



REPUBLIC OF KENYA



**Southern Bay Limited v Kioko & 2 others (Environment and Land Case 166 of 2021) [2025] KEELC 6653 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6653 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE 166 OF 2021**

**AE DENA, J**

**OCTOBER 3, 2025**

**BETWEEN**

**SOUTHERN BAY LIMITED ..... PLAINTIFF**

**AND**

**GIDION MBUVI KIOKO ..... 1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL (ON BEHALF OF THE REGISTRAR OF LANDS,  
KWALE) ..... 2<sup>ND</sup> DEFENDANT**

**OMARI MBWANA ZONGA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Judgment of this Honourable Court pertains to an amended plaint dated 6<sup>th</sup> December 2018 commencing this suit through the firm of Khalid Salim and Company Advocates seeking the following reliefs:-
  - a. A declaration that the Plaintiff is the registered, absolute and indefeasible owner of Land Reference Kwale/Kinondo S.S.S/193.
  - b. A declaration that the title issued to the 1st Defendant in respect of the Plaintiff's parcel of land Kwale/Kinondo S.S.S/193 was issued irregularly, unprocedurally, fraudulently, unlawfully and illegally and is therefore invalid null and void.
  - c. An order directed to the Registrar of Lands Kwale to revoke, cancel, destroy void and or nullify the certificates of titles and the Green Card in respect of Land Reference No. Kwale/Kinondo S.S.S/193 issued in favour of the 1st Defendant and publish the said revocation cancellation destruction or nullification in the Kenya Gazette.



- d. A permanent injunction to issue restraining the Defendants jointly and severally their agents' servant's relatives and or any person under instructions from the Defendants from further interfering and or in any way dealing with Land Reference No. Kwale/Kinondo S.S.S/193.
  - e. Alternatively, an order directed to the 3rd Defendant to refund the Plaintiff the amount of Kshs. 8,135,040/=.
  - f. Costs of the suit and interest.
2. The plaintiff pleads it is the registered owner of the parcel of land known as Kwale/Kinondo S.S.S/193 (suit property), acquired from the 3<sup>rd</sup> defendant via a sale agreement dated 7<sup>th</sup> April 2014 for Kshs. 7,750,000/=, with transfer registered and title issued on 6<sup>th</sup> May 2014. However, a search in April 2016 revealed the property was registered to the 1<sup>st</sup> defendant, allegedly through an irregular, fraudulent transfer assisted by the 2<sup>nd</sup> defendant, backdated to 26<sup>th</sup> March 2013. The plaintiff claims the 1<sup>st</sup> and 2<sup>nd</sup> defendants colluded to replace the green card with a fraudulent one, and the 3<sup>rd</sup> defendant failed to disclose a prior transaction with the 1<sup>st</sup> defendant.
  3. The 1<sup>st</sup> defendant responded to the suit through a defense dated 18<sup>th</sup> May 2019 through the firm of J.O Magolo & Company Advocates, denying the plaintiff's claims. He avers he purchased the suit property from the 3<sup>rd</sup> defendant for Kshs. 9,000,000/= on 21<sup>st</sup> March 2013, with transfer registered and title issued on 26<sup>th</sup> March 2013. He claims the 3<sup>rd</sup> defendant could not legally transfer the property to the plaintiff in 2014. He notes a suit by Emfil Limited (Mombasa ELC 113 of 2015) claiming ownership, which halted further payments to the 3<sup>rd</sup> defendant. The 1<sup>st</sup> defendant sought orders that the suit be dismissed with costs.
  4. The 2<sup>nd</sup> defendant filed a defense dated 2<sup>nd</sup> October 2019 through Nguyo Wachira Principal Litigation Counsel Attorney General's Office denying illegality or negligence, asserting that the 1<sup>st</sup> defendant's registration was valid, and the plaintiff's transfer was a mistake due to the 3<sup>rd</sup> defendant's misrepresentation. The 2<sup>nd</sup> defendant prays the suit be dismissed with costs.
  5. The 3<sup>rd</sup> defendant never entered appearance despite substituted service in the Standard Newspaper of 4/02/2022.

