



REPUBLIC OF KENYA



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**Ulungalu Na Utanu Yatta Trading Industry and Transport Co. Limited v Francis Mutua Mboya t/a Mutua Mboya & Nzissi Advocates & 2 others (Environment & Land Case 72 of 2003) [2024] KEELC 1692 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1692 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT & LAND CASE 72 OF 2003**  
**CA OCHIENG, J**  
**APRIL 4, 2024**

**BETWEEN**

**ULUNGALU NA UTANU YATTA TRADING INDUSTRY AND TRANSPORT CO. LIMITED ..... PLAINTIFF**

**AND**

**FRANCIS MUTUA MBOYA T/A MUTUA MBOYA & NZISSI ADVOCATES ..... 1<sup>ST</sup> DEFENDANT**

**NGANGA NGIGI T/A NGANGA NGIGI & CO. ADVOCATES 2<sup>ND</sup> DEFENDANT**

**PAUL NDIKU MUNYWOKI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Through a Plaint dated the 23<sup>rd</sup> September, 2003 and amended on 2<sup>nd</sup> December 2008, the Plaintiff sought the following Orders against the Defendants for:-
  1. An order declaring the memorandum of appearance and defence as well as the proceedings and consent orders in Civil Suit No. 82 of 2002 pending before this court together with all consequential orders a nullity.
  2. A permanent injunction restraining the 1<sup>st</sup> Defendant herein from transferring, alienating, trespassing or in any other manner interfering with the Plaintiffs quiet possession of the suit land herein.
  3. Costs of the suit.
  4. Spent



5. The Sale Agreement between the 3<sup>rd</sup> Defendant and the 1<sup>st</sup> Defendant be declared null and void by the court.
2. The 1<sup>st</sup> Defendant opposed the suit by filing his defence dated the 7<sup>th</sup> November, 2003 wherein he denied the averments in the Plaint. He averred that he was a bona fide purchaser for value of the suit land. He was insistent that there was a pending suit being HCCC NO. 82 of 2002 between the parties herein.
3. The 2<sup>nd</sup> Defendant filed a Defence dated the 29<sup>th</sup> October, 2003, denying the averments in the Plaint. He denied recording the consent in HCCC No. 82 of 2002 and allegations of fraud contained in the Plaint. He contended that there was a pending related suit.  
  
There was no defence from the 3<sup>rd</sup> Defendant.
4. The matter proceeded for hearing where both the Plaintiff and Defendants' called witnesses.

### **Evidence of the Plaintiff**

5. The Plaintiff called two witnesses PW1 John Michael Musya and PW2 PW2 Julius Wambua Malai. They confirmed that as at June 2002, the Plaintiff was the proprietor of the suit land. They denied that the Plaintiff had sold the suit land to third parties moreso to the 1<sup>st</sup> Defendant. They explained that before transfer of the suit land to the 1<sup>st</sup> Defendant, one of the Plaintiff's Director's had placed a caution to prevent the said transfer. They explained that there was a consent order in Machakos HCCC No. 82 of 2002 which was obtained fraudulently as the Plaintiff never participated in the said suit. Further, it is through the said consent that enabled the 1<sup>st</sup> Defendant to acquire the suit land.
6. During cross-examination they denied instructing the 2<sup>nd</sup> Defendant to represent them in HCCC No. 82 of 2002. They denied knowledge of the Sale Agreement dated the 16<sup>th</sup> February, 1993 which the Chairman Moses Mutune and one director Kyalo Muendo had entered into, with the 1<sup>st</sup> Defendant. It was their testimony that one Director and the Chairman held a secret meeting where they decided to sell the suit land without informing the members. Further, that the said meeting was attended by Moses Mutune, the former Chairman of County Council Kyalo Muendo and the wife of the former Chairman who acted as the Secretary and the meeting resolved to sell the suit land to the 1<sup>st</sup> Defendant. They testified that the matter was reported to the D.O, D.C and OCS Embu which culminated in the arrest of the director and Chairman. Upon re-examination, they clarified that they never filed Machakos HCCC No. 82 of 2002 but became aware of its existence much later. They denied being served with summons to enter appearance and instructing anyone to defend them in the said suit. They reiterated that the company was not aware of the alleged sale of suit land as there was no board resolution authorizing it, but the two Directors indicated in the impugned Sale Agreement, purportedly held a meeting. Further, they reported John Muendo Kyalo and Moses Mutune as they took the title and handed to the 1<sup>st</sup> Defendant. On minutes dated the 10<sup>th</sup> February, 1993, they clarified that the people indicated therein were not Directors apart from the Chairman Moses Mutune and a member Muendo Kyalo. It was their testimony that after discovering the suit land had been fraudulently transferred, they reported the issue to DO and DC Machakos and thereafter the said two Directors were arrested. They further clarified that Moses Mutune and Muendo Kyalo are both deceased hence they could not sue them. The Plaintiff produced the following documents as exhibits: Agreement dated 7<sup>th</sup> day of March; Certificate of Official search for Machakos/Matuu/5960; Certificate of Official search for Machakos/Matuu/5959; Certificate of Official search for Machakos/Matuu/5958; Certificate of Official search for Machakos/Matuu/5957; Certificate of Official search for Machakos/Matuu/5956; Certificate of Official search for Machakos/Matuu/5955; Caution for



