



**Mbugua (Suing as Administrator of the Estate of the Late Joseph Kiarie Mbugua) v Bakari & 4 others (Environment & Land Case 291 of 2014) [2025] KEELC 4747 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4747 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 291 OF 2014**

**SM KIBUNJA, J**

**JUNE 25, 2025**

**BETWEEN**

**FLORENCE WAIRIMU MBUGUA [SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE JOSEPH KIARIE MBUGUA] ..... PLAINTIFF**

**AND**

**IBRAHIM A. BAKARI ..... 1<sup>ST</sup> DEFENDANT**

**THE COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**PETER KINYUA MUCHENDU, T/A M/S KINYUA & CO. AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**HEMEDI HAMADI ABDALLA ..... 4<sup>TH</sup> DEFENDANT**

**THE REGISTRAR OF TITLES ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit through the plaint dated the 17<sup>th</sup> November 2014, seeking for orders as hereunder:
  - a. “A declaration that the plaintiff is the legal owner and occupier of property CR/13893/1 subdivision 2464 (Original Number 1113/1) Section vI Mainland North measuring 0.554 acres.
  - b. A declaration that the Certificate of Title on the 5<sup>th</sup> Defendants records allegedly in respect of property CR/13893/1 subdivision 2464 (Original Number 1113/1) Section vI Mainland North and showing the 1<sup>st</sup> Defendant as registered owner from 25<sup>th</sup> November 1983 is null and void ab initio.



- c. An order of rectification be issued directing the 5<sup>th</sup> defendant to cancel the fraudulent registration in favour of the 1st Defendant and to rectify the register to show the Plaintiff as the Legal owner of property CR/13893/1 subdivision 2464 (Original Number 1113/1) Section vI Mainland North measuring 0.554 acres
- d. A declaration that all alleged proceedings by the 2<sup>nd</sup> Defendant against the 1st Defendant for outstanding rates allegedly in respect of property CR/13893/1 subdivision 2464 (Original Number 1113/1) Section vI Mainland North and the alleged auction of the property by the 3rd Defendant and transfer to the 4th Defendant are null and void ab initio.
- e. An order be issued cancelling the Provisional Title issued to the 4th Defendant and directing the 5th Defendant to issue a Certificate of Title to the Plaintiff.
- f. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants by themselves or by their agents, servants or otherwise howsoever be restrained from trespassing upon, entering, remaining on and/or otherwise interfering with the Plaintiffs access to, use of and quiet possession of property CR/13893/1 subdivision 2464 (Original Number 1113/1) Section vI Mainland North measuring 0.554 acres.
- g. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants by themselves or their agents, servants or otherwise howsoever be restrained from advertising, offering for sale, selling, leasing, mortgaging, charging, transferring, or assigning and/or otherwise dealing with property title number CR/13893/1 subdivision 2464 (Original Number 1113/1) Section vI Mainland North measuring 0.554 acres.
- h. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants be ordered to pay the plaintiff costs of this suit together with interest thereon at court rates from the date of filing of suit until payment in full.
- i. Any such other or further relief as this Honourable Court may deem appropriate.”

The plaintiff has averred that CR/13893/1, subdivision 2464 (Original Number 1113/1), Section vI Mainland North measuring 0.554 acres, hereafter known as the suit property, was bought by the deceased on 10th July 1979, from Harry Korobia Mbui. She has in her pleading set out the ownership history of the suit property to 1970.

2. The plaintiff averred that she has seen a copy of the title of the suit property maintained by the 5<sup>th</sup> defendant that show that from 25<sup>th</sup> November 1983 to 3<sup>rd</sup> October 2014, the said land was in the name of the 1<sup>st</sup> Defendant, and was measuring 0.530 acres. That further, the 2<sup>nd</sup> Defendant had through 3<sup>rd</sup> defendant advertised the suit property for auction on 25<sup>th</sup> August 2014, due to 1<sup>st</sup> defendant’s outstanding rates arrears of Kshs.1,304,525, and that the 4<sup>th</sup> defendant, was the successful bidder for Kshs.6 million and paid the above outstanding rates. That pursuant to a vesting order issued by the Mombasa Chief Magistrates court, the 4<sup>th</sup> defendant was issued with a provisional title over the suit property. The plaintiff pleaded that the said copy of title in the name of the 1<sup>st</sup> defendant, if it relates to the suit property, was acquired through fraud, misrepresentation, error and misdirection. The plaintiff has set out the particulars of fraud at paragraph 12 (a) to (e), and averred that the 4<sup>th</sup> defendant is interfering with her quiet possession of the suit property by among trespassing thereon with strangers and threatening her servants. That she has since reported the issue about the 1<sup>st</sup> and 4<sup>th</sup> defendants’ registration with the suit property to the 5<sup>th</sup> defendant and the Criminal Investigation Department for investigations.
3. The 4<sup>th</sup> defendant opposed the plaintiff’s claim through his statement of defence dated the 5<sup>th</sup> December 2014, and inter alia averred that the plaintiff has no locus to file this suit as the alleged letter of administration relied on is joint and the suit property is not part of the alleged estate; that he bought