### **Evidence Of The Parties**

6. The case was set down for hearing and proceeded on 24/05/2022, 21/02/2023, and 2/10/2024.

### **Plaintiff's Case**

7. PW1, Paul Van Beveren, testified on behalf of the plaintiff company a director. Adopting his witness statement dated 17/4/2018 PW1 asserted he purchased the suit property from the 3<sup>rd</sup> defendant for Kshs. 7,750,000/=. Due diligence, including a pre-registration search, confirmed the 3<sup>rd</sup> defendant as owner. No anomalies were evident on the title. Consents from the Land Control Board and the 3<sup>rd</sup> defendant's spouse were obtained, stamp duty of Kshs. 155,040/= paid, and transfer registered on 6<sup>th</sup> May 2014. A title was issued, and a post-registration search confirmed ownership. In April 2016, a search revealed the 1st defendant as owner. That upon inquiry the 3<sup>rd</sup> defendant informed him that he had tried to sell the property to the 1<sup>st</sup> defendant who never finished payment of the balance of Kshs. 8million purchase price. PW1 alleged the 2<sup>nd</sup> defendant cancelled the plaintiff's title without notice, replacing the green card fraudulently.



8. On Cross Examination by Mr. Omollo counsel on record for the 1<sup>st</sup> defendant, PW1 stated he contacted the 3<sup>rd</sup> defendant who confirmed he received Kshs. 1 million. On being referred to the 3<sup>rd</sup> defendant's affidavit (PEX 5) he noted it confirmed the 3<sup>rd</sup> defendant signed the transfer in 2013 before he sold the suit property to the plaintiff. He confirmed he has also prayed for refund of his money in the event he does not get back his land. He further confirmed the contents of paragraph 29 of the plaint that in his view it was the 3<sup>rd</sup> defendant who was in the wrong.
9. Cross examined by Ms. Langat for the 2<sup>nd</sup> defendant PW1 confirmed his sale agreement was with the 3<sup>rd</sup> defendant. He had no consent from the two Directors of the plaintiff. He conducted a search before purchase of the property but had not produced the search. The witness indicated while he saw the original title before purchase he was not aware if the same was cancelled after purchase by the plaintiff.
10. On reexamination the witness clarified that he saw the title at the time he purchased the suit property and it was still in the 3<sup>rd</sup> defendant's name. PW1 indicated he was not seeking refund from the 2<sup>nd</sup> defendant. That being a business man he bargained for the purchase price.
11. With the above, the plaintiff's case was marked as closed.

### **1<sup>st</sup> Defendants Case**

12. The 1<sup>st</sup> defendant called Mr. Jared O. Magolo Advocate to testify in support of his case. He adopted his witness statement filed on 3/07/2010. He stated that he acted for both the vendor (3<sup>rd</sup> defendant) and purchaser (1<sup>st</sup> defendant) whom he knew, to the extent of executing the transfer. That the 3<sup>rd</sup> defendant received Kshs. 1 million at the point of signing the agreement.
13. On cross examination by Ms. Nafula Mr. Magolo told the court he was not involved in the registration of the transfer as the parties went away with the documents after signing. He confirmed the purchase price as Kshs. 9 million and only Kshs. 1 million was paid in his presence. That though he was informed an additional Kshs 5 million was paid he could not confirm the payment. He was not aware of criminal proceedings involving the 1<sup>st</sup> and 3<sup>rd</sup> defendants. That the 1<sup>st</sup> defendant had informed him he did not pay the balance because Emfil sued the government of Kenya.
14. Cross examined by Ms. Langat he confirmed the transfer was between a willing buyer and willing seller.
15. DW3 was Mike Mbuvi Gideon Kioko the 1<sup>st</sup> defendant. Adopting his witness statement dated 29/06/2018. He testified that he purchased the suit property from the 3<sup>rd</sup> defendant on 21<sup>st</sup> March 2013 for Kshs. 9,000,000/=, paid Kshs. 1,000,000/= deposit and the transfer executed. That the transfer was registered, and title issued on 26<sup>th</sup> March 2013. He later paid Kshs. 5,000,000/= but withheld the balance owing to orders of injunction in Emfil Limited (Mombasa ELC 113 of 2015). That they executed forms for special LCB consent. The 3<sup>rd</sup> defendant had no title to transfer to the plaintiff in 2014. The witness was the only person who could do so as registered proprietor then and presently.
16. Upon cross examination by Ms. Nafula the witness conceded he did not have the sale agreement as his evidence. He paid the Kshs. 5 million in cash but there was no acknowledgement note. He pointed the balance is usually paid after registration. He reiterated that he paid stamp duty for transfer and the same would not have been registered without the said payment. That the three agents who facilitated the LCB consents and registration on his behalf and on instructions of the 3<sup>rd</sup> defendant were not his witnesses. The 3<sup>rd</sup> defendant never informed him of the sale to the plaintiff and he only became aware upon the present proceedings. He has not joined Emfil Limited in the present proceedings. The witness on being shown the title in the plaintiff's name reiterated it is illegal having been issued after his title.