title numbers Machakos/Matuu/5955, 5956, 5957, 5958, 5959, 5960; Plaintiff's member delegation for the 5<sup>th</sup> September 2005; Letter dated 28<sup>th</sup> October, 2005 from the Complaint's commission; Letter dated 25<sup>th</sup> June, 2004 from the Provincial criminal investigation Officer; Proceedings in Machakos HCC No. 82 of 2002.

### **Evidence by the Defendants**

7. DW1 Francis Mboya Mutua who is the 1<sup>st</sup> Defendant testified that in 1993, he had been approached by the Directors of the Plaintiff, being Moses Mutune Kithome and Mwenda Kyalo with an offer to sell to him the suit land. He confirmed that he purchased the said suit land at a price of Kshs. 240,000.00 which he paid through a cheque. It was his testimony that the said Directors provided him with all necessary documents which included: Certificate of Incorporation, copy of the Plaintiff's Memorandum and Articles, Plaintiff's minutes authorizing the sale of the plot and copy of the adjudication books as the titles had not been issued. He claimed to have visited the plot in 1993. He was emphatic that it is the Plaintiff that handed over vacant possession of the said land to him. Further, that he had been handed over the Title Deed in March, 1993 when titles were out. He explained that together with the Plaintiff, they had filed Machakos HCCC No. 82 of 2002 and their advocate on record filed the relevant documents and later approached the 2<sup>nd</sup> Defendant who informed him that the Defendants' therein had been paid their share of the purchase price by the Plaintiff's Directors, hence they would not be contesting the said suit. He denied knowledge of any fraud and was surprised that the 2<sup>nd</sup> Defendant had not been instructed to defend Machakos HCCC No. 82 of 2002. Upon cross-examination by the Plaintiff's Counsel, he stated that he was approached by Moses Mutune Kithome and Muendo Kyalo to sell the suit land, being Machakos/Matuu/594 and that they were also selling another parcel of land No. 3596. He averred that he purchased the suit land at Kshs. 240,000 by cheque which he issued to the Plaintiff. He testified that he had conducted due diligence to confirm the names of the Directors of the Plaintiff Company, who had come to him with the Memorandum of Association, Certificate of Incorporation and Articles of Association. Further, that their names appeared in the Articles of Association and Memorandum of Association and they had Minutes of Directors' meeting authorizing them to dispose of the suit land which were only signed by two Directors, Muendo Kyalo and Moses Mutune respectively. He confirmed to have drawn the two agreements but the minutes were not clear on which property was to be sold and just mentioned plots. He was not aware if there was an AGM or SGM authorizing the sale of suit land nor was he issued with any other minutes authorizing the sale of the said land. He could not recall the exact date the Title Deed was issued and confessed that he did not undertake any due diligence on the minutes as they were sealed and that the persons who were indicated as absent with apology were George K. Wambua and Sammy Mutiso Mutunga. He reaffirmed that at the execution part, the same were signed by the Secretary, Muendo Kyalo, Charles Maithya, George K. Wambua, Sammy Mutiso Mutunga and Moses Mutune Kithome (Chairman Board of Directors). Further, that George K. Wambua and Sammy Mutiso Mutunga despite being indicated as absent signed the minutes. He further confirmed that in 1979 there were five Directors of the Plaintiff. He was not aware if there was an AGM to ratify the minutes dated the 6<sup>th</sup> February, 1993. It was his further testimony that he filed Machakos HCCC No. 82 of 2002 together with the 2<sup>nd</sup> Plaintiff as the Chairman Moses Mutune Kithome gave him instruction to institute the suit on its behalf, although he did not have a resolution from the 2<sup>nd</sup> Plaintiff to file the suit. He could not confirm whether the Defendants' in Machakos HCCC No. 82 of 2002 were directors of the 2<sup>nd</sup> Plaintiff. He explained that in Machakos HCCC No. 82 of 2002, they entered into a consent with all the Defendants, who were represented by the 2<sup>nd</sup> Defendant herein but the court order did not indicate the name of the Judge who issued it. Further, that in prayer No. 2 of the said consent order issued on 22<sup>nd</sup> August, 2002, it indicated the title as Machakos/



