in aid of a person who has no demonstrable [actionable] rights and/or interests over the designated property.

144. Furthermore, this court has also found and held that the suit property was re-numbered as L.R No. 209/12892 and thereafter a certificate of title was issued in favour of the 3rd Defendant. At any rate, there is no gainsaying that no relief was ever sought to invalidate and/or cancel the said certificate of title.
145. Besides, it is common ground that the said certificate of title remains in situ. To this end, it then means that the bearer of the certificate of title holds the statutory rights and privileges attendant to such title. [See Sections 24 and 25 of the [Land Registration Act](#) 2012].
146. To the extent that the 3rd Defendant continues to hold the certificate of title to an in respect of L.R No. 209/12892 [Original number 209/10721/90], it means that an order of permanent injunction cannot issue and/or be granted against it. For good measure, the issuance of a such an order, if at all, would be tantamount to negating the certificate of title in the absence of any credible basis.
147. Before departing from this issue, it is imperative to take cognisance of the decision in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR) where the Court of Appeal stated thus:

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.

148. In the premises, I am afraid that the order of permanent injunction which has been sought against the Defendants and more particularly, the 3rd Defendant has been sought in vacuum. Same does not lie.

Final Disposition:

149. Flowing from the foregoing analysis, it is evident that the Plaintiff herein has not established and/or proven his claim to and/or in respect of the suit property to the requisite standard. In this regard, I find and hold that the Plaintiff's suit is bereft of merits.
150. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder:
- i. The Plaintiff's suit be and is hereby dismissed.
 - ii. Costs of the suit be and are hereby awarded to the Defendants.
 - iii. The costs in terms of clause (ii) hereinabove shall be agreed upon and in default, same to be taxed in the conventional manner.
151. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI ON THE 23RD DAY OF APRIL, 2025.

OGUTTU MBOYA, FCIArb

JUDGE.

In the presence of:

Benson/ Brandy: – Court Assistant[s].

Mr. Kimani h/b for Mr. Gichachi for the Plaintiff.

Ms. Kyumu for the 1st and 2nd Defendants.



Mr. T. Ruto for the 3rd Defendant.