- the suit property through public auction and followed all the due process until he was registered as proprietor; that the suit is incompetent, bad in law and an abuse of court process.
4. The 2<sup>nd</sup> defendant also opposed the plaintiff's claim through their statement of defence dated 20<sup>th</sup> January 2015, among others averring that the letter of administration relied on by the plaintiff is joint and the suit property is not part of the estate; that the said land was registered with 1<sup>st</sup> defendant who was in rates arrears of Kshs.1,304,525 as at 22<sup>nd</sup> October 2014, that they sued him over in Mombasa SRMCC No. 285 of 2014, County Government of Mombasa versus Ibrahim A. Bakari; that upon obtaining judgement against the 1<sup>st</sup> defendant, they instructed 3<sup>rd</sup> defendant to auction the suit property, during which the 4<sup>th</sup> defendant emerged the successful bidder at Kshs.6 million; that the 4<sup>th</sup> defendant paid the amount and obtained registration as proprietor regularly; that the plaintiff's suit is wholly incompetent, bad in law, vexatious, abuse of court process and should be dismissed with costs.
  5. The 1<sup>st</sup> & 3<sup>rd</sup> defendants neither entered appearance, or file any defence, nor participate in the hearing.
  6. The plaintiff testified as PW1, adopting her witness statement dated 17<sup>th</sup> November 2014 as her evidence in chief and produced the documents in the list of the same date as exhibits 1 to 11. She told the court she was the one in occupation of the suit property, and that the 1<sup>st</sup> defendant has not shown how he acquired the land. She added that she was not aware about the auction through which the 4<sup>th</sup> defendant bought the suit property, and the 5<sup>th</sup> defendant did not involve her when transferring it to 4<sup>th</sup> defendant. During cross-examination, she told the court the deceased had bought the suit property in 1999, but could not tell whether he was paying rates. She admitted that she has not paid rates after the deceased died on 22<sup>nd</sup> February 2006 to date. The plaintiff testified that she still has the original title of the suit property. That her workers reside on the suit property and that there is a bungalow on a portion of the said land.
  7. The 4<sup>th</sup> defendant testified as DW1, adopting his statement dated 15<sup>th</sup> December 2014 as his evidence in chief, and produced documents numbers 2, 4 to 7 in his list dated 15<sup>th</sup> December 2014 as exhibits. He told the court that he bought the suit property from the 3<sup>rd</sup> defendant in an auction attended by about six or seven people after he emerged the highest bidder at Kshs.6 million. He paid Kshs.1,500,000 immediately as deposit, and Kshs.2 million later that afternoon, and the balance as he processed the title. He also paid rates of Kshs.1,300,000, stamp duty of Kshs.240,000. That he took possession of the suit property after he was issued with the title after paying the squatter he found there Kshs.200,000, to vacate. He repaired an old structure thereon, from where he operates a garage. During cross-examination, DW1 told the court that the 3<sup>rd</sup> defendant had told the bidders that he was selling the said property on behalf of the 2<sup>nd</sup> defendant, pursuant to a court process. That before participating in the auction, he had confirmed from the Land Registrar that the land was registered with the 1<sup>st</sup> defendant. that the plot is  $\frac{3}{4}$  acre and not 0.530 acres. That the plot he bought during the auction is situated on the same position the plaintiff claims hers was situated. That he followed the due process to have the plot registered in his name after the auction. That he was issued with receipts for all the payments that he made and has continued paying rates. That he had constructed the office for the garage before the court order.
  8. The 5<sup>th</sup> defendant called Mercy Chepkemei, Land Registrar, who testified as DW2. She produced the three documents filed on 6<sup>th</sup> October 2020 as exhibits, and confirmed that from the parcel file, the suit property is registered in the 4<sup>th</sup> defendant's name pursuant to a vesting order. That previously, the land was registered in the name of 1<sup>st</sup> defendant following a transfer of 1983, that was however not in the parcel. That there are no ownership documents in the parcel file mentioning the plaintiff as an owner of the suit property at any time. During cross-examination, DW2 stated that she has not seen the document transferring the land to the 1<sup>st</sup> defendant. She confirmed that the document of title in



the name of Peter Cleve Panyako in the plaintiff's list of documents is genuine as it carries with the copy in the parcel file. She termed the difference in the acreage of 0.530 and 0.534 acres on the documents as a typographical error. She confirmed that the document number 8 in the plaintiff's list of documents is a transfer and appear to have been processed through the land registrar's office. That as can be seen at paragraph 8 of their defence, they blamed the 1<sup>st</sup> to 4<sup>th</sup> defendants for misrepresenting the facts to the land registrar. She confirmed that her office has not carried out any investigation to confirm the claim of the parties because the suit was in court.