Matuu/894 while in prayer No. 1 the title is indicated as Machakos/Matuu/594. He was categorical that the Caution that had been placed in reference to Machakos/Matuu/594, was removed pursuant to the court order issued on 22<sup>nd</sup> August, 2002. He further confirmed that the draft consent and the court order issued on 22<sup>nd</sup> August 2002 differed. Further, that he sold the suit land in 2009 to Paul Muthoki but he did not know if it was subdivided or not. He was not aware if the directors of the Plaintiff issued instructions to be defended in HCCC No. 82 of 2002. He could not recall if the draft consent order compromised the whole suit or Application. He contended that the draft consent order emanated from their office and was approved by the 2<sup>nd</sup> Defendant. Further, that the Court order dated the 22<sup>nd</sup> August, 2002, was issued by the Deputy Registrar but he never served it upon the 2<sup>nd</sup> Defendant. He recalled that it is the Court Order that he used to transfer the suit land in his name. He further explained that the order in respect to the application dated the 16<sup>th</sup> September, 2002 was directed to Executive Officer instead of Deputy Registrar but could not recall if he served it upon the 2<sup>nd</sup> Defendant. He reiterated that the transfer of the suit land to him was signed by the Senior Executive Officer, Machakos. On re-examination, he clarified that he was provided with a clear copy of the Sale Agreement with a visible seal of the document and he did not require any minutes for the transfer as it was a consequence of the Sale Agreement. Further, he never sought for the minutes but instructed a process server to serve summons upon all the Defendants in Machakos HCCC No. 82 of 2002. He produced the following documents as exhibits: Certificate of Incorporation dated 26<sup>th</sup> February 1979; Memorandum and articles of the Plaintiff dated 6<sup>th</sup> June 1979; Minutes of the Plaintiff's Director's meeting of 6<sup>th</sup> February 1993; Adjudication Plot No. 594 and Plot No. 3569; Agreement between the Plaintiff and Mr. Nzuki dated 16<sup>th</sup> February 1993; Agreement between the Plaintiff and the 1<sup>st</sup> Defendant dated 16<sup>th</sup> February 1993; Title for Machakos/Matuu/594 dated 13<sup>th</sup> October 1993; Search dated 12<sup>th</sup> September 2002; Plaint in Machakos HCCC No. 82 of 2002; Mr. Kithome's Affidavit dated 27<sup>th</sup> June 2002; Notice of Preliminary Objection in Machakos HCCC No. 82 of 2002; Defendants' joint defence in Machakos HCCC No. 82 of 2002; Approved draft order in Machakos HCCC No. 82 of 2002; Chamber summons in Machakos HCCC No. 82 of 2002 dated 16<sup>th</sup> September 2002; Court orders dated 12<sup>th</sup> September 2002 in Machakos HCCC No. 82 of 2002; Copy of executed transfer form; Notice of Appeal in Machakos HCCC No. 82 of 2002; Notice of address for service in Machakos HCCC NO. 82 of 2002; Affidavit of John Mutua Kamunya dated 24<sup>th</sup> September, 2002; Affidavit of John Mutua Kamunya dated 2<sup>nd</sup> December, 2008; Registrar of Companies letter dated 29<sup>th</sup> January, 2003 and Affidavit of John of John Mutune Kithome dated 24<sup>th</sup> March, 2009.

