



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 70 OF 2022

FRAMALU LIMITED

MATTEO BARBAGLIOPLAINTIFFS

-VERSUS-

NGOMENI SWIMMERS LIMITED DEFENDANT

-AND-

OMAR NGONYO MBAURO INTERESTED

PARTY

JUDGMENT

1. The plaintiffs, in their plaint dated 3 November 2022, sought the following reliefs against the defendant:

a) General damages.

b) Special damages in the sum of Kshs. 47, 597, 209.89/-

c) Costs and interests.

2. The Interested Party also submitted a defense and counterclaim dated July 8, 2024, and requested the following reliefs:

a) A declaration that the title held by the Defendant is invalid ab initio and that the interested party is the rightful owner of the property known as Malindi Ngomeni 774, where the Plaintiffs' villa called Ndoto Boutique is located.

b) An order restraining the Plaintiff, Defendants, their servants, assigns, agents, or anyone acting under their instructions from remaining on the suit property known as Portion number 20117 Mambrui.

c) An order granting vacant possession of the suit property to the interested party; if not, the OCS Gongoni Police Station is to oversee the eviction or handover.

d) Mesne profits from 2008 until vacant possession is granted to the Interested Party.

e) Costs and interests.

f) Any other relief that the court may deem fit.

3. The Defendant filed a defense to the Interested Party's defense and counterclaim. Its defense is dated November 4, 2024.

4. The matter proceeded to a hearing on the merits as shown in the court proceedings. The Plaintiffs' case was supported by

the testimony of Matteo Barbaglio, the 2nd Plaintiff herein (**PW1**), while the Defendant called one witness, Miano Nuzzo (**DW1**).

5. At the conclusion of the hearing, the court directed the parties to submit written submissions. I acknowledge receipt of the written submissions from Ms. Mwangi, learned counsel for the plaintiffs; Mr. Murgor, learned counsel for the defendant; and the Interested Party, who appeared in person, with gratitude, as these submissions greatly assisted in resolving the issues raised in the suit.
6. Based on the evidence on record and submissions, the issues I identify for this court's decision are whether the Plaintiffs are entitled to the specific and general damages sought; whether the Interested Party's counterclaim is justified; and who will bear the costs of the case.
7. PW1 adopted his witness statement dated November 3, 2022, as his primary evidence. He also presented exhibits Nos. 1 to 20, which correspond to the documents listed in the November 3, 2022, list. He testified that he learned about the Interested Party's claim over the suit property (Portion Number 20119/2

Mambrui, approximately 0.60 hectares) after signing the agreement for sale and ELC 15 of 2010, in which the Court canceled the Defendant's title to the suit property (PEXH 9 is a copy of the judgment). He was not aware of any ongoing appeal. He mentioned there was a proposal for him to buy the property when the Interested Party asked him to vacate, but that was only a proposal. He was unaware of any agreement between the Defendant and the Interested Party.

- 8.** On cross-examination, PW1 testified that one Mr Angelo was in occupation of the suit property, having sold it to him for a consideration of Kshs. 29,000,000/-. He stated that when he purchased the suit property, he went to his advocate, Ms. Muli, who was also the Defendant's secretary.
- 9.** The evidence on record also established a sale agreement dated September 4, 2020, between the 2nd Plaintiff and the Defendant, as well as a sub-lease registered as entry six on December 9, 2020, in favor of the 1st Plaintiff. According to the agreement, the interest sold was for a term of 99 years, starting on July 1, 1994. The consideration was Kshs. 18,000,000, to be paid in three installments- a deposit of Kshs.

3,000,000 paid upon execution; Kshs. 12,000,000 to be paid on or before October 15, 2020; and Kshs. 3,000,000 on or before November 2020, with the condition that the vendor completes the works specified in clause 7 of the agreement. The conditions under clause 7 stated that the works (removal of sand on Plot No. 20119/1) were to be completed by the dates mentioned above, and that the remaining balance would be paid only upon satisfactory completion of the works.

10. Clause 8.1 also provided a warranty that the subject property's title was clear, and the vendor agreed to indemnify the purchaser against any loss, demands, or claims. Furthermore, under clause 8.2, the vendor warranted, among other things, that there were no adverse claims to the property, that all material information related to the property had been disclosed, and that the vendor was not involved in any litigation, arbitration, or administrative proceedings concerning the property.

11. Miano Nuzzo (DW1), a director of the Defendant Company, also adopted his written statement dated October 3, 2023, as his evidence in chief. He presented exhibits Nos. 1 to 6, which

are listed in the filed documents. He testified that he informed PW1 of the pending lawsuit. He confirmed that the Interested Party was not a party to the previous lawsuit and only became aware of the Interested Party when he started construction on the suit property. It was at that point that he decided to purchase the property from the Interested Party. He paid a sum of Kshs. 3,000,000.