17. Cross examined further by Ms. Langat DW3 testified that he was in possession of the suit property through his caretaker and was still in communication with the 3<sup>rd</sup> defendant. That the 3<sup>rd</sup> defendant was aware of the present case including his outstanding balance due to the encumbrance herein. The witness could not confirm if he was a defendant in the Emfil case.
18. DW3 clarified in reexamination that there was no dispute in the production of the sale agreement between him and 3<sup>rd</sup> defendant since the same is admitted at paragraph 27 of the plaint. His transfer from the 3<sup>rd</sup> defendant is franked which is done by the officers at the land registry. The 1<sup>st</sup> defendant case was closed at this juncture.

### **The 2<sup>Nd</sup> Defendants Case**

19. Mr. Mokaya, Land Registrar Kwale, testified as DW1. Referring to the records in the parcel file he had brought to court, the witness told the court the suit property was first registered to the Settlement Fund Trustee on 1/11/2011. On 8/11/2011 it was transferred to the 3<sup>rd</sup> defendant. On 26/03/2013 it was transferred by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant for Kshs. 9million. That there were three (3) registers where entries 1,2 & 3 in all of them were the same. That one of the registers shows the property was transferred to the plaintiff for Kshs. 7million. However, the green card is cancelled on 6/5/2014 by two lines indicating the property was sold twice and showing the 1<sup>st</sup> defendant as owner. That the entry bearing the 1<sup>st</sup> defendant is marked 'fraud' but the word is also cancelled.
20. According to the Land Registrar the 1<sup>st</sup> defendants entry was opened under Section 79 (2)(3) of the Land Registration Act. That the current registered owner is the 1<sup>st</sup> defendant and the plaintiffs entry cancelled because the land was not available for transfer having been transferred earlier. That the records show the 3<sup>rd</sup> defendant signed two transfers to the 1<sup>st</sup> defendant and plaintiff which was fraudulent.
21. Cross examined by Ms. Nafula the witness confirmed the parcel was initially registered to the 3<sup>rd</sup> defendant and was sold to both the plaintiff and 1<sup>st</sup> defendant. That at some point there were two people holding title to the suit property but the office cancelled the plaintiffs since it came 1 year later after the 1<sup>st</sup> defendants. The file bore no notice to the plaintiff before the cancellation. DW1 conceded the parcel file had no receipt for payment of stamp duty, LCB consent and attendant application though he could not confirm if they were never presented. He asserted that any transaction without LCB consent is void.
22. Upon further cross examination by Mr. Omollo, Mr. Mokaya added that the 3<sup>rd</sup> defendant having transferred the property to the 1<sup>st</sup> defendant his interest ceased and could not transfer the property to the plaintiff. He reiterated that the entry should therefore be expunged.
23. With the above the 2<sup>nd</sup> defendants case was marked as closed.

### **Submissions**

24. Parties filed and exchanged closing written submissions pursuant to the court's direction.

### **Plaintiff Submissions**

25. The plaintiffs' submissions dated 12<sup>th</sup> November 2024 were filed through the firm of Khalid Salim & Company advocates and three issues were identified for determination and are summarized here below;



### **Whether the Plaintiff is a bona fide purchaser for value**

26. It is submitted that the plaintiff conducted all necessary due diligence including pre- and post-registration searches, obtained consents, and paid stamp duty and purchase price and acquired a valid title in good faith, and is therefore a bona fide purchaser for value. Reliance is placed on *Samuel Kamere v Land Registrar* [2015] eKLR, *Harrison Kiambuthi Wanjiru & Another Vs District Land Registrar Nairobi & 3 Others* (2022) eKLR and *Katende v Haridar & Co. Ltd* [2008] 2 E.A. 173.
27. It is contended that no fraud or misrepresentation is attributable to the plaintiff. The 1st defendant's transfer lacks proof of Land Control Board consent, stamp duty, or a sale agreement, rendering it void under Section 3(3) of the *Law of Contract Act* and Section 6(1) of the *Land Control Act* as per the case of *Nancy Chepkirui Soi Nancy Chepkirui Soi v Gideon Maritim* [2021] eKLR, relying on the case of *Rani Ngaithe Githire VWanjiku Munge* [1979] KLR 50, and *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR.. The Plaintiff argues that lack of consent renders such transactions null and void.