9. The learned counsel for the plaintiff, 2<sup>nd</sup> and 5<sup>th</sup> defendants filed their submissions dated the 31<sup>st</sup> January 2025, 3<sup>rd</sup> February 2025 and 11<sup>th</sup> February 2025 respectively, that the court has considered.
10. The issues for the court's determinations are as follows:
  - a. Whether the plaintiff has legal capacity to sue.
  - b. Whether the suit property was part of the estate in which the plaintiff was a joint administrator.
  - c. Whether there was fraud, irregularity or unprocedurality when the 1<sup>st</sup> defendant got registered with the suit property.
  - d. Whether the 4<sup>th</sup> defendant is an innocent purchaser for value without notice.
  - e. What orders commends to be issued.
  - f. Who pays the costs?
11. The court has carefully considered the pleadings filed, oral and documentary evidence presented by PW1, DW1 and DW2, submissions by the learned counsel for the plaintiff, 2<sup>nd</sup> & 5<sup>th</sup> defendants, superior courts decisions cited thereon, and come to the following determination:
  - a. On the first issue of capacity/locus standi, the heading of the plaint dated 17<sup>th</sup> November 2014 filed by the plaintiff clearly shows that she has filed this suit in her capacity as an administrator of the estate of the late Joseph Kiarie Mbugua, who was her husband. In the list of documents filed with the plaint, also dated the 17<sup>th</sup> November 2014, is attached among others documents 1 & 2, which are copies of the grant of letters of administration with the plaintiff being one of the four administrators, and consent order issued on 2<sup>nd</sup> July 2010 in Nairobi H.C Succession Cause No. 784 of 2007, confirming the grant. The plaintiff as administrator has capacity to sue over the suit property on behalf of the deceased's estate.
  - b. On the second issue of whether the suit property forms part of the estate of the deceased, in which the plaintiff is one of the administrators, I have perused the consent order issued on 2<sup>nd</sup> July 2010, that was produced as exhibit and is document number 3 in the plaintiff's list of documents dated 17<sup>th</sup> November 2014, and noted it is not among the properties distributed thereunder. PW1 in her testimony stated the suit property was left out through an error in the consent order. Taking that to be the case, the [Law of Succession Act](#) chapter 160 of Laws of Kenya, has clear procedures for rectification of a grant, including Rule 43 of the Probate and Administration Rules, which the plaintiff and her co-administrators should have taken advantage of, by taking the necessary steps to correct the error, but they have not done so, yet they are represented by counsel. That as there is no apparent challenge of the deceased title to the suit property from Peter Cleve Panyako, the evidence tendered by PW1 and DW2 and the conclusions above, leads the court to find that the suit property was owned by the deceased and was erroneously left out in the distribution consent issued by the family court on 2<sup>nd</sup> July 2010. The deceased's title would only be defeated if the alleged title to the 1<sup>st</sup> defendant was upheld.



- c. The most important question which all the defendants have failed to answer is how the suit property was transferred from the deceased to the 1<sup>st</sup> defendant. The defence counsels have meticulously submitted that the due process was followed in the public auction, but they steered clear of the above question of transfer of ownership. State counsel Mr. Muema for the 5<sup>th</sup> Defendant has tried to defend the sanctity of title of the 4<sup>th</sup> defendant under sections 24, 25 and 26 of the *Land Registration Act* Cap 300, but has not addressed the lack of base records of the transfer from the deceased to the 1<sup>st</sup> defendant. The fact that the 1<sup>st</sup> defendant did not enter appearance to defend this suit while well aware his title to the suit property was under challenge is a cause for concern. Under said section 26, a title can be challenged on grounds of fraud/misrepresentation or on an illegality/irregularity and where procedure was not followed. In the case of *Munyu Maina versus Hiram Gathiba Maina, Civil Appeal No. 239 of 2009* the Court of Appeal stated thus:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

In Bullen & Leake & Jacobs, Precedent of Pleadings 13<sup>th</sup> Edition at page 427 it states as follows on fraud:

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

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

In her plaint, the plaintiff pleaded particulars of fraud and misrepresentation, which are the grounds she chose to challenge the title of the 1<sup>st</sup> defendant and consequently, that of the 4<sup>th</sup> defendant on.