8. DW2 Zechariah Ng'ang'a Ngigi, who is an advocate testified that in July, 2002, three middle aged men had gone to his office and said that they had been sued together with four others in HCCC No. 82 of 2002 and sought legal representation. He confirmed that they agreed on the legal fees. He testified that he entered appearance on their behalf and filed a Defence including a Preliminary Objection. He explained the circumstances leading to the drafting of the consent by the Plaintiff's Counsel therein. He further explained that the Plaintiff's Counsel in HCCC No. 82 of 2002 served him with a draft consent on 6<sup>th</sup> June, 2002 which he signed and thereafter the same was filed in court on 13<sup>th</sup> August, 2002. He further testified that he did not hear from any of the parties since then, until the year 2003 when three elderly men went to his office accompanied by an officer from the Provincial Criminal Investigation, Embu. Further, the officer briefed him that he had purportedly acted for three men in the HCCC No. 82 of 2002 and that one Francis Mutua was an advocate had fraudulently transferred the suit land to himself. During cross-examination, he confirmed that he acted for all the Defendants in Machakos HCCC No. 82 of 2002 while the 1<sup>st</sup> Defendant was the advocate acting for the Plaintiffs in the said matter. He explained that the witnesses who had testified for the Plaintiffs herein were different from those that instructed him. He realized he had been duped by impostors. It was his contention that the 1<sup>st</sup> Plaintiff in Machakos HCCC No. 82 of 2002 called Francis M. Mutua and the Advocate



acting for the Plaintiff who was Mutua Mboya Nzissi was one and the same person. He denied drafting the consent which was brought by the firm of messrs Mutua Mboya Advocate, insisted that there were changes as Order No. 3 fully disposed of the entire suit whereas it was only supposed to compromise the application dated the 27<sup>th</sup> February, 2002. He highlighted how the Consent was altered without his consent, culminating in the suit land being registered in the 1<sup>st</sup> Defendant's name. It was his testimony that in Paragraph 5 of his defence, he had stated that allegations of fraud against him were misplaced. He referred to the searches in the Plaintiff's bundle of documents and confirmed there were several owners of the suit land who are not parties to this suit and was emphatic that the root of their title should be investigated.

## **Parties Submissions**

### **Submissions by the Plaintiff**

9. The Plaintiff in its submissions reiterated its averments as per the Plaint and contended that the entire suit was based on fraud. It insisted that the title held by the 2<sup>nd</sup> Defendant was fraudulently obtained hence could not be sufficient proof of ownership. As for the alleged consent entered into between the parties in HCCC No. 82 of 2002, it submitted that there was no agreement between them since the parties who allegedly entered into a consent were the wrong ones. To buttress its averments, it relied on the following decision: *Munyu Maina vs Hiram Gathira Maina*, Civil Appeal No. 239 of 2009.

### **Submissions by the 1<sup>st</sup> Defendant**

10. The 1<sup>st</sup> Defendant in his submissions insisted that the instant suit is bad in law and abuse of the court process since there was another suit in which the matter in issue herein is directly and substantially in issue therein. On the allegations of fraud, he submitted that the Directors' of the Plaintiff seem to be split into two groups but instead of settling their issues they are unfairly accusing him. He reiterated that he was an innocent purchaser for value and that the transfer was duly signed by the Senior Executive Officer, an officer of the High Court with authority just like the Deputy Registrar. On the allegations by the 2<sup>nd</sup> Defendant, he submitted that the said Defendant is bound by his defence which he filed on 29<sup>th</sup> October 2003. To support his averments, he relied on the following decisions: *R vs Paul Kihara Kariuki, Attorney General and 2 Others Ex Parte Law Society of Kenya*, *Elizabeth O.Odhiambo v South Nyanza Sugar Co.Ltd* [2019] eKLR and *Sangram Singh vs Election Tribunal Kotah* (AIR 1953 664).

### **Submissions by the 2<sup>nd</sup> Defendant**

11. The 2<sup>nd</sup> Defendant in his submissions concurred with the Plaintiff that proceedings in HCCC No. 82 of 2002 should be expunged and the title held by the 1<sup>st</sup> Defendant ought to be cancelled by dint of Section 26(1) of the *Land Registration Act*, 2012 on the grounds of fraud and misrepresentation. On the issue of costs, he submitted that the Plaintiff was not entitled to costs against him as no demand notice was served upon him, prior to the filing of the suit. Further, that he had agreed to assist the Plaintiff towards quashing of the proceedings in HCCC No. 82 of 2002 as well as cancellation of the 1<sup>st</sup> Defendant's title.

## **Analysis and Determination**

12. I have considered the Pleadings, Testimonies of the Witnesses, Exhibits including rivalling Submissions and the following are the issues for determination:-
  - a. Whether the 1<sup>st</sup> Defendant legally acquired the suit land.



