



Malai & 4 others v Blue Horizon Properties Ltd & 3 others (Civil Suit 467 of 2011) [2023] KEELC 20652 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 467 OF 2011
LL NAIKUNI, J
OCTOBER 5, 2023**

BETWEEN

**MZURI MALAU MALAI 1ST PLAINTIFF
JUMAA KOMBE CHARO 2ND PLAINTIFF
PETER K. KALAMA 3RD PLAINTIFF
JEFWA KAZUNGU KALUTE (Suing for his own and on behalf of
MIRITINI REDEEMED GOSPEL CHURCH) 4TH PLAINTIFF
TRUSTEES OF REDEEMED GOSPEL CHURCHES INCORPORATED 5TH
PLAINTIFF**

AND

**BLUE HORIZON PROPERTIES LTD 1ST DEFENDANT
MUNICIPAL COUNCIL OF MOMBASA 2ND DEFENDANT
COUNTY GOVERNMENT OF MOMBASA 3RD DEFENDANT
NATIONAL LAND COMMISSION 4TH DEFENDANT**

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Mzuri Malau Malai, Jumaa Kombe Charo, Peter K. Kalama, Jefwa Kazungu Kalute (Suing for his own and on behalf of Miritini Redeemed Gospel Church) and Trustees of Redeemed Gospel Churches Incorporated, the Plaintiffs herein. It was through an Amended Further Plaint dated 5th February, 2014 and filed on court on 7th February, 2014 against the 1st, 2nd, 3rd and 4th Defendants herein.



2. Upon service of the pleadings and summons to entered appearance thereon, the 1st Defendant filed their statement of defence dated 21st March, 2014 filed on 24th March, 2014.
3. On 4th April, 2019 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference, it was fixed for full trial. Subsequently, on 17th October, 2019 the hearing commenced in earnest whereby PW – 1 testified on behalf of the Plaintiffs and closed down its case, on 30th May, 2022 PW 2 testified on behalf of the Plaintiffs. Subsequently, on 10th November, 2022, the Defence case commenced whereby the Defendants summoned DW – 1 who testified on their behalf. On 10th November, 2022 they closed their case.

II. The Plaintiff's case.

4. The Plaintiffs prayed for Judgment against the Defendants for the following orders:-
 - a. A declaration that the title issued to Blue Horizon Properties Ltd is irregular, fraudulent and / or illegal and that the Registrar of Titles do enter the names of the Plaintiffs' in the Registrar in place of the Defendant.
 - b. An order directing the Registrar of Titles to cancel the title issued in the Name of the Defendant in respect of Plot No. MN/V/2400.
 - c. Damages.
 - i. A declaration that the notice issued by the 2nd Defendant is improper and contrary to the law.
 - ii. A permanent injunction against the 1st and 2nd Defendants restraining them from demolishing, dealing, interfering and/or in any manner interrupting the quiet occupation of the Plaintiffs.
 - d. Costs and interests thereon.
 - e. Any other relief which this Honourable Court may deem just and expedient so to grant
5. Based on the filed pleadings the Plaintiffs claimed that the they were in actual physical possession of the land from time immemorial. They were the ones who planted the coconut and mango trees on it whose annual income was over a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000/-). The Plaintiffs and the Miritini community built the church that was the Miritini Redeemed Gospel Church with a church attendance of over seven (700) people for three (3) services in a Sunday. The shallow water well there was dug in the year 1980. The 2nd Plaintiff used it for growing vegetables for sale. This supported a family of thirty (30) people. They had enjoyed quiet and uninterrupted life at all material times and continue doing so. In or about year 2006 the Plaintiffs were deprived their interests in the said parcel of land by the operation of the Registration of Titles Act, Chapter 281, Laws of Kenya; through the Defendant's fraud and misrepresentation.
6. The Plaintiffs relied on the Particulars of fraud and/ misrepresentation where they claimed that the acquiring of the registration of the land through a process that was tainted with fraud and or misrepresentation. The Defendant and or any other person/institution whatsoever on its behalf conducted themselves country to common law and must not have been issued with title.
7. The Plaintiff claimed that in the month of October 2015, the 1st, 2nd and 3rd Defendants without any colour of right and in collusion with the land adjudication officer encroached into the Plaintiff's plot and through a disputed survey exercise put beacons right in front of the steel structure on the front



portion of the Plaintiff's plot which is leased out. The Defendant and/or any other person/institution whatsoever on its behalf did not possess prior interest and that could be registered. Unlawfully ignoring the presence of the Plaintiffs on the land by presenting falsehoods to the Registrar of Titles. And the Plaintiffs claim damages.

8. The Plaintiffs claimed that the 4th Plaintiff is the local branch of the 5th Plaintiff and it was the representative of the 5th Plaintiff's church in Miritini within Mombasa and at all material times the 4th Plaintiff has been in occupation of the Plot No.2400/MN/V since the year 2002. The Plaintiffs prayed for a permanent injunction restraining the defendant, agents, employees, assigns and/or otherwise from trespassing, interfering or dealing in any manner whatsoever with the said parcel of land known as Plot No.MN/V/2400.
9. The Plaintiffs averred that there was no other suit pending and that there had been no previous proceedings in any court between themselves and the 1st Defendant over the same subject matter and that the cause of action related to the Plaintiffs herein. The 1st Defendant was unknown to them and up to the time of filing this suit no claim was made by the Defendants. However, they became suspicious of the land being brought under the Registration of Titles Act where people in the neighbourhood were issued with titles, but not them – the Plaintiffs who fell within the same area.
10. The Plaintiffs claimed that they made inquiries at the land offices at the Municipal Council of Mombasa (now County Government of Mombasa) where they got the details that did relate to Miritini settlement scheme and in particular plot No. MN/V/2400 that covers the whole of our land. A search at the Registrar of Titles Mombasa confirmed that the registered owner was the 1st Defendant who was granted lease for 99 years. The 1st Defendant acted illegal, unlawful with a clear intention and had the land fraudulently registered in its name and as a result this action was rendered necessary. On 11th July, 2012, the 2nd Defendant served the 4th Plaintiff with a letter dated 3rd July, 2012 purportedly from the Municipal Council of Mombasa (now County Government of Mombasa) which letter purported to give a notice under the Local Government Buildings by-laws and demanded the Plaintiffs to demolish the church and all other structures erected on Plot No. MN/V/2400.
11. The 4th and 5th Plaintiffs averred that the notice by the 2nd Defendant was instigated by the 1st Defendant in a clandestine plot to defraud the Plaintiffs off their ancestral land and from the 4th and 5th Plaintiffs of their interest in the land. The Plaintiffs averred that the 3rd Defendant was duly empowered under *the constitution* to investigate claims to land ownership including historical injustices and fraudulent acquisitions of the Land.
12. On 17th October, 2019, the hearing of the Plaintiffs' case commences whereby they summoned PW 1 and later on 30th May, 2022 called PW 2. They testified as follows:

A. Examination in chief of PW -1 by Mutugi Advocate

13. He was Sworn and testified in Kiswahili language. He identified himself as Mzuri Malau Malai. He lived in Miritini, Mombasa County and was a businessman. He was the 1st Plaintiff in this case. The case was over the Plot No. 2400 Miritini Mungusi, Mombasa. He had lived on that land since birth. He was born on the suit property in the year 1958. His grandfather and his father also lived there. While his grandfather was Malai Mambo, his father was Malau Malai. To prove that he had lived there, he had photographic evidence of coconut in his supplementary list filed on 4th December, 2018. He also appeared in the photograph at page 6. He stated that he planted the trees in the year 1980. At page 7, it showed him in the company of his workers by the names Churi, Mwaditi and Kashokole in the maize Plantation founded on the suit land.