12. DW1 maintained during cross-examination that he informed PW1 about the court case before purchasing the suit property. He confirmed that Kshs. 3,000,000 is still owed to the Interested Party, and the agreement between them remains valid. During re-examination, he told the court that there is a pending appeal against the decision in ELC 15 of 2010, and he denied owing the Interested Party any money arising from their transaction.

13. In their submissions, Ms. Mwangi argued that the Sale Agreement dated September 9, 2020, included key warranties under Clause 8.2, specifically that there were no adverse claims on the property, full disclosure had been made, and the vendor was not involved in litigation. The 2nd Plaintiff testified

that these warranties were essential to the purchase, yet no disclosure was made of ELC No. 15 of 2010 or the Chief Land Registrar's letter dated November 13, 2019. He stated that he would not have gone through with the transaction if he had known about the dispute or Omar's third-party title, and he claimed that the concealment was intentional.

14. Relying on **Hydro Water Well (K) Ltd v Sechere & 2 Others (2021) eKLR**, counsel argued that the Plaintiffs had proven the existence of a contract, its breach, and the resulting loss. They also cited **Hahn v Singh [1985] KLR 716**, asserting that the claim for Kshs. 47,597,209.89 in special damages was specifically pleaded and strictly supported by documentary evidence, including costs related to construction, utilities, taxes, landscaping, legal fees, and other expenses. Counsel further cited **Framalu Ltd v Malindi Water & Sewerage Co. & Another [2023] eKLR**, where the court concluded that a purchaser misled by a vendor's misrepresentation is entitled to special damages, particularly when due diligence is hindered by intentional non-disclosure.

15. Regarding general damages, Ms. Mwangi stated that they are payable for breach, misrepresentation, and interference with property rights. Referencing Anson's Law of Contract, 28th Edition, she argued that damages can compensate for loss even if it cannot be precisely measured. Counsel cited **Reuben Kioko Mutyaene v KCB (2020) eKLR**, **Samuel Mwangi Nguuni v District Land Registrar [2016] eKLR**, and **Ali Salim Baraka v Commissioner of Lands [2022] eKLR**, where courts awarded general damages for emotional distress, uncertainty, and loss of use caused by defective titles and misrepresentation.

16. To counsel, the Defendant's concealment caused emotional and financial harm, further worsened by: use of a conflicted lawyer, Omar's competing Government-issued title, an eviction notice, and the risk of losing possession or paying mesne profits. Counsel also cited Article 40(6) of the Constitution, **Freedom Ltd v Mbarak [2024] KESC 76**, and **Harcharan Singh Sehmi v Tarabana Co. Ltd [2023]** to support the argument that fraud can invalidate title, even against *bona fide* purchasers.

17. Counsel further submitted that, although the Plaintiffs sold the suit property to Angelo, they had not yet transferred ownership; thus, ownership did not change merely by signing a sale agreement, as was established in **David Peterson Kiengo v Kariuki Thuo [2012] eKLR**. She argued that the agreement with Angelo occurred after the filing of this suit; therefore, the Plaintiffs' standing in this case could not be challenged, as they possessed the necessary *locus standi* at the time of filing. She also cited the case of **John Mungai v Samuel Mburu [2021] eKLR**.

18. On his part, Mr. Murgor, learned counsel for the Defendant, argued that having sold the suit property, the Plaintiffs had no standing to bring the suit. He stated that they cannot seek damages and a refund of the purchase price while simultaneously benefiting from the proceeds of the sale of the exact property to a third party. He relied on the case of **Republic v Institute of Certified Public Secretaries of Kenya (ex parte Mundia Njer Geteru) [2010] eKLR**.

19. Counsel also stated that, having relinquished their interest in the suit property, the Plaintiffs no longer have a justiciable

interest in the matter, according to Order 3 Rule 4 (2) of the Civil Procedure Rules. To support this claim, he cited the case of **Swanya Limited & Another v National Bank of Kenya Limited & Another [2022] eKLR**.

20. Counsel further argued that the doctrine of unjust enrichment, as highlighted in the case of **Vinyak v Singh & 2 Others (application 175 of 2017) [2023] KECA 1433**, prevents the Plaintiffs from receiving double recovery, and allowing the Plaintiffs' claim would constitute unjust enrichment in this case.