- b. Whether the 1<sup>st</sup> Defendant can be deemed to be a bona fide purchaser for value without notice.
- c. Whether the consent order issued in HCCC No. 82 of 2002 on 22<sup>nd</sup> August 2002 bound the Plaintiff.
- d. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

It is not in dispute that the Plaintiff was the initial owner of the suit land.

13. The Plaintiff claimed that as at 28<sup>th</sup> June, 2002, it was the registered owner of the suit land situate at Matuu market. Further, one of the Company's Directors had placed a caution after the 1<sup>st</sup> Defendant had claimed to have purchased it and sought the same to be transferred in his name. It was the Plaintiff's contention that the 1<sup>st</sup> Defendant had filed HCCC No. 82 of 2002 in which he alleged that the Plaintiff had sold the suit land to him. Further, that the Defendants in the said suit, who were no longer members of the Plaintiff company were interfering with the smooth transfer of the said parcels of land to him. It emerged in evidence that summons in the said suit were never served upon the Defendants therein but certain three persons, instructed the 2<sup>nd</sup> Defendant herein to represent them. Further, this culminated in the parties in HCCC No. 82 of 2002 entering into a consent without the knowledge of the rightful Plaintiff and resulting in the transfer of the Plaintiff's aforementioned parcel of land to the 1<sup>st</sup> Defendant. The Plaintiff contends that these actions of were fraudulent and occasioned great miscarriage of justice to it. The 1<sup>st</sup> Defendant insisted that there was a consent in HCCC No. 82 of 2002 culminating in his obtaining a transfer of the suit land in his name. Further, that he was hence a bona fide purchaser for value. It further emerged in evidence that during the pendency of this suit, the 1<sup>st</sup> Defendant proceeded to transfer the suit land to the 3<sup>rd</sup> Defendant on 5<sup>th</sup> May, 2005. Further, that the suit land was subdivided on 28<sup>th</sup> February 2008 into plots being Nos. 5955, 5956, 5957, 5958, 5959 and 5960 respectively. The 2<sup>nd</sup> Defendant as DW2 confirmed that the persons who approached him to defend them in HCCC No. 82 of 2002 were not the Plaintiff's directors as he learnt that they were imposters when the real directors including the Police went to his office. DW2 further confirmed that the alleged consent that the 1<sup>st</sup> Defendant sent to his office was in respect to compromising an application and not to conclude the suit and transfer the land to him. Further, he insisted that the 1<sup>st</sup> Defendant had added a paragraph into the alleged consent. The 1<sup>st</sup> Defendant confirmed that he used the court order emanating from the consent to transfer the land to himself. Further, that the said transfer forms were executed by the Senior Executive Officer and not the Deputy Registrar. Which bring this question that if the parties who entered into the consent to transfer the land were imposters, then does it bind the Plaintiff. Further, could the Executive Officer have capacity to sign transfer forms in a High Court matter and with these events, did the 1<sup>st</sup> Defendant legally acquire a proper title to the suit land. DW1 claimed that the Directors' whose name appeared in the Articles and Memorandum of Association had minutes dated the 6<sup>th</sup> February, 1993 authorizing them to dispose of the suit land. Further, that the minutes were signed by two Directors, Muendo Kyalo and Moses Mutune only. It is on this basis that he entered into a Sale Agreement with them. Further, he confirmed that he is the one who drew the two Agreements for sale of plot 3596 and the suit land. He however admitted that the said minutes were not clear on which property was to be sold and just mentioned plots. It was DW1's testimony that he filed Machakos HCCC No. 82 of 2002 together with the 2<sup>nd</sup> Plaintiff and the Chairman Moses Mutune Kithome who gave him instruction to do so on their behalf, although there was no company resolution to that effect. He claimed in Machakos HCCC No. 82 of 2002, they entered into a consent with all the Defendants, who were represented by the 2<sup>nd</sup> Defendant herein but the court order did not indicate the name of the Judge who issued it. Further, prayer No. 2 of the said consent order issued on 22<sup>nd</sup> August, 2002, indicated that the title as Machakos/Matuu/894 while in prayer No. 1 the title is indicated as Machakos/Matuu/594. DW1 further admitted that a Caution