14. He stated that the photographs on pages 8, 9 and 10 showed him within the coconuts, cassava, bananas, sweet potatoes plantations among others. The Photographs were on page 11 which showed him holding a maize crop outside his house. His employees lived in a house showed in the photo. He produced the set of the photographs and marked as Plaintiff Exhibit 1(a) to (f). In the year 2006, the Government sent surveyors on the ground. It created Miritini Squatters Settlements Scheme Surveyors. They started their survey works from a place known as Marben. They came through Chitoni road, passed Chitoni river until they reached his property. Since he was away in his business, there was a village elder Hamisi Haruni Hamisi (now deceased), called him and told him the surveyors had reached his land. His land was surveyed for him.
15. He told the court that on arrival, he met the village elders and the surveyors. They told him, he was late. For that reason they would leave and return some other time to survey his land. They never came back again up to the time he was testifying. From the portions of land which were adjudicated, there were people he knew including Athumani Haruni Hamisi, Juma Haruni Hamisi and the village elder, Hamisi Haruni Hamisi. He had seen the 1st Defendant's list of documents filed on 30th September, 2015. Among the documents was a copy of Provisional Certificate of Title issued on 25th January, 2019 in the name of Blue Horizon Properties Limited and a transfer dated 12th March, 2008 from Wycliffe Jorgeuson Ginda Mukhonyo t/a Creek Company to Blue Horizon Properties Limited. He had never seen the Creek Company on the land. He could see a miscellaneous income receipt in the name of Creek Auctioneers Company. He testified that he had never seen such a company on that land.
16. He could also see the copy of Grant No. CR. 42684 in the name of Wycliffe Jorgeuson Ginda Mukhonyo t/a Creek Auctioneers Company. He had never had a neighbour by that name. His neighbours were Athumani Haruni Hamisi, Juma Haruni Hamisi, Hamisi Haruni Hamisi, Juma Pombe Charo and Kazungu Chanjera and a church of Pastor Kazungu Kalute. There was no building constructed by Jorgeuson Ginda Mukhonyo. The land was a farm. He never saw the Defendants being allocated the land. He could see the grant had changed from IR to CR. He asked the Court to revoke the Defendant's title and instead he be given title to that land. He had never received any notice from anybody. He recorded his witness statement filed on 14th February, 2017 which he relied on and adopted as his evidence in chief. They had had meetings of the settlement scheme. He had minutes of the meetings in which they wanted the land to be adjudicated to them. That was all.

Cross examination of PW - 1 by Mr. Omwenga Advocate

17. He confirmed that he was a squatter on the suit land. It was true that the land had a title deed in the name of the 1st Defendant. The suit property was located within the County of Mombasa. It was true that no construction could be done without approval by the County Government. He had not built on the suit property. He only had a temporary shade (kibanda) he had built for his workers. There were various crops on the land. He had not prepared any Survey report. It was true that the photographs did not show when the photographs were taken and by whom but he was the one who took the photos. There were coconuts plantations on the land. He never received any letter from the Land Surveyors stating that they would come and adjudicate the land for him. He had no letter from the village elder. He did not have any documents over Miritini Squatters Settlement Scheme. He had mentioned that some people were adjudicated the land.
18. He further testified that he had not produced any document to support that there was any adjudication process that took place. He confirmed that the 1st Defendant had a title deed to the land. The title showed that the first owner was Jorgeuson Ginda Mukhonyo who sold and transferred it to the 1st Defendant. He could see the transfer. They had never sued Wycliffe Jorgeuson Ginda Mukhonyo.



There was a church on the land. He was aware the church was given approval by County of Mombasa and had no title. It was true they put up a tent in which they worshipped every Sunday. He was not aware that the County Government had written to them for illegally putting up tents on the land.

19. He told the court that from the documents, he agreed that the 1st Defendant purchased the land. They were using the suit land as a farm but they lived elsewhere. He knew Marben was under World Bank Estate. There was no time he had requested the government to allocate them the land. The surveyors came to the land about 10 years ago. They indicated they would return but that never happened. He lived elsewhere but only farmed on the suit property. He had not caused any of his workers to record witness statements.

Cross examination of PW - 1 by Mr. Mwangunya Advocate

20. He confirmed that he resided in Mombasa. He was not aware that one needed approval from the County Government to carry out any construction on the suit land. It was well within his knowledge that any construction without approval was illegal. In approval documents one was required to submit title documents to the County Government. If the County Government issued notice that one had constructed without approval, it was their right. But he had not carried out any construction. He never had any title documents for the suit land.

Re - examination of PW - 1 by Mr. Mutugi Advocate

21. He reiterated that he had not constructed a house on that land. He had only put up a worker's hut. He had never received any notice that land Surveyors were coming. The notice was given to the village elder. The village elder recorded a witness statement on 28th February, 2017. He had not built his house on the suit because according to Duruma Customs, they lived away from the farms. The Grant was in the name of Creek Auctioneers Company while the transfer was in the name of Creek Company. Those were different names.

B. Examination in chief of PW - 2 by Mr. Wameyo Advocate

22. The PW – 2 was sworn and testified in Kiswahili language. He told the court that he was Jefwa Kazungu, a pastor of the Redeem Gospel Church Miritini. He knew Blue Horizon Properties Limited, the 1st Defendant herein. He received a letter dated 3rd July, 2012 from the town clerk – Mombasa which was attached in his supplementary list of documents dated 3rd December, 2018. The letter indicated that they were to demolish the buildings being the church and toilet in the said Plot No. 2400/V/MN Miritini area. It said they were trespassers for two reasons that they had put up structures without the consent from the Council nor the landlord. They had been on the land from the year 2002.
23. He testified that from the year 2012 they had not received any letter from the 1st Defendant nor had they filed the suit. He signed a statement which he adopted as his evidence in chief. They began the Church in the years 2000 and 2002. They had temporary structures on the land. They were looking for a land to buy. There was an elder of the church who approached him. He indicated having 5 acres. They requested him to allow them take possession. He agreed by giving them 1 acre. They started developing the church. He asked for a title deed. He said there was no title but the Government of Kenya sent land surveyors on the land. The then Minister of Lands, Prof. Kibwana assured everyone that they would be given a portion. In the year 2006 the land surveyors went to the land. PW – 2 was at the land then but when the Land Surveyors reached his portion they never surveyed it. They promised to come back but this never happened.
24. PW – 2 told the court that his neighbour, Mr. Harun was given a Letter of Allotment. There were eight people who had built permanent houses on there. This was ancestral land. They were 3 people on the



land. Harun had lived there since the year 1963. Blue Horizon Limited had never neither cultivated, fenced nor built on the land. They had 700 congregants in their church; they had electricity and water services provided for by the Government and they were paying for the amenities. The 1st Defendant claimed to be holding a title deed since the year 2006 which claim was refuted as they had never been on the land. The 1st Defendant had been a neighbour to PW - 2.