### **Whether the 2nd Defendant breached his duty of care owed and acted negligently in his duties to the Plaintiff**

28. The plaintiff further submits that the 2<sup>nd</sup> defendant breached his duty of care owed to it and acted negligently by arbitrarily cancelling the entries in the green card for the suit property and issuing a title to the 1<sup>st</sup> defendant which title was allegedly issued before the Plaintiffs on 26<sup>th</sup> March 2013. The 2nd defendant breached its duty of care by issuing searches confirming the 3rd defendant's ownership, then cancelling the plaintiff's title without notice, violating Section 79, 80 and 87 of the *Land Registration Act* and Article 47 of *the Constitution* on fair administrative action, arguing that it was denied an opportunity to be heard.

### **Whether the Plaintiff is entitled to the reliefs sought.**

29. The Plaintiff therefore urges that it be declared the rightful owner of the suit land. In the alternative, it seeks refund of the purchase price of Kshs. 8,135,040/= and costs.

### **1<sup>st</sup> Defendants Submissions**

30. The 1<sup>st</sup> defendant's submissions are dated 20<sup>th</sup> December 2024 filed through the firm of Kamoti Omollo & Company advocates.
31. The 1st defendant asserts that he is the lawful registered proprietor of the suit property having purchased it from the 3<sup>rd</sup> defendant by an agreement dated 21<sup>st</sup> March 2013 for Kshs. 9,000,000/=. He paid Kshs. 1,000,000/= as deposit and later Kshs. 5,000,000/=:, after which a transfer was executed in his favour. His title was registered on 26<sup>th</sup> March 2013, prior to the Plaintiff's alleged purchase.
32. He relies on the testimony of the Land Registrar, Kwale, who confirmed that the 1st defendant was duly registered on 26<sup>th</sup> March 2013, and that the later transfer to the Plaintiff was in error.
33. The 1<sup>st</sup> defendant cites *Joseph N.K. Arap Ngok v Justice Moiyo Ole Keiwua & Another* [1997] eKLR, where the Court affirmed that the title of a registered proprietor is sacrosanct and indefeasible unless obtained through fraud. He contends that no fraud was proved against the 1<sup>st</sup> defendant, and further relies on *Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* [2004] eKLR, to argue that fraud must be specifically pleaded and strictly proved.



34. It is urged the plaintiff neither pleaded fraud against the 1<sup>st</sup> defendant nor proved it. On the contrary, the Plaintiff admitted in its own pleadings that the 3<sup>rd</sup> defendant had sold the land to the 1<sup>st</sup> defendant and executed a transfer in his favour. The plaintiff is thus bound by its pleadings.
35. The 1st defendant therefore prays that the plaintiff's case be dismissed with costs.

### **The 2<sup>nd</sup> Defendants Submissions**

36. No submissions were filed on behalf of the 2<sup>nd</sup> defendant.

### **Issues For Determination**

37. Upon considering the pleadings, the evidence led, the rival submissions of the parties and the law and authorities cited the following issues commend determination.
1. Whether the plaintiff is the lawful owner of the suit property.
  2. Whether the 1<sup>st</sup> defendant's title was obtained irregularly or fraudulently.
  3. Whether the Plaintiff is a bonafide purchaser for value without notice
  4. Whether the 2<sup>nd</sup> defendant breached its duty of care to the plaintiff.
  5. Whether the plaintiff is entitled to the reliefs sought.

### **Analysis And Determination**

38. Briefly, my understanding of the plaintiff's claim is that it is the registered owner of the suit property, having acquired it from the 3rd defendant through a sale agreement dated 7th April 2014 for a consideration of Kshs. 7,750,000/=. The plaintiff asserts that transfer was duly registered and a title deed issued in its name on 6th May 2014. However, upon conducting an official search in April 2016, the plaintiff discovered that the property had been registered in the name of the 1st defendant through an earlier transfer allegedly backdated to 26th March 2013. The plaintiff claims that the 1st and 2nd defendants colluded to fraudulently alter the green card, thereby displacing its lawful ownership, and further blames the 3rd defendant for failing to disclose a prior transaction with the 1st defendant.
39. On the other hand, the 1st defendant contends that he is the bona fide owner of the suit property, having purchased it from the 3rd defendant on 21st March 2013 for a consideration of Kshs. 9,000,000/=. He maintains that transfer was duly registered and a title deed issued on 26th March 2013, hence the 3rd defendant had no valid interest left to transfer to the plaintiff in 2014. The 1st defendant further notes that there exists a pending suit, Mombasa ELC 113 of 2015 (Emfil Limited Vs AG & 421 Others ) contesting ownership of the same property, which prompted him to suspend further payments to the 3rd defendant. He therefore prays that the plaintiff's claim be dismissed with costs.
40. The 2nd defendant, for his part, denies any fraud, illegality or negligence in the registration process. He asserts that the 1st defendant's registration as proprietor was proper and lawful, and if the plaintiff's name was ever reflected in the register, the same was a mistake occasioned by the 3rd defendant's misrepresentation. The 2nd defendant maintains he bears no liability and prays that the suit against it be dismissed with costs.