which had been placed in reference to Machakos/Matuu/594 was removed pursuant to the court order issued on 22<sup>nd</sup> August, 2002. He also confirmed that the draft consent and the court order issued on 22<sup>nd</sup> August 2002 differed. DW1 however could not recall anything contained outside the draft consent order or if it was to compromise the whole suit or Application but insisted that as per the wording of the draft Order at prayer No. 3, they were dealing with an Application. He also confirmed that the draft consent order emanated from their office and was approved by 2<sup>nd</sup> Defendant and that the Court order dated the 22<sup>nd</sup> August, 2002, was issued by the Deputy Registrar but there was a probability that he may never have served it upon the 2<sup>nd</sup> Defendant. DW1 claimed that the Plaintiff's handed over the suit land to him in 1993 but when it came to ownership in 2002, he had to file an Application dated the 16<sup>th</sup> September, 2002 seeking the Executive Officer to be directed to sign the transfer forms instead of the Deputy Registrar. DW2 in his testimony confirmed that there were imposters who instructed him to represent them in Machakos HCCC No. 82 of 2002. Further, that the 1<sup>st</sup> Defendant amended the terms of the draft consent and inserted an order that would enable him be registered as owner of the suit land, which was not the position as it was only meant to compromise the Application dated the 27<sup>th</sup> February, 2002. He confirmed that the 1<sup>st</sup> Plaintiff in Machakos HCCC No. 82 of 2002 called Francis M. Mutua and the Advocate acting for the Plaintiff who was Mutua Mboya Nzissi was one and the same person. From the evidence tendered by the parties herein and looking at the exhibits presented, I note DW1 failed to produce any resolution from the Plaintiff that confirmed selling of the suit land by the company. The 1<sup>st</sup> Defendant did not offer any proper explanation on why he failed to serve DW2 with a notice to attend court so as to record the impugned consent. I note he was only dealing with two Directors of the company. As for the consent, there were amendments but he failed to share the final copy with the 2<sup>nd</sup> Defendant. Further, he ensured he sought for the Executive Officer to sign the Transfer Forms knowing fully well as an Advocate, that for High Court matters, it is the Deputy Registrar who was supposed to sign them. To my mind these were glaring anomalies that required explanations. Further, despite the pendency of this suit, the 1<sup>st</sup> Defendant proceeded to transfer the suit land to himself, disposed of it to a third party and the said land was later subdivided. It seems to me, he wanted to defeat this suit by destroying the fulcrum of the dispute. The Plaintiff alleged fraud in the 1<sup>st</sup> Defendant's acquisition of the suit land, and from the evidence presented, I find it discharged its burden of proof, since it was clear the 1<sup>st</sup> Defendant was only dealing with the Plaintiff's two Directors whom he claimed also instructed him to file HCCC No. 82 of 2002 against the other directors, yet there was no company resolution produced to confirm this position.

15. On proof of ownership of land, I wish to make reference to Sections 24(a) and 26(1) of the [Land Registration Act](#). Section 24(a) of the [Land Registration Act](#) states thus:-

Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto..."

16. While Section 26(1) of the [Land Registration Act](#) stipulates thus:-

The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -



- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

17. In Civil Appeal No. 246 of 2013 Arthi Highway Developers Limited Vs West End Butchery Limited and Others, the Court of Appeal expressly stated thus:-

Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

18. In the case of Richard K. Bunei & 8 others t/a Geo-Estate Development Services v Lorien Ranching Company Limited & 799 others (being sued on behalf of themselves and on behalf of alleged 795 Members) [2017] eKLR, the Court of Appeal held that:-

We now turn to the question of whether the orders obtained in HCCC 80 of 1983 as well as in 252 of 1994 and 264 of 2008 were fraudulent, which we shall answer together with the issue raised in this appeal of whether it was proper for the learned Judge to declare those orders to be null and void. The plaintiff avers that the Tunoi consent in particular was fraudulent in several respects the particulars of which were pleaded as we have set them out earlier in this judgment. We think that in view of the various findings we have already made, the conclusion is inescapable that the consent orders that were made against the interest and to the prejudice of the Company and its bona fide members numbering 613 were fraudulent through and through. There seems to be no doubt and it is plain to see that the Birgen Group, sued as defendants in the High Court were not shareholders of the Company yet they held themselves out to be; they concealed the fact that there were only 613 genuine members of the Company who had paid the full purchase price and been settled on the Farm since 1970 being facts they were fully aware of; Birgen misled his group and the courts that entered the consents that he was a shareholder and Director of the Company while well knowing that he never was and/or had ceased to be so; Birgen collected money from various members of his group including his co-defendants which never did nor could reach, the Company yet used court proceedings to attempt to impose strangers on the Company’s Farm; Birgen in collusion with Samson Malakwen Arap Serem colluded for Birgen to appear as a defendant and conclude consents when he in fact was a plaintiff; and the Birgen Group fraudulently entered names of strangers in the Company’s register as pleaded in the plaint.