Cross examination of PW - 2 by Mr. Omwenga Advocate

25. He confirmed that he did not have any documents from the area Chief. He was aware their case was filed in year 2011 and that the letter by the Municipal Council dated 3rd July, 2012. It was well in his knowledge that he sued the 1st Defendant as the legal owner to the suit land from the official search conducted. He did not have any documents from the chief or the village elder on the ownership. He was aware that they had been at the municipal area. They had sought for approval from the County Government. He used an agreement by his grandfather to apply for electricity and water connection. He did not have the agreement or any documents by his grandfather to show that he was the owner of Plot No. 2400/V/MN Miritini Area.
26. He did not have any correspondence with the survey people that they would be coming for the survey. He was aware that the 1st Defendant bought the land from the allottee of the land. He was aware that his advocate wanted to bring the allottee of the land to Court as a party but the Court declined. He was aware that the County Government had the mandate to regulate the area. He was aware of Mr. Wycliffe Jorgenson trading as Creek Auctioneers Company being the owner of the suit land. He was their neighbour. The transfer was done on 18th March, 2008 to Blue Horizon Properties, the 1st Defendant herein. He had no evidence on fraud caused by the 1st Defendant. He had nothing to show that the 1st Defendant committed fraud or misrepresentation to acquire the title deed.
27. He testified that he had requested the Registrar of Title to cancel the title deed but he never sued the Registrar of Title nor the County Surveyor as he did not deem it necessary. He never found it necessary to file a report from the village elder and the chief to prove that the land belonged to the family. He sued the Defendants who were the right persons.

Re - examination of PW - 1 by Mr. Wameyo Advocate

28. He told the court that the 1st Allottee had never been his neighbour. He did not know him. He had never asked them to vacate the land. He was issued with a title deed dated 2007. He had never sought to evict him. The 1st Allottee transferred the land to the 1st Defendant where they were living and had constructed there; if they were genuine and they knew what they were buying they would have noticed and seen that the Church and the neighbours were on the ground. From the year 2008 they had never filed any suit to remove them from the suit land. Mr. Harun had received a Letter of Allotment and had built a permanent house. They were living on the land peacefully. It marked the close of the Plaintiffs' case.

III. The 1st Defendant's Case

29. The 1st Defendant's case as per the Pleadings through his amended statement of defence dated 5th February, 2014 where the 1st Defendant averred that it was a stranger to the averments of Paragraphs numbers 1, 2, 3, and 4 and 4a of the Further Amended Plaintiff.
30. The 1st Defendant was a stranger to the averments of Paragraph 6 (a) and 6 (b) of the Further Amended Plaintiff. The 1st Defendant specifically denied in entirety the allegations in Paragraph 7 and particulars enumerated a - e of the Further Amended Plaintiff.



31. The 1st Defendant specifically denied in entirety each and every allegation and or averments of Paragraph 8 and 8(a) and particulars of fraud and or representation enumerated a to d of the Further Amended Plaintiff. The 1st Defendant denied that the Plaintiffs were entitled to any of the orders sought in paragraph 9 of the Further Amended Plaintiff as they had no locus whatsoever to either bring the suit herein and had not met the minimum requirement for grant for such.
32. The 1st Defendant admitted the contents of Paragraph 10 of the Further Amended Plaintiff. The 1st Defendant averred that it was a stranger to the averments of Paragraph 11 (a) through to (d) of the Further Amended Plaintiff hence denied the same in toto.
33. It was the legally registered proprietor of all that parcel of land known as MN/V/2400 having lawfully and regularly acquired the same hence its title was indefeasible for lack of any fraud on its part. The Plaintiffs' suit was mischievous, bad in law and would at the earliest moment raise a preliminary objection to the same. The demand notice and liability was denied. The Jurisdiction of the Honourable court was denied and the Plaintiffs would before the hearing matter herein raise a preliminary objection to the same.

A. Examination in chief of DW - 1 by Mr. Omwenga Advocate

34. DW – 1 was sworn under oath and testified in English language. He identified himself as being Abdulrabat Hamsa Muhsin. He had filed a list of documents dated 28th February, 2022 and he produced it as Defendant's Exhibit A to Q. He informed the Court that the 1st Defendant was a purchaser of the suit land for a sum of Kenya Shillings Four Million Five Hundred Thousand (Kshs 4,500,000/-) and not allocated. Before purchasing the parcel of land, it was vacant. It was unoccupied. It was his testimony that the 1st Defendant was still the registered owner and there was a copy of the Certificate of Postage of the official search and they had receipts for the purchase and the original Certificate of title deed. He stated that had the Plaintiff's been on ground, they would not have purchased it.
35. He told the court that he would loved if the court dismissed the case with costs. The 2nd Defendant had not approved the building on the land and he had documents to prove that fact.

Cross examination of DW - 1 by Mr. Wameyo Advocate

36. By the time of filing this suit there were no structures on the suit property. But by now there were structures on the land. By the year 2012 the County Government of Mombasa had written a letter to the Redeemed Church indicating to them as being illegal structure on the land. The letter never mentioned when the alleged structures were constructed. Hence the allegations of the structures were from him. He confirmed that he had never built structures nor planted anything on the land. He confirmed that he had not called the vendor to prove that the land was vacant. He never took any photos of the land. He could not confirm that there was a settlement scheme on the land. Apart from the church, there were people over the land. He had never had any dialogue with the people on the land. He knew the people on the ground. There were coconuts and mango trees on the land which had matured and he was not the one who planted them.

Re - examination of DW - 1 by Mr. Omwenga Advocate

37. Before paying anything, that is Kenya Shillings Four Million Five Thousand (Kshs 4,500,000/-) there were no people and structures. The structures were only after the filing of the case in Court. That marked the close of the Defendants case.



IV. The Submissions

38. Upon the closure of the case by both the Plaintiffs and the Defendants herein, the parties were directed to file their written submission within stringent timeframe thereof on. Pursuant to that, by the time the Court was penning down this Judgement only the 1st Defendant complied accordingly. Hence, the honourable court reserved a date to deliver its Judgement on merit and notice to all the parties.

A. The 1st Defendant's written submission

39. On 28th February, 2023, the 1st Defendant through the Law firm of Messrs. Mogaka Omwenga & Mabeya Advocates filed their written submissions dated 16th February, 2022. Mr. Omwenga Advocate commenced his submissions by providing a detailed and comprehensive the introduction and facts of the suit. He submitted that Plaintiffs' filed this suit 'inter - alia' seeking: -

- a. A declaration that the title deed issued to the 1st Defendant was irregular, fraudulent and or illegal and the Registrar of Titles to enter the names of the Plaintiffs in the Registrar (hopefully they meant Registry) in place of the Defendant.
- b. An order directing the Registrar of Title to cancel the title issued in the name of the Defendant in respect of Plot No.MN/V/2400.
- c. Damages
 - i. A Declaration that the notice issued by the 2nd Defendant was improper and contrary to the Law.
 - ii. A permanent injunction against the 1st and 2nd Defendants restraining them from demolishing dealing, interfering and or in any manner interrupting the quiet manner of the Plaintiffs.
- d. Costs and interest thereon.