- d. In the case of Kinyanjui Kamau versus George Kamau [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo v Ndolo [2008] 1KLR (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 the 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 case where fraud is alleged it is not enough to simply infer fraud from the facts.”

Black’s Law Dictionary states as follows on fraud:

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

The foregoing shows that fraud is a matter of evidence. DW2 confirmed from the parcel file/ records in her custody, that the document in the plaintiff’s list of documents with Peter Cleve Panyako as the registered owner of the suit property was genuine. She also indicated she had the records of the transactions from the 1<sup>st</sup> to the 4<sup>th</sup> defendants. DW2 stated that her office did not carry out investigations to confirm the legality of the title. That in the absence of the source documents of transfer from the parcel file, she could therefore not confirm whether the title to the suit property was legally transferred from Peter Cleve Panyako to the deceased, and from deceased to the 1<sup>st</sup> defendant. In the prevailing situation, it is only logical for the court to take it that the Land Registrar’s office [DW2], did not have any records of transfer from the deceased, to the 1<sup>st</sup> defendant. This is bizarre and absurd as the Land Registrar is the custodian of all registers and records in the Land Registry. In view of the above noted and proved absence of transfer documents from the deceased to 1<sup>st</sup> defendant, the court can only infer that fraud took place so as to interfere with record keeping of the transactions.

- e. The next issue for consideration is whether the 4<sup>th</sup> defendant was an innocent purchaser for value and without notice of any irregularity on the suit property’s title. In the case of Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura versus Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014 the Court of Appeal cited with approval the case of Katende versus Haridar & Company Ltd (2008) 2 EA 173, where 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 as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;



4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

In his testimony, DW1 told the court that he saw an advertisement for public auction of the suit property for the reason of the 1<sup>st</sup> defendant being in arrears of rates. That he participated in the auction conducted by 3<sup>rd</sup> defendant, and was successful. He paid the bid value, and arrears of rates and was issued with a rates clearance certificate and consequently a certificate of sale. He then applied for and obtained the vesting orders in Mombasa CM Misc. Appl. No. 162 OF 2014, and proceeded to pay the stamp duty and thereafter was issued with a title to the suit property. He also testified that he had visited the suit parcel before hand together with the son of the auctioneer. He produced a certificate of postal search dated 7<sup>th</sup> November 2014 showing the acreage as 0.530 acres. The said differences in acreage on the title and search was explained by DW2 to be a typographical error in the deed plan.

- f. The Supreme Court of Kenya in the landmark case of *Dina Management Limited versus County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) stated that:

“ Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bonafide purchaser.”

The court having found that the 1<sup>st</sup> defendant title was obtained through fraud, any subsequent transfer thereof cannot be sanitized. As a rule of thumb, courts have regularly applied from time immemorial the term ‘nemo dat quod non habet’ which simply is means that no one can give what they do not have. In view of the decision in the case of *Dina Management Limited versus County Government of Mombasa & 5 Others* [supra], which is bidding on this court, the court finds the 4<sup>th</sup> defendant was not a bonafide purchaser for value without notice, and his title to the suit property is impugned. The new reality requires potential buyers to establish the root of title before buying any land.

- g. This court has discretion to award costs as per section 27 of the *Civil Procedure Act* Chapter 21 Laws of Kenya that states costs follow event unless where there is a good reason to depart from that position. The plaintiff has succeeded in proving part their case and the defendants have not succeeded in proving their sanctity of title, thus it is only just that the 1<sup>st</sup> 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants jointly and severally pay the costs of the suit.

12. From the foregoing conclusions, the court finds the plaintiff has substantially proved her claim to the standard required, and judgement is entered in her favour and the following orders issued:

- a. Prayers (b), (d), (f) & (g) on the plaint dated 17<sup>th</sup> November 2014 are granted as prayed.



- b. Prayers (a), (c), & (e) on the said plaint are rejected and in their place 4<sup>th</sup> defendant's title to the suit property is hereby revoked and the Mombasa County Land Registrar is hereby directed to rectify the register of the suit property to reflect the late Joseph Kiarie Mbugua, as proprietor, on the last entry thereof.
- c. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants to pay the plaintiff's costs of the suit, as sought in prayer (h).
- It is so ordered.

**DATED, SIGNED AND VITUALLY DELIVERED ON THIS 25<sup>TH</sup> DAY OF JUNE 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence of:

Plaintiff : No appearance

Defendants: M/s Kiti for 5<sup>th</sup> Defendant

Mr. Paul Magolo for Asige for 4<sup>th</sup> Defendant

Shitemi-court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