19. On our own assessment and analysis of the evidence, the fraud committed against the Company that emerges was even more egregious than was pleaded and particularized. Taking fraud to mean, as it does from Black’s Law Dictionary 9th Edn. 2009 Thomson Reuters P 731; “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment, a misrepresentation made recklessly without belief in its truth to induce another person to act; ... unconscionable dealing,” it is evident that the consent orders that were under attack in the suit,



especially the Tunoi consent, were a cynical study in fraudulent conduct on the part of the Birgen Group who included the defendants in the Court below. It is instructive that the Tunoi consent order was made in Civil Suit NO. 80 of 1983 filed by Wilson Arap Birgen and 799 Others against the Company which further reinforces our earlier findings that the protests of innocent victimhood of some unknown, unserved, undeterminable defendants who may not have been aware of the proceedings in the court below is wholly unmeritorious.

20. In that consent, the Coram reads that the defendants (sic) were present. As the Company was the defendant and its true directors not having been present, with none in fact named as such in the order, and absent any authority for participation in that suit, the coram itself was false and misleading and was setting the stage for proceedings detrimental to the Company.
21. The consent also named Samson Arap Malakwen and Wilson Arap Birgen as ‘Consultants’, a term the context and meaning whereof is not immediately discernible. It then proceeded to lay down various orders which can only be described as a study in depredation and depletion of the Company’s land by literally sharing it out to strangers, persons and groups that were not entitled. This was being done without the knowledge, consent and authority of the Company and, by all appearances, entirely without consideration, in what was clearly an attempt to subvert and abuse the judicial process by deploying it as a forum and tool for a most calculated, detailed and vicious scheme of land theft. It purported to establish the membership of the Company at 2500 which was a four-fold inflation of the true membership. It purported to authorize or direct the opening of a bank account in the Company’s name with some four persons as its signatories including Wilson Arap Birgen and John Kamau Kahiga who has featured prominently in this endless rounds of litigation against the Company. It allocated some 300 acres to an amorphous group called the “Wangari Group” and then added some 120 people comprising “Kamotho’s Group” into the Birgen Group. It also deigned to allocate some 600 acres to the Karen Group. All of this appears to have been a systematic quartering and squandering of the Company’s land in a veritable free-for-all. It involved misrepresentations and concealment of various obvious facts as we have already established them from the record. It was all an obvious fraudulent scheme and we say so cognizant of the high standard of proof for fraud as it is quasi-criminal in character.
22. How then was the Company to deal with the fraudulent consent orders once they came to its attention” A central plank of the appellants’ complaints before us, and captured in ground 6 of the memorandum of appeal, is that the learned Judge lacked jurisdiction to impeach and therefore nullify the court orders said to have been obtained by fraud. It is telling, though, that neither Mr. Kamweru nor Mr. Nganga and Mr. Ndegwa who supported the appeal attempted in their address to us to assail the learned Judge’s orders consequent upon finding that fraud had been established a propos the consent orders. Indeed, their respective written submissions are also silent on the subject. And we think there was cause for that coyness.
23. The jurisdictional competence of the court below to entertain a fresh suit to nullify court orders previously made in other suits on account of fraud had previously been raised in the proceedings leading to this appeal by way of preliminary objection which Juma, J. by a brief ruling made on 28th May 2003 rejected thus;

“At the commencement of the hearing of this suit, counsel for one of the defendants took up a preliminary objection to the effect that this suit is incompetent. If the plaintiff seeks to set aside orders in those earlier cases, then the application should have been brought in those earlier cases, and not to file a new case. The other objection is that the suit is res judicata.



It would appear that counsel did not understand the import of this case. If I got what counsel for the plaintiff was arguing about, it is to the effect that the defendants, purporting to be duly authorized agents of the plaintiff filed suits against other parties. The present suit is by the “legal” plaintiff against those who misused its name. This is a complete new case with a new cause of action and parties are clearly different. ...This Court, after expressing its opprobrium against fraud when proved to have been used to deceive the court, as an “insidious disease” that “spreads and infects the whole body of the judgment”, dismissed the appeal and authoritatively endorsed the holding of the Privy Council in the above-cited Hip Goong Hong case (supra) quoting with approval the judgment of the Committee as delivered by Lord Buckmaster at P 894; “A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail; ...where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient.”