40. The Counsel averred that the Plaintiffs' claim was opposed by the 1st and 2nd Defendants who filed Defences to oppose the same. The 3rd Defendant did not file any pleadings. The Learned Counsel submitted that the Plaintiffs called two (2) witnesses in support of their claim and did produce the Supplementary List of Documents filed on 4th December, 2018 as exhibits in support of their claim. Whilst, the 1st Defendant called one (1) witness in support of its defence and also produced its exhibits as per its List dated 28th September, 2015 which list had 17 exhibits.

41. The Learned Counsel stated that the Plaintiffs' witnesses inter alia averred in their testimony that:-

- a. They produced a set of photographs of coconut trees to proof that they had lived on the suit property for a long time.
- b. They averred that they had also planted maize, bananas, cassava, bananas plantations and many more crops.
- c. There was survey work done in the year 2006. However their land was never surveyed then. Other neighbours had their Land surveyed.
- d. They confirmed that 1st Defendant ownership was via a transfer from the previous owner.
- e. They denied to have never seen the 1st owner of the ground nor was he their neighbour and proceed to name their neighbours.



- f. They sought revocation of the title.
 - g. They alleged to have minutes of the Adjudication of the land.
 - h. They also averred they had built a church on the plot.
 - i. They averred that the suit land was their ancestral land and hence they were entitled to the same.
42. According to the Learned Counsel, on cross examination they ‘inter alia’ stated that:
- a. They confirmed they were squatters on the suit land.
 - b. The suit property was within Mombasa County.
 - c. They confirmed that all construction works within the County of Mombasa must be approved.
 - d. The set of photographs produced did not show when they were taken and by whom.
 - e. There were no documents produced to show adjudication was done.
 - f. The 1st Defendant had title for the suit property after having been transferred from the 1st owner.
 - g. They alleged the church had approval from the County Government of Mombasa but they had no title.
 - h. From the documents, the 1st Defendant did purchase the property (suit).
 - i. They used the suit land for farming but not for living. They lived elsewhere.
 - j. They denied that at no time did they ever request the Government to allocate the Land.
 - k. Their workers had not recorded any witness statement.
 - l. They denied to have put up construction of buildings and they were aware approvals must be given by the 2nd Defendant otherwise the structure would be illegal.
 - m. They denied that they had no title documents for the suit property.
43. The Learned Counsel submitted that on the other hand the 1st Defendant did testify through calling one (1) witness by the name Abdulbasit Saleh Muhsin who is a Director of the 1st Defendant. He adopted his statement of 17th February, 2016 and did produce as 1st Defendant exhibits the documents in its list of 28th September, 2015.
44. In summary his evidence inter alia was that;
- a. That the 1st Defendant legally acquired the suit and it's the registered owner of the suit property.
 - b. They bought the property from the registered owner and had it transferred to their name on 18th March, 2008 as per the copy of the provisional Certificate of title produced as evidence.
 - c. When they bought the property, it was empty and unoccupied. There were no squatters on it.
 - d. The property was within the County Government of Mombasa.
 - e. They followed all the process till it was transferred to the 1st Defendant. The due diligence was done prior to purchase.



- f. The 1st Defendant was a bonafide purchaser in good faith, for value and without notice and hence it has a good title which could not be challenged as alleged by any of the Plaintiffs.
 - g. The Plaintiffs' claim had no legal basis and it should be dismissed.
 - h. The 1st Defendant did not acquire the title deed fraudulently as alleged.
 - i. The 1st Defendant had lawfully purchased the suit property and it was the registered owner it could not be denied the usage of the suit properly by the Plaintiffs and hence the Plaintiff's suit should be dismissed with costs. Even on cross examination he maintained the above position of the 1st Defendant.
45. The Learned Counsel argued that the other Defendants never called any witnesses. According to the Counsel, the Honourable Court needed to interrogate a few issues inter alia;
- a. Did the Plaintiffs prove any fraud and or misrepresentation respect to the Plaintiff's Title Deed necessitating it been declared to have been acquired irregularly, fraudulently and or illegally and hence to be cancelled?
 - b. Did the Plaintiffs proof their case to warrant issued Title Deed to the 1st Defendant to be cancelled?
 - c. Was the 1st Defendant a bona fide purchaser for value of the suit property without notice?
 - d. What were the Orders as to costs?
46. In respect to Issue No. A above it was the 1st Defendant's Submissions that the Plaintiffs did not at all proof any fraud and or misrepresentation on the part of the 1st Defendant as to how they acquired their title deed to the suit property. The Plaintiff did not even proof one of the particulars of fraud and or misrepresentation as per the Plaint. Hence on that ground alone their suit should be dismissed.
47. To buttress on that point, the Learned Counsel relied in the case "Nyahururu ELC No. 80 of 2017 Mary Wairimu W. Mwangi – Versus - Mary Wanja Macharia Wachira & Anor" - where the Court held "inter alia;

"The Plaintiff filed suit at the Nakuru Environment and Land Court vide a Plaint on the 9th October 2014. The Plaintiff's suit against the Defendants sought for the following orders:

- i. A declaration that the Registration of and issuance of title deed for title in the is illegal and fraudulent and therefore null and void ab initio and ought to be cancelled and revoked forthwith.

The Plaintiff's case is therefore an attack on the proprietorship of Symon Kamira Kabangi's title for reason that it had been obtained through Fraud, irregularity, illegality and/or Misrepresentation.

Having pleaded fraud and illegality on the part of the 1st Defendant in the manner in which the title to the suit land had been obtained, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In R.G Patel – Versus - Lalji Makanji 1957E.A 314, the Court of Appeal stated as follows:

"Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable



doubt, something more than a mere balance of probabilities is required”.

In the case of Arthi Highway Developers Ltd – Versus - West End Butchery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R), the Court of Appeal cited the following passage from Bullen & Leake precedents pleadings 13th edition at Page 427:

“The statement of the 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.....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..... 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”.

I have no doubt in my mind that the Plaintiff herein has distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for her to prove those allegations to the required standard which was to a standard above the balance of probabilities but not beyond reasonable doubt. I will therefore interrogate all those allegations of fraud, illegality and misrepresentation as submitted by the Plaintiff.

From the narration of the Plaintiff's case, she ought to have produced evidence to support her allegation, no documents were produced for example there was no sale agreement produced contrary to the provisions of the Law of Contract Act, no evidence of the Company's resolution to have her purchase the second parcel of land or even a receipt to show that she had paid the alleged Kshs.44,000/= or even a shareholding of 2 shares were produced.

Again this being a case where the entry of the 1st Defendant husband's name on the Company register was allegedly inserted fraudulently, it was upon the Plaintiff to adduce evidence of an expert witness in the nature of a forensic document examiner or even independent evidence to confirm this allegation. Sections 107 to 109 of the Evidence Act place the onus of proof on the Plaintiff, it was therefore her duty to do so.

It was held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR, that the statutorily, the sanctity of title to land is assured and protected under Sections 24, 25 and 26 of the Land Registration Act 2012 produced as herein under’;

Section 24 stipulates as follows:

Subject to this Act-

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and



- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the act provides:

- (1) The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

- (1) 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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.