## Whether the plaintiff is the lawful owner of the suit property

41. He who asserts must prove. Section 107 of the Evidence Act Cap 80 of the laws of Kenya requires that  
“Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
42. Based on the facts of the case and pleadings it was incumbent upon the plaintiff to prove that he is the absolute and indefeasible owner of the suit property as pleaded. That the 1<sup>st</sup> defendant perpetrated fraud by himself or in collusion with the 2<sup>nd</sup> defendant among other allegations pleaded against his registration.
43. PW1 produced in evidence Agreement for Sale dated 7/4/2014 between Paul Van Beveren(purchaser) and Omari Bwana Zonga (Vendor) the 3<sup>rd</sup> defendant herein in respect of parcel reference Ramisi Kinondo Squatter Settlement No. 193 Msambweni. The purchase price is indicated as Kshs.7,750,000/-.
44. Section 3(3) of Law of Contract Act provides that- No suit shall be brought upon contract for disposition of land unless, the contract which the suit is founded upon is in writing, signed by all parties thereto and the signature of each party has been attested by witnesses who are present when the contract was signed.
45. The court has reviewed the sale agreement between the plaintiff and the 3<sup>rd</sup> defendant and is satisfied that it meets the above conditions having been signed by both parties in the presence of Caroline Njogu Advocate.
46. The other question to confirm is whether the suit property initially belonged to the vendor who is sued as the 3<sup>rd</sup> defendant herein. This fact has not been disputed by both the plaintiff and 1<sup>st</sup> defendant. PW1 availed Certificate of title LR. No. Kwale/Kinondo Ramisi SSS/193 dated 8/11/2011 to Omari Mbwana Zonga as the absolute proprietor. The Land Registrar DW1 confirmed in his evidence and from the parcel file that the 3<sup>rd</sup> defendant was registered as proprietor as at the said date and also produced a copy of the title (DW1 Ex5).
47. PW1 further produced a copy of Certificate of title dated LR. No. Kwale/Kinondo Ramisi SSS/193 dated 6/5/2014 in favor of Southern Bay Limited the plaintiff herein. He also produced a Transfer of Land dated 28/04/2014 in this regard. But in my view what is pertinent at this point is whether at the time of this registration/conveyance the 3<sup>rd</sup> defendant was still the registered proprietor. For me for purposes of the plaintiffs claim any pre-registration search as at the time of the registration of the plaintiff as proprietor ought to have indicated the 3<sup>rd</sup> defendant as registered proprietor of the suit property. The burden of proof therefore was on the plaintiff. This burden was not discharged and I will shortly show why.
48. During his direct evidence PW1 sought to produce the pre-registration Official Search (see item 5 of the plaintiffs list of documents) however an objection was raised by Mr. Omollo which the court sustained for production by the maker. Be that as it may PW1 told the court that his counsel Caroline Thongori did full due diligence before PW1 paid the purchase money and showed him a green card search which did not show any anomaly but confirmed the 3<sup>rd</sup> defendant as the owner.
49. The above green card search was not produced in evidence by PW1 I never saw it. I therefore had no preregistration search conducted on behalf of the plaintiff and or PW1 to confirm that as at March 2014 or thereabouts the suit property was still registered in the name of the 3<sup>rd</sup> defendant as proprietor.



I say this considering the 1<sup>st</sup> defendant's claim that as at this time the 3<sup>rd</sup> defendant had no capacity to transact on the suit property having allegedly transferred it to the 1<sup>st</sup> defendant.