24. This Court also referred to and accepted the earlier decision of the Queens Bench Division in *Cole Vs. Langford* [1898] 2 QB 36 which, after considering the decisions of Jessel M. R. in *Flower Vs. Lloyd* 6 Ch. D 297 and Lord Justice Baggallay in *Baker Vs. Wadsworth* [1898] 67 L.J. Q.B 301 held that;

“Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside.” Finally, this Court did also consider and was fully persuaded by yet another English decision, this time of the former House of Lords in *Jonesco vs. BEARD* [1930] AC which held categorically and in a manner that seemed to put the matter beyond dispute that; “It is the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action, in which the particulars of the fraud must be exactly given and the allegation must be established by strict proof. Although there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial, if for any special reason departure from the established practice is permitted; the necessity for stating the particulars of fraud and the burden of proof are in no way abated and all the strict rules of evidence apply.” Given that resounding endorsement of a new trial as the mode for uprooting a judgment obtained by fraud, spoken no less than by this Court itself, we do not see that any arguments to the contrary stood any chance. The appellants knew this well and kept their peace. The decision of this Court was before the learned Judge and it was binding upon him. In proceeding to hear and determine the case he proceeded properly and we, on our part have no difficulty finding and holding that the suit was competent and that fraud having been established, the learned Judge was perfectly entitled to nullify the fraud-tainted consent orders.” Emphasis mine

25. See also the Ugandan Court of Appeal Case of *Katende V Haridar & Company Ltd* that provided parameters who can be deemed a bona fide purchaser for value as well as the Court of Appeal Case of *Munyi Maina v Hiram Githiha Maina* (2013) eKLR on tracing of root of title.
26. Based on the evidence before me while associating myself with the cited decisions as well as the legal provisions quoted above, since the 1<sup>st</sup> Defendant obtained a consent fraudulently in HCCC No. 82 of 2002 against imposters who were not directors of the Plaintiff who had not even been served with



summons to enter appearance and thereafter proceeded to transfer the suit land to himself and later disposed off the said land to third parties, I find that the Plaintiff has indeed demonstrated that he indeed acquired the suit land fraudulently. I opine that HCCC No. 82 of 2002 was stage managed by the 1<sup>st</sup> Defendant and concluded hastily by consent so as to fraudulently take away the suit land from the Plaintiff and hence hold that the orders emanating therefrom cannot be used to sanctify his title as well as deny a company its land. It is my considered view that since the 1<sup>st</sup> Defendant proceeded to dispose of land, which root of title was fettered, then he is responsible for any dispute emanating from the third parties that acquired the said resultant subdivisions. It is interesting to note that the 1<sup>st</sup> Defendant despite knowing his title was challenged and previously having been, the Plaintiff's Advocate, still proceeded to dispose of it, despite the pendency of this suit and this is a key pointer to fraud. In the circumstances, and in the interest of justice, I find that the only recourse is to invoke the provisions of Section 143 of the Registered Land Act (repealed) which is similar to Section 80 of the Land Registration Act and revoke/cancel all the resultant titles which emanated from the suit land, and revert them back to the Plaintiff company.

27. In the foregoing, I find that the Plaintiff has proved its case on a balance of probability and will enter Judgment in its favour. I will however exonerate the 2<sup>nd</sup> Defendant as it was clear he was conned by imposters and even agreed to be a prosecution witness.

I will proceed to enter the following final Orders:-

1. A declaration be and is hereby issued that the Memorandum of Appearance and defence as well as the proceedings and consent orders in Civil Suit No. 82 of 2002 pending before this court together with all consequential orders are a nullity.
2. The Title to LR No. Machakos/Matuu/594 issued to the 1<sup>st</sup> Defendant including the resultant titles being Nos. 5955, 5956, 5957, 5958, 5959 and 5960 emanating therefrom be and are hereby revoked and reverted back to the name of the Plaintiff.
3. A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant herein from transferring, alienating, trespassing or in any other manner interfering with the Plaintiffs quiet possession of LR. No. Machakos/Matuu/594.
4. The Sale Agreement between the 3<sup>rd</sup> Defendant and the 1<sup>st</sup> Defendant be and is hereby declared null and void by the court.
5. Costs of this suit is awarded to the Plaintiff to be borne by the 1<sup>st</sup> Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4<sup>TH</sup> DAY OF APRIL, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of;

Munyao for Plaintiff

Mutua Mboya for 1<sup>st</sup> Defendant

Court Assistant – Simon/Ashley