One of the ingredients of impeaching the title of an owner of property on the grounds of fraud or misrepresentation is that the owner has to be proved to have been party to the acts of fraud and misrepresentation. Having found that the suit land herein was registered to the said Simeon Kabangi and there having been evidence that he had disappeared on the 4th August 1999 wherein the impugned title was issued on the 29th November 2002, I find that the Plaintiff did not attempt to prove how Symon Kamira Kabangi who was not even party to the suit had been engaged in fraud in acquisition of his title deed. There was no evidence from the Registrar of Lands office to testify on how the Symon Kamira Kabangi was a party to the acquisition of the Certificate of title held by him in a fraudulent manner. Apart from making general allegations of fraud, the same was not remotely proved.

Indeed, I find that the Plaintiff having not adduced any evidence to show that the Title Deed for the suit land herein was procured by the 1st Defendant fraudulently, or by misrepresentative or through a corrupt scheme, the Plaintiff's claim that the suit property belongs to herself cannot therefore stand. The end result is that the Plaintiff suit is herein dismissed with costs to the 1st Defendant.

48. On this point, the Learned Counsel stated that he had been persuaded by the holding of Justice M.C.Oundo and proceed to hold that no fraud and or misrepresentation was proved by the Plaintiff herein.
49. Further, the Learned Counsel referred Court to the case of:- “Chuka ELC No. E002 of 2020 Eviline Karigu – Versus - M’chabari Kinoro” -where it was inter alia held that:

The Plaintiff commenced this suit pursuant to a plaint dated 20th November 2020 and filed on 25th November, 2020 seeking for orders that: -

- a) A declaration that Plot No. Kajuki/Kamutiria/1533 (Adjudication Section) belongs to the Plaintiff and the suit properties L.R NO Kajuki/ Kamutiria/ 815 and Kajuki/ Kamutiria/ 2088 currently registered in the names of the Defendant were fraudulently obtained and therefore illegal, null and void.
- b) An order cancelling Title Deeds Registration L.R. No. Kajuki/ Kamutiria/ 815 and Kajuki/ Kamutiria/ 2088 currently registered in the names of the Defendant and all entries made in the register and the Chuka Land Registrar be directed and authorized to issue new Title Deeds for the said suit properties in the name of the Plaintiff without any conditions.
- c) An order compelling the Defendant to demolish and pull down all the structures standing on Plot no. Kajuki/Kamutiria/1533 (Adjudication Section) and in default the Plaintiff to be at liberty to demolish the same at the Defendant's expense and under the supervision of the O.C.S Kathwana Police Station for purposes of maintaining peace and order.
- d) Costs of the suit and interest thereon.
- e) Any other or further relief as this Honourable Court may deem fit and just to grant.

The Plaintiff has stated that the Defendant fraudulently acquired titles to the suit properties and prayed to court to cancel the titles. To succeed in claiming fraud, the Plaintiff not only need to plead but also particularize it by laying out water tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must be



pleaded and strictly proved. I am guided by the Court of Appeal in case of Kuria Kiarie & 2 Others – Versus - Sammy Magera [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria – Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states 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. As regards the standard of proof, this court in the case of Kinyanjui Kamau – Versus - 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 – Versus - 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.”

The certificate of titles in the name of the Defendant are to be taken by court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner as per section 26 of the [Land Registration Act](#). Title documents are prepared and issued by the Land Registrar. In the absence of contrary documents from the office of the Land Registrar, the court has no reason to find the title documents to be fraudulent. The Plaintiff, in my view, has failed to prove the alleged fraud against the defendant. In this case, the Plaintiff has not tendered sufficient evidence that prove the particulars of fraud against the Defendant to the satisfaction of the court.

Having considered and reviewed all the evidence and material placed before the court, I find and hold that the Plaintiff has not proved her case against the Defendant on a balance of probabilities. Accordingly, the Plaintiff's suit is dismissed with costs to the Defendant.

50. Hence, the Learned Counsel urged the Honourable Court to be persuaded by the Judgment of Justice C.K. Yano and hold that the Plaintiffs failed to prove the allegations of fraud against the 1st Defendant and proceeded to dismiss their suit with an order that they vacate the suit property forthwith.



51. On Issue No. B whether the Plaintiffs did proof their case to warrant cancellation of the 1st Defendant's title deed, the Learned Counsel urged the Court to be persuaded by the attached case Law and hold that the Plaintiffs did not proof their case and the same should be dismissed.
52. The Counsel made reference to the cases of "Nakuru ELC Case No. 156 of 2016 Erastus K. Rotich – Versus - David Langat" where the Court held:

(Plaintiff filing suit for vacant possession and permanent injunction against the Defendant; Plaintiff not being registered owner but purporting to have purchased the suit land from the previous owner and having title deed of previous owner; register of the land showing that the previous owner transferred the land to a different person and that person now being registered as proprietor; no search or green card to back up the title held by the Plaintiff; no proof that plaintiff has acquired any proprietary rights; plaintiff's suit dismissed)

This suit was commenced through a Plaint which was filed on 5th May 2016. In the Plaint, the plaintiff has pleaded that he is the legitimate owner of the land parcel Nakuru/Karao Settlement Scheme/785 (herein after referred to as "the suit land"). He has pleaded that in the year 2016 (date and month not specified), the defendant unlawfully and without any justifiable reason, laid a claim of ownership over the suit land and threatened to take vacant possession contrary to the proprietary rights of the Plaintiff. In the suit, he has asked for orders to have the Defendant permanently restrained from the suit land and in the alternative an eviction order against the defendant.

Having doubts on the authenticity of the title of Karen Chebet, I am not persuaded that the plaintiff has proved that he is entitled to the prayers in the plaint. He has not demonstrated to me that he has acquired any proprietary rights over the suit land. He has no title in his name and I am afraid to inform the plaintiff that he cannot get judgment based on the dubious title that is still purportedly in the name of Karen A. Chebet. That title is in serious doubt given that the name in the register is a different name from that in the title deed held by the Plaintiff and it is quite telling that the person said to be Karen A. Chebet opted not to face the court when her identity was questioned.

For the above reasons, the Plaintiff has failed to prove to the required standard that he has any proprietary rights over the suit land and his case is hereby dismissed with costs.

53. On the Issue No. C whether the 1st Defendant was a bona fide purchaser for value without notice. It was the Learned Counsel's contention that there was evidence on record by the 1st Defendant which supported the position that indeed the 1st Defendant was a purchaser for value of the suit property without notice. The Learned Counsel invited the Court to look at the exhibits produced by the 1st Defendant, They all showed that the 1st Defendant indeed purchased the suit property upon following the due diligence. The Learned Counsel invited the Court to look at the holding in the case of: "Eldoret ELC No. 84 of 2018 Annah Kimitei - Versus - Isaack Kipketer Talam & 2 Others":

This suit was commenced vide the Plaint dated 30th May, 2018 as amended on the 30th July, 2018 pursuant to the leave granted on the 23rd July, 2018. The Plaintiff sought out the following orders:

- (a) "A declaration that Annah Kimitei is the legitimate owner of Land parcel known as I.R.15449, Land Reference number 9723.
- (b) A declaration that the agreement for sale was null and void for lack of proper Land Control Board consent.