50. Moreover the 1<sup>st</sup> defendant on his part produced in his list a search dated 26/03/2013 showing at entry No. 4 & 5 the 1<sup>st</sup> defendant as proprietor. The application for the same is also attached having been made on the same date. Mr Magolo who gave evidence on behalf of the 1<sup>st</sup> defendant corroborated that the parties signed the transfer from the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant in his presence.
51. In addition PW1 produced an Affidavit sworn on 24/11/2015 by the 3<sup>rd</sup> defendant (see item 10 of plaintiff's list of documents) where it is deponed that a sale agreement was entered into on 21/3/2013 between the 1<sup>st</sup> and 3<sup>rd</sup> defendant. That a transfer of land was also signed pursuant thereto in his presence. This date of March 2013 predates the plaintiff transaction in respect of the suit property.
52. Did the plaintiff acquire a valid title to the suit property? I have already demonstrated that there was no evidence that the 3<sup>rd</sup> defendant was still the registered proprietor of the suit property at the time the plaintiff was purchasing the suit property in 2014. It had already been sold to the 1<sup>st</sup> defendant and a transfer actually signed and registered. Mr. Mokaya the land registrar indeed asserted during cross examination that the 3<sup>rd</sup> defendant having transferred the property to the 1<sup>st</sup> defendant his interest ceased and could not transfer the property to the plaintiff. The court respectfully agrees with this position. Since the plaintiff transaction was undertaken after the 3<sup>rd</sup> defendant had already sold the property to someone else and executed the transfer he had no capacity both legally and morally to transfer the suit property to the plaintiff and or PW1 when he knew very well he had not formally rescinded the earlier arrangements.
53. How then would the 1<sup>st</sup> defendant be blamed for the above? The 1<sup>st</sup> defendant cannot be blamed for the earlier sale. In fact the plaintiff pleads at paragraph 20 of the amended plaint that the 3<sup>rd</sup> defendant did not disclose to the plaintiff that a transfer had been signed between the 1<sup>st</sup> defendant and himself with regard to the suit property. This exonerates the 1<sup>st</sup> defendant. A party is bound by its pleadings.

**Whether the 1<sup>st</sup> defendant's title was obtained irregularly or fraudulently.**

54. The Plaintiff asserts that the 1<sup>st</sup> defendant perpetrated the fraud that occasioned the registration of the suit property in its name. It is now trite that fraud must be specifically pleaded, particularized and its standard of proof is slightly higher than the balance of probabilities, the normal standard in civil cases. In *Nizar Viram t/a Kisumu Beach Resort Vs Phoenix of East Africa Assurance Co. Ltd (2004) eKLR* cited by the 1<sup>st</sup> defendant, the Court of Appeal stated thus; -

‘Firstly, there is no denying that there were no particulars supplied in the defence pleading under Order VI rule 8(1) which requires in mandatory terms that:

“every pleading shall contain the necessary particulars of any claim defence or other matter pleaded including, without prejudice to the generality of the foregoing: –

- (a) particulars of any .....fraud ..... on which the party relies.
- (b) Where a party pleading alleges .....fraudulent intention.....particulars of the facts on which the party relies.”

In the absence of such pleading, the insurer is not at liberty to agitate the allegation of fraud or fraudulent intention. Fraud is a serious quasi – criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient



notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation.’

55. The Court of Appeal in *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR stated thus:-

“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.”

56. In *Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another* [2016] eKLR the court stated that –

‘He who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case *Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others* [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges....

57. It has been submitted on behalf of the 1<sup>st</sup> defendant that no particulars of fraud were pleaded against the 1<sup>st</sup> defendant. I have perused the amended plaint. In my view paragraphs 13 and 14 brings out the events of fraud as backdating of the 1<sup>st</sup> defendants title to the year 2013. Also, that the 1<sup>st</sup> defendant colluded with the registrar to unlawfully remove the original green card containing the plaintiffs proprietorship and replacing it with the 1<sup>st</sup> defendant. In my view this is sufficient information and notice. The plaintiffs task was to prove this fraud was committed by the said parties.

58. Based on my earlier analysis I have already demonstrated that there was no proof led by the plaintiff confirming that at the time of his transaction the 3<sup>rd</sup> defendant was still registered as owner of the suit property and not the 1<sup>st</sup> defendant. He did not produce the green card search he referred to as having been shown to him by Ms. Njogu. If Ms. Njogu had shown him this document then all the plaintiff should have done would be to obtain it from her and produce it as part of his evidence before court. PW1 having failed to adduce this critical evidence, his allegations of backdating and removal of the green card therefore had no foundation upon which they could stand. These specific allegations were not proved in my view to the required standard which is slightly higher than a balance of probabilities.

59. Was there any wrong committed by the 2<sup>nd</sup> defendant apart from the above allegations? It is pleaded that the 2<sup>nd</sup> defendant colluded with the 1<sup>st</sup> defendant to backdate the 1<sup>st</sup> defendant title. I have already explained elsewhere why this allegation and that of removal of the green card cannot be sustained. It is further pleaded that the 2<sup>nd</sup> defendant failed to follow the procedure provided in cancellation of the plaintiffs title. For me as long as there was no valid title issued to the plaintiff then this argument would be of no value to this dispute it is otiose.

60. The plaintiff also desires that the 1<sup>st</sup> defendants title is cancelled. The plaintiff also avers at paragraph 16 of the amended plaint that the certificate of title registered in favor of its name is absolute and



indefeasible and thus craves to be declared as such. The court has been referred to the provisions of section 26 of the [Land Registration Act](#) which provides that a title shall be taken as prima facie evidence that the person who holds the title is the absolute and indefeasible owner of the property in question.

61. Additionally as long as the court has found that the plaintiff did not have good title, the plaintiff has no locus to impeach the other title. In my view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. See the Court of Appeal decision in the case of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] KECA 27 (KLR).

### **Whether the Plaintiff is a bonafide purchaser for value without notice**

62. But having made the foregoing findings would the plea of bonafide purchaser for value without notice be available to the plaintiff? It has been suggested that the Plaintiff is a bonafide purchaser for value of the suit property without notice of other claims. But who is a bonafide/innocent purchaser?

63. The Court of Appeal in the case of Samuel Kamere Vs Land Registrar (Kajiado Civil Appeal No.28 of 2005 (2015) eKLR held that in order to be considered a bonafide purchaser for value, one must prove they acquired a valid legal title and carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title as well as paid a valuable consideration.

64. In Suleiman Rahemtulla Omar & another v Musa Hersi Fahiyeh & 5 others (2014) eKLR the Court of Appeal defined the duties bestowed upon a person claiming bona fide purchaser's interest. It held that:

“It is our view that counsel for both parties failed to carry out sufficient due diligence before committing their clients to the transaction. It is true that practically speaking counsel for the purchaser carries the heavier burden when it comes to carrying out due diligence. This is so because it is his client who stands to lose if he commits his funds to purchase a property that later turns out to be problematic....”

65. The most elaborate test was laid down in the Ugandan Case of Katende Vs Haridar & Company Ltd (2008) 2EA 173 which has been cited with approval in many decisions in our courts where 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.

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



66. Applying the foregoing to the facts of this case I must state the plaintiff through PW1 may have purchased the property in good faith. However, he has failed to show that the 3<sup>rd</sup> defendant had apparent good title at the time the plaintiff was entering into the sale transaction. He also did not produce the pre-registration search which he reiterated when cross examined by Ms. Langat for the 2<sup>nd</sup> defendant that did not bring it to court. The court has also made a finding that the plaintiff does not have good title
67. Further while PW1 testified that he visited the suit property as part of his due diligence with a land surveyor to see the beacons, he did not call the surveyor to corroborate this evidence. He also did not call the Chairman Kinondo whom he alleged to have confirmed that the property belonged to the 3<sup>rd</sup> defendant.
68. I think I have said enough to show why I'm persuaded that the defence of innocent purchaser would not be available to the plaintiff.
69. But assuming PW1 was an innocent purchaser for the reason that he honestly intended to purchase the property, where would the plaintiffs recourse lie this being a court of justice? Indeed, PW1 conceded in cross examination that his sale agreement was between him and the 3<sup>rd</sup> defendant. That it was a willing buyer willing seller arrangement. I do not see the privity of contract as far as the 1<sup>st</sup> defendant is concerned in this arrangement. I think if there is anyone to blame then it is the 3<sup>rd</sup> defendant whom it has already been established sold the suit property to two individuals and failed to make a disclosure to PW1.

**Whether the plaintiff is entitled to the reliefs sought.**

70. Having considered the facts and the evidence placed before this court, the plaintiffs remedy and or recourse lies against the 3<sup>rd</sup> defendant who sold the suit property to the plaintiff without disclosing that he had previous arrangements with the 1<sup>st</sup> defendant even if he was denying full payment of the purchase price. PW1 affirmed during cross examination by Mr. Omollo that he was asking for a refund of his money if he does not get the suit property back. He also confirmed that as per the contents of paragraph 29 of the amended plaint it is Mr. Zonga who is in the wrong.
71. The above paragraph 29 reads 'The plaintiff avers that the 3<sup>rd</sup> defendant was negligent as he failed to disclose to the Plaintiff that the 1<sup>st</sup> defendant had in possession the executed transfer from the initial purchase he made of the suit property.'
72. Indeed a party is bound by its pleadings- see the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR. This is further supported by the Land Registrars evidence that according to the documents Mr. Zonga the 3<sup>rd</sup> defendant herein signed two transfers to the 1<sup>st</sup> defendant and to the plaintiff and it is the 3<sup>rd</sup> defendant who committed fraud. The court agrees with this position.
73. In view of the foregoing I will proceed to look at the plaintiffs alternative claim. This is conceded by PW1 and pleaded at paragraph 25 of the amended plaint. The plaintiff claims it has suffered loss and damages in the sum of Kshs. 8,135,040/=. The particulars of loss are given as hereunder; -
  - i. Purchase Price Paid .....Kshs 7,750,000/=
  - ii. Stamp duty paid on the purchase Price....155,040/-
  - iii. Legal Fees Incurred.....200,000/-
  - iv. Consent.....15,000/-