- (c) An eviction order to issue against the Defendants, their agents, servants from entering, occupying, selling, transferring, encumbering, wasting or otherwise interfering with the Plaintiffs quiet possession, enjoyment of the suit land to the detriment of the Plaintiff's right as the proprietor of the same.

That the pleadings, evidence and submissions proffered by the 2nd and 3rd Defendants simply show that they are bona fide purchasers for a money consideration, with no notice as to any defect in title. That in the case of WESTON GITONGA & 10 OTHERS – VERSUS - PETER RUGU GIKANGA & ANOTHER [2017] eKLR, the court cited with approval the Ugandan case of Katende – Versus - Haridar & Company Limited [2008] 2 E.A.173 in which it was held that;

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

- a. He holds a certificate of title
- b. He purchased the property in good faith
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud. [Emphasis added].

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

That indeed the 2nd & 3rd Defendants are bona fide purchasers for value and without notice of any defect in the 1st Defendant's claim of ownership. That I therefore find that the plaintiff has failed to prove her case against all the defendants to the standard required.

That in view of the foregoing, the court finds and orders as follows;

- (a) That the plaintiff has failed to prove her claim to the standard required of a balance of probabilities and her suit is hereby dismissed.

54. The Learned Counsel invited the Honourable Court to hold inter alia that the 1st Defendant was a bona fide purchaser of the suit property without notice hence it has absolute unqualified and insurable defence against claims of the Plaintiffs.
55. Additionally, the Counsel cited the case of:- “NAIROBI CIVIL APPEAL NO. 411 OF 2018 Moses Parantai & Another -Versus - Stephen Njoroge Macharia” the Court held that:

By a Plaint dated 16th July, 2015, the Plaintiffs seek for the following orders:



- a) A declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of the parcel of land known as Kajiado/ Olchoro – Onyore/ 3665 situated in Kajiado and that the alleged occupation and possession of the plot by the 3rd Defendant is illegal, unlawful, null and void.
- b) An order of permanent injunction restraining the 3rd Defendant either by himself, his employees, servants and/or agents from continuing to occupy, trespassing on, purporting to sell, subdividing, erecting structures and/or in any other manner interfering with the Plaintiffs’ quiet enjoyment and possession of land known as Kajiado/ Olchoro – Onyore/ 3665 situated in Kajiado within the Republic of Kenya.
- c) An order of eviction against the 3rd Defendant from the land known as Kajiado/ Olchoro – Onyore/ 3665 situated in Kajiado.
- d) An order directing the Officer Commanding Station (OCS) Kiserian Police Station to provide security and ensure compliance with the orders herein.
- e) An order compelling the 3rd Defendant to surrender the title known as Kajiado/ Olchoro – Onyore/ 3665 to the 4th Defendant for cancellation and correction of entries in the register to reflect that the legal representatives of the estate of the deceased are the sole owners of the property and to have title registered as such.
- f) An order to issue compelling the 4th Defendant to cancel the title issued to the 4th Defendant to cancel the title issued to the 3rd Defendant and register it in the names of legal representatives of the estate of the deceased.
- g) General damages for loss of user.
- h) General damages for trespass.
 - i) Damages for loss of income and mesne profits.
- j) Costs of this suit and interest thereon.
- k) Any other relief this Honourable Court shall deem just and fit to grant.

The basis of the claim was that the respondent fraudulently, illegally and in breach of statutory duty, dispossessed the appellants of the suit land and had it eventually registered in his name. The respondent was in the circumstances a trespasser.

As to whether the respondent was a bona fide purchaser for value, the Judge noted that the respondent produced a Sale Agreement dated 7th November, 2014 and a Transfer dated 10th November, 2014 which he had executed with Joseph and was subsequently registered as the owner of the suit land. The court further noted that the respondent was issued with a title deed in 2014 and that at the time of purchase of the suit land, the respondent undertook due diligence and the records at the Land Registry confirmed that Joseph was the proprietor of the suit land. The court was thus satisfied that the respondent was a bona fide purchaser for value.

Consequently, the trial court held that the appellants had not proved their case against the respondent on a balance of probability and were not entitled to the orders sought. The suit was as a result dismissed with costs to the respondent.



The Black's Law dictionary defines fraud as follows:

“ A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

In the case of *Urmula w/o Mahendra Shah – Versus - Barclays Bank International Ltd & Another* [1979] eKLR, this Court took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria – Versus - Nansingh Madhusingh Darbar & another* [2000] eKLR, 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 distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

Given the seriousness of the allegations, the onus was on the appellants to provide evidence to the Court of the alleged fraud which evidence must meet the standard of proof as was underscored by this Court in *Central Bank of Kenya Limited – Versus - Trust Bank Limited & 4 Others* [1996] eKLR as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the Court rendered itself as follows:

“ The Appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent.

To this end we are satisfied just like the trial court that fraud was not proved against Janet, Joseph and the respondent to the required standard. As to whether the respondent was a bona fide purchaser for value without notice, the Black's Law Dictionary 9th Edition defines a bona fide purchaser as:

“ One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

In *Katende – Versus - Haridar & Company Limited* [2008]2 E.A.173 the Court of Appeal in Uganda held that:

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



- a. He holds a certificate of title;
- b. He purchased the property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of fraud;
- f. He was not party to any fraud.”

In the instant appeal, the respondent currently holds the certificate of title to the suit land and is in actual possession having acquired the same on 10th November, 2014 upon transfer and registration. It is therefore prima facie evidence that he is the absolute and indefeasible owner as provided for under Section 26 of the *Land Registration Act*. His title is also shielded from being defeated by Section 25 unless proved otherwise. The Respondent further led evidence to the effect that he purchased the suit land in good faith, having executed the sale agreement and paid the purchase price as was stipulated in the sale agreement without any notice of fraud. The appellants did not tender any evidence to show that indeed the Respondent had any notice of an illegality or fraud. Having done his due diligence by conducting a search and obtaining a Green Card which clearly indicated that Joseph was the registered owner of the suit land, it would have been near impossible for a normal thinking person to suspect fraud let alone have knowledge of it.

The Respondent also proved that he paid Kshs.7 Million as the purchase price for the suit land. The respondent thus had no knowledge of any fraud and was not a party to any fraud having followed due process as was required of him under the law and obtained a valid title deed to the suit land. We are therefore satisfied that the respondent who holds a title deed to the suit land exercised due diligence in acquiring the suit land and is a bona fide purchaser or innocent purchaser for value and without notice.

In the end, we find no reason to interfere with the judgment of the trial court.

The appeal lacks merit and is accordingly dismissed with costs to the Respondent.

56. The Learned Counsel urged this Honourable Court to the bound by the Judgment of the Court of Appeal in respect to the issue of that the Plaintiff did not prove fraud and misrepresentation and that the 1st Defendant herein was a bona fide purchaser for value without notice.
57. On the last issue ‘D’ it was the Learned Counsel’s humble submissions that the Plaintiff case herein ought to be dismissed. Hence costs to follow the event, they urged the Honourable Court to grant the 1st Defendant costs of the suit.