v. Valuation & Facilitation Fees...15,000/-

74. It is now established that special damages must be specifically pleaded and proved see the case of Equity Bank Ltd vs Gerald Wangomb'e Thuni [2015] eKLR) and the Court of Appeal decision in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177.
75. With regard to the legal fees above the court had no way of authenticating the same. There was no fee note nor corresponding payment. The same observation would apply to the consent and valuation and facilitation fees. While the LCB consent was issued the court had nothing against which to validate the fees chargeable. The purchase price is indicated in the sale agreement as 7,750,000/- which is consistent in the documents produced by the plaintiff being the sale agreement between the plaintiff and the 3<sup>rd</sup> defendant, the transfer, the LCB consent and the Stamp Duty Declaration and pay in slip. The court was further emboldened by a payment acknowledgement dated 6/5/2014 of the final balance of Kshs.650,000 signed by the 3<sup>rd</sup> defendant. This evidence was not controverted. The payment of Kshs. 155,040/- stamp duty was corroborated by a stamp on the Stamp Duty Declaration as having been received at the National Bank of Kenya.
76. Moreover it would be against equity to let the 3<sup>rd</sup> defendant get away with the purchase price. Equity suffers no wrong without a remedy. It would be a travesty of justice and unjust enrichment. The court is reminded of the case of Samuel Kamau Macharia Vs Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited [2003] eKLR where Kuloba J in explaining the concept of unjust enrichment had this to say;-

‘..., indeed, as a remedy attracting wrong, unjust enrichment was well-known in our courts fairly early. Thus, as far back as 1957, we see it spoken of by the then Court of Appeal for Eastern Africa comprising of Judges of eminence, namely, Sir Newnham Worley, P, Sir Ronald Sinclair, V-P, and Briggs, J A, in the case of Saleh bin Ghaleb v Hussein al Qu’aiti , [1957] EA 55, at p 73, where one finds this passage, vis, “so far as the allowances are concerned, this was a clear case of unjust enrichment” leading to a suffering of wrongful loss of which equity would provide a remedy. Broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow a defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff’s expense, and this, subject to certain defined limits, will not be tolerated by the law, and owing to the importance and aim of this doctrine in every advanced and civilized system of justice: “Woe unto the day when it is lost sight of in Kenya, which would also be contrary to the spirit of Section 3(c) of the *Judicature Act*. I trust that in future, in appropriate cases, there will be less smothering of just equitable rights” on the basis of technical objections and artificial distinctions oblivious to justice and substance.’

77. The court would not hesitate to grant the prayers for refund as identified and analysed hereinabove.
78. Additionally the plaintiff having failed to successfully defend his title on the grounds raised cannot be granted the prayers (a),(b), (c)and (d) of the amended plaint dated 6/12/2018.
79. Having arrived at the foregoing conclusion I see no need to discuss the import of the judgement in the case of Emfil Limited which has featured in these proceedings. I have seen the orders of A. Omollo J dated 2<sup>nd</sup> June 2015 which also affected parcel Kwale/Ramisi/Kinondo S.S.S. Parcel Number 193. The 1<sup>st</sup> defendant has also not filed a counterclaim which would have warranted this discussion.



80. The court therefore to dispose of this suit enters judgement for the Plaintiff against the 3<sup>rd</sup> defendant for loss in the following terms;-
1. Purchase Price paid to 1<sup>st</sup> defendant of Kshs 7,750,000/-
  2. Stamp duty paid on purchase price Kshs 155,040/-
  3. Interest on the 1) and 2) above from 6<sup>th</sup> December 2018 when the alternative prayer was pleaded until payment in full.
  4. Costs of the suit as against the 3<sup>rd</sup> defendant
81. The plaintiff's suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants is dismissed with no orders as to costs.  
Orders accordingly.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 3<sup>RD</sup> DAY OF OCTOBER 2025.**

**HON. LADY JUSTICE A.E DENA**

**JUDGE**

**03.10.2025**

Judgement delivered virtually through Microsoft teams Video

Conferencing Platform;-

In the presence of:

Mr. Omollo for the 1<sup>st</sup> Defendant

No appearance for the Plaintiff

No appearance for the 2<sup>nd</sup> Defendant

No appearance for the 3<sup>rd</sup> Defendant

Mr. Daniel Disii – Court Assistant.