V. Issues of Determination

58. I have considered the pleadings, all the documentary and oral evidence tendered by the witnesses summoned thereof and the submissions and plethora of authorities cited thereof by the parties herein. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -
 - a. Whether the Plaintiffs have managed to prove their case on the required standards and if so whether the 1st Defendant acquired title to the suit property by fraudulent means.



- b. Whether the Plaintiffs are entitled to the prayers sought.
- c. Who should bear costs of the suit.

VI. Analysis and Determination

Issue No. a). Whether the Plaintiffs have managed to prove their case on the required standards and if so whether the 1st Defendant acquired title to the suit property by fraudulent means.

Brief facts__

- 59. Before commencing on the analysis of the issue framed under this Sub heading, its imperative that the Honourable Court extrapolates on the brief facts of this case. From the filed pleadings and the evidence adduced herein, the Plaintiffs averred in the Plaint that they were in actual physical possession of the land from time immemorial. They held that they were the ones who planted coconut, banana and mango trees on the suit land and whose annual income was over a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000/-). They stated that they and the Miritini Community built the Church that was that Miritini Redeemed Gospel Church with a church attendance of over 700 people for 3 services in a Sunday. The shallow water well was dug in the year 1980. The 2nd Plaintiff used it for growing vegetables for sale. This supported a family of 30 people. They had enjoyed quiet and uninterrupted life at all material times and continued doing so. In or about the year 2006 the Plaintiffs were deprived their interests in the said parcel of land by the operation of the Registration of Titles Act, Chapter 281, Laws of Kenya; through the Defendant's fraud and misrepresentation.
- 60. The Plaintiffs case was that the 1st Defendant acquired his title to the suit premises by fraudulent means. They relied on particulars of fraud and/or misrepresentation in that the 1st Defendant acquired registration of the land through a process that was tainted with fraud and or misrepresentation. The Defendant and or any other person/institution whatsoever on its behalf conducted themselves contrary to common law and must not have been issued with title. The Defendant and or any other person/institution whatsoever on its behalf did not possess prior interest and that could be registered. Unlawfully ignoring the presence of the Plaintiff's on the land by presenting falsehoods to the Registrar of Titles.
- 61. In his evidence PW - 1 told the court that the case was over plot No. 2400 Miritini Mungusi, Mombasa. He had lived on that land since birth. He was born on the suit property in year 1958. His grandfather and his father also lived there. His grandfather was Malai Mambo while his father was Malau Malai. To prove that he had lived there since he had photographic evidence of coconut in his supplementary list filed on 4th December, 2018. He was also in the photo at page 6. He stated that he planted the trees in 1980. At page 7, it showed him in the company of his workers by the names Churi, Mwaditi and Kashokole in the Maize Plantation.
- 62. The photographs on pages 8, 9 and 10 show him with the coconuts, cassava, bananas, sweet potatoes among others. The Photographs on page 11 showed him holding a maize crop outside his house. His employees live in a house he showed in the photo. He produced the photographs as Plaintiff exhibit 1(a) – (f). In the year 2006, the Government sent surveyors and created Miritini Squatters Settlements Scheme Surveyors started their survey works from a place known as Marben, came through Chitoni road, passed Chitoni river until they reached his property. Since he was away in his business, there was a village elder Hamisi Haruni Hamisi (now deceased), called him and told him the surveyors had reached his land and that he showed so and had his land surveyed for him.



63. PW - 1 told the court that on arrival, he met the village elders and the surveyors. They told him, he was late and for that reason they would leave and return some other time to survey his land. They never came back again up to the time he was testifying. From the notions which were adjudicated, there are people he knew including Athumani Haruni Hamisi, Juma Haruni Hamisi and the village elder, Hamisi Haruni Hamisi. He had seen the 1st Defendant's list of documents filed on 30th September, 2015. Among the documents was a copy of provisional certificate of title given on 25th January, 2019 in the name of Blue Horizon Properties Limited and a transfer dated 12th March, 2008 from Wycliffe Jorgeuson Ginda Mukhovyo t/a Creek Company to Blue Horizon Properties Ltd. He had never seen the Creek Company on the land. He could see a miscellaneous income receipt in the name of Creek Auctioneers Company.
64. He testified that he had never seen such a company on that land. He could also see the copy of Grant No. CR. 42684 in the name of Wycliffe Jorgeuson Ginda Mukhonyo t/a Creek Auctioneers Company. He had never had a neighbour by that name. His neighbours were Athumani Haruni Hamisi, Juma Haruni Hamisi, Hamisi Haruni Hamisi, Juma Pombe Charo and Kazungu Chanzeru and a church of Pastor Kazungu Kalute. There was no building constructed by Jorgeuson Ginda Mukhonyo. The land was a farm. He did not see the Defendants being allocated the land. He could see the grant was changed by hand from IR to CR. He asked the Court to revoke the Defendants title and that he is given title to that land. He had never received any notice from anybody. He recorded his witness statement filed on 14th February, 2017 which he relied on and adopted as his evidence in chief. They had had meetings of the settlement scheme. He had minutes of the meetings in which they wanted the land to be adjudicated to them.
65. On the other hand, the 1st Defendant testified that they purchased the suit property in the year 2008 by paying a sum of Kenya Shillings Four Million Five Hundred Thousand (Kshs. 4, 500, 000/=). They got the transfer and all approvals for the land and subsequently they were legally issued with Certificate of Title Deed which they produced its original in Court. By this title it conferred indefeasible title and rights over the land. They vehemently refuted the allegations of having acquired it through fraudulent means which they held the Plaintiffs were never able to prove as required by the legal standards. At the time of purchasing the property it was vacant as no one including the Plaintiffs were in occupation otherwise they indicated they would never buy it. To them the structures such as the Church were constructed after the purchase had taken place. It was their case that indeed the Plaintiffs received a letter from the County Government of Mombasa for them to demolish all the struts on it as they had been constructed illegally and without the approval of the County Government. That is adequate on facts.
66. Now turning to the issues under the Sub heading herein. The main substratum of this case is on ownership of the suit land. There are allegations that the Certificate of Title deed was acquired through fraudulent means. These are extremely serious issues and hence the Court need to critically tackle them in all fairness. However, the Honourable Court wishes to state that land in Kenya is an extremely sensitive matter. Land is utilized as a source of livelihood. It is categorized into three classes – Public, Private and Community land under the provisions of Articles 61, 62, 63 and 64 *the Constitution* of Kenya, 2010. The provision of Section 7 of the *Land Act*, No. 6 of 2012 provides the methods of acquisition of land in Kenya as follows:
- S. 7 Title to land may be acquired through:-
- i. Allocations;
 - ii. Land Adjudication process;



- iii. Compulsory acquisition;
 - iv. Prescription;
 - v. Settlement programs;
 - vi. Transmissions;
 - vii. Transfers;
 - viii. Long term leases exceeding Twenty one years created out private land; or
 - ix. Any other manner prescribed in the Act of Parliament.
67. In this case, the 1st Defendant has held it acquired its land from an innocent bona fide purchaser for value on notice and consideration which I shall be assessing in more depth hereinbelow. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:
- “Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
68. The provision of Section 26 of the [Land Registration Act](#), No. 3 2012 states as follows;
- “Certificate of title to be held as conclusive evidence of proprietorship.
- (1) 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.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
69. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
70. In the instant case, the certificate of titles in the name of the 1st Defendant are to be taken by court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner



as per section 26 of the [Land Registration Act](#). Title documents are prepared and issued by the Land Registrar.

71. The Court of Appeal in Uganda in “Katende – Versus - Haridar & Company Limited (supra)” as quoted by the Court of Appeal in “Nakuru CoA App No. 291 of 2013;- Weston Gitonga & 10 others (supra)” where the former held:-

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

- a. He holds a certificate of title;
- b. He purchased the property in good faith;
- c. He had no knowledge of the fraud;
- d. He purchased for valuable consideration;
- e. The vendors had apparent valid title;
- f. He purchased without notice of any fraud;
- g. He was not party to any fraud.”

72. To succeed in claiming fraud, the Plaintiff not only needed to plead but also particularize it by laying out water tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the Court of Appeal in case of “Kuria Kiarie & 2 Others – Versus - Sammy Magera [2018] eKLR” where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria – Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states 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.”

73. The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. As regards the standard of proof, this court in the case of “Kinyanjui Kamau – Versus - 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 –vs- 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.”

74. The Plaintiffs claim that the suit property has been in their possession for a very long time while the 1st Defendant in their testimony that of DW - 1 claims that by the time they bought the property in 2010, there was nobody on the suit property. On 11th July, 2012, the 2nd Defendant served the 4th Plaintiff with a letter dated 3rd July, 2012 purportedly from the Municipal Council of Mombasa (now County Government of Mombasa) which letter purported to give a notice under the Local Government Buildings by-laws and demanded the Plaintiffs to demolish the church and all other structures erected on Plot No. MN/V/2400.
75. This court in considering this matter referred to the case of “Elijah Makeri Nyangw’ra – Versus - Stephen Mungai Njuguna & Another (2013) eKLR” where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of the provision of Section 26(1) (a) and (b) of the [Land Registration Act](#) rendered himself as follows:-

“.....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

76. In the absence of contrary documents from the office of the Land Registrar, the court has no reason to find the title documents to be fraudulent. The Plaintiffs, in my view, has failed to prove the alleged fraud against the defendant. In this case, the Plaintiff has not tendered sufficient evidence that prove the particulars of fraud against the Defendant to the satisfaction of the court.

ISSUE No. b). Whether the Plaintiffs are entitled to the prayers sought.

77. Under this sub heading, this Honourable Court has previously stated in this Judgment that a certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Section 24 of the [Land Registration Act](#) 2012, gives the registered proprietor absolute rights over land. Further, this title is protected under Section 26 of the same Act. Flowing from the foregoing provisions, a registered proprietor enjoys the statutory protection of title as long as he/she can show that the title was acquired procedurally. The circumstances when title can be cancelled or revoked have been enumerated above (26(1) (a) & (b) of the [Land Registration Act](#).
78. In this instant case, the Plaintiffs seek to revoke and cancel the title to the suit premises belonging to the 1st Defendant on the basis of fraud. The Plaintiffs allege that the power to cancel the title can be exercised through a court order. The Power to cancel title was drawn from Section 79(2) of the [Land Registration Act](#). Part VIII of the Act makes provisions for the rectification of title, which can be done by either the Registrar or by Court Order. Rectification by the Registrar under Section 79:-
- (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—
- (a) In formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;



- (b) In any case and at any time with the consent of all affected parties; or
- (c) If upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;
- (d) For purposes of updating the register;
- (e) For purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.

79. A quick reading of the said section shows that the Act refers to alteration of title without consent, if it is established that the error, mistake or omission was obtained by fraud or lack of proper care. The rectification is limited to errors, mistake or omission, which do not materially affect the rights of registered proprietor. The foregoing provisions envision rectification that does not affect the rights/interest of registered property loosely translated, basic and apparent errors or mistakes. The rectification can only occur with the proprietor's consent unless:

- a. The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or
- b. It would for any other reason be unjust for the alteration not to be made.

80. Rectification by Court concerns and/or involves cancellation or amendments of title, circumstances of which are provided above. The Registrar does not therefore have the power to cancel title of a registered proprietor, unless under the express Order of the Court. The Court of Appeal in the case of:- "Mombasa Civil Appeal No. 312 of 2012:- Emfil Limited - Versus - Registrar of Titles Mombasa & 2 others [2014] eKLR" stated:-

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

81. I dare say that, the Plaintiffs have not presented any documents to show ownership of the land apart from photographs of PW 1 in the suit property. PW 1 also stated that he never built on the suit property as he stayed elsewhere.

82. For this reason and that this Honourable Court has pronounced itself before in this Judgment that the 1st Defendant acquired a clean title. Therefore, I find that the Plaintiffs have not proved their claim to warrant the grants of prayers a to e of the Plaintiff and therefore the Claim by the Plaintiffs fails.

Issue No. C). Who should bear costs of the suit

83. It's now well established that the issue of Costs is at the discretion of Court. Costs means any award that a party is as the conclusion of any legal action, proceedings and process of any litigation. The Proviso of the provision of Section 27(1) of *Civil Procedure Act* provides that costs follow the events. By events it means the result such a legal action, process and/or proceedings. (See the Supreme Court case of "Jasbir Rai Singh Rai – Versus Tarchalon Singh (2014) eKLR; and the Court RoseMary Wambui Munene – Versus – Ihururu Dairies Co – Operative Limited (2014) eKLR, Kenya Sugar Board – Versus –



Ndungu Gathini (2013) eKLR; and Cecilia Nyayo – Versus Barclays Bank of Kenya Limited (2016) eKLR” where Courts held that:-

“The basic rule on attribution of costs is that costs follow the event.....it is well recognised that the principles costs follow the event is not be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting of defending the case”.

84. Although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party, in this case the 1st Defendant herein, should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

VII. Conclusion & Disposition.

85. In conclusion, having considered and reviewed all the evidence and material placed before the Honourable Court, I find and hold that the Plaintiffs have not proved their case against the Defendants on a balance of Probabilities and I hereby make the following final orders:-

- a. That Judgement entered to the effect that the Plaintiffs’ suit instituted by the Further Amended Plaint dated 5th February, 2014 be and is hereby dismissed entirely.
- b. That an order to have any persons occupying the suit land through illegal means and trespass to be legally evicted from the land within the next 90 days from the date of the delivery of this Judgement pursuant to the provisions of Section 152E of the *Land Act*, No. 6 of 2012.
- c. That this matter be and is hereby closed.
- d. That the 1st Defendant shall have the costs of the suit which shall be borne by the Plaintiffs jointly and severally.

It Is Ordered Accordingly

JUDGEMENT DELIEVERD THOUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF OCTOBER 2023.

.....

HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT OF KENYA AT MOMBASA

Judgement delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. No appearance Advocate for the Plaintiffs.
- c. No Appearance for the 1st Defendant.
- d. M/s. Jadi Advocate for the 2nd Defendant.
- e. No appearance for the 3rd Defendant.

JUDGMENT ELC. 471 OF 2011 Page 16 of 16 HON L.L. NAIKUNI (JUDGE)