21. Regarding whether the Plaintiffs were entitled to general damages, Mr. Murgor referenced the case of **National Industrial Credit Bank Limited v Aquinas Francis Wasike & another [2015] eKLR**. He argued that when a party has been compensated or has placed himself in a better position than he would have been if the breach had not occurred, general damages cannot be awarded. Since the Plaintiffs sold the suit property at a significant profit, they are not entitled to general damages.

22. Counsel further argued that the Plaintiffs were not entitled to the special damages they claimed because they failed to specifically plead and strictly prove these damages, as required in the case of **Hahn v Singh [1985] KLR 716**. Additionally, counsel stated that awarding both general and special damages was punitive and violated the principle established in **Addis v Gramophone Co Ltd [1909] AC 488**, which holds that contract damages should compensate for actual loss, not result in windfalls.

23. Counsel argued that there was no breach of contract justifying the damages claimed, and that if the court found any breach, the Plaintiffs failed to prove a connection between the breach and the damages sought.

24. There is no doubt that a sale agreement existed between the 2nd Plaintiff and the Defendant for the sale and purchase of the suit property for a consideration of Kshs. 18,000,000/-. Undoubtedly, the sale was completed, and registration was ultimately effected in favor of the 1st Plaintiff. The Plaintiffs' grievance arose after this Court's decision in ELC No. 15 of 2010, where the Defendant's title was nullified. As already

noted, clause 8.2 of the Sale Agreement expressly warranted that there were no adverse claims over the property, that full disclosure had been made, and that the Defendant was not engaged in litigation or administrative proceedings touching on the land. The evidence before the Court confirms these warranties were false.

25. The Defendant tried to rely on its alleged disclosure to the 2nd Plaintiff and on a pending appeal to avoid liability. However, no credible documentary evidence was presented to show that any adverse title, ongoing litigation, or the Chief Land Registrar's letter of 2019 was actually disclosed. The Defendant cannot rely on mere oral disclosure to negate the explicit written warranties it openly provided. Under clause 8.1, the Defendant also agreed to indemnify the purchaser for any losses arising from title defects, thereby assuming full contractual responsibility.

26. I am therefore convinced that the Plaintiffs proved fraud and misrepresentation that resulted in a breach of contract. The Defendant misrepresented the title status and deliberately

concealed key facts relevant to the transaction. That breach occurred at the point of sale and was unjustified.

27. Having established a breach of contract, the Plaintiffs bore the duty to demonstrate resulting loss to justify the remedies sought.

28. The Plaintiffs' claim for special damages was calculated at Kshs. 47,597,209.89. They listed the amounts in the Plaint to include the purchase price, new equipment and facilities, maintenance costs, taxes, employees' salaries, Caterpillar fuel and maintenance, bills, swimming pool expenses, accountant fees, NHIF and medical costs, generator fuel, publication and advertising, miscellaneous fees, hotel expenses, office items and expenses, and uncategorized items.

29. It is well-established law that special damages must not only be specifically pleaded but also scrupulously proven. The Plaintiffs failed to show how the various expenses resulted from the Defendant's alleged concealment, or that such costs would not have been incurred if the title had been clear of dispute. More importantly, aside from the purchase price, which the Defendant did not dispute, the amounts claimed lacked

supporting admissible evidence. The management accounts and expense sheets provided by the 1st Plaintiff did not, in my view, sufficiently demonstrate a direct causal link between the Defendant's alleged misrepresentation and the claimed expenses. Many entries were vague, lacked supporting invoices or receipts, and were not solely attributable to the current dispute. Therefore, I conclude that the evidence does not meet the legal standard for proving special damages.

30. About the reimbursement of the purchase price, the Plaintiffs acknowledged that they subsequently entered into a sale agreement with a third party, Angelo, for Kshs. 29,000,000/-, which constitutes a significant profit over their original acquisition cost. I find the Defendant's argument persuasive that issuing a refund under these circumstances would contravene the equitable principle against unjust enrichment and the rule against double recovery, as affirmed in **Vinayak v Santokh & 2 others [2023] KECA 1433 (KLR)**.

31. The Court of Appeal in that case examined the principle of unjust enrichment as follows:

“34. Unjust enrichment has been defined as: “a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.” (See Black's Law Dictionary, Eighth Edition (Bryan A. Garner) at page 1573). A claim for unjust enrichment arises where there has been an “unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience...”

36. The essentials of the doctrine of unjust enrichment are:

(a) the defendant has been enriched by the unjust benefit;

(b) this enrichment has taken place at the expense of the plaintiff; and, (c) the enrichment which has been acquired is unjust or unfair.”

32. The Plaintiffs, having sold the suit property to a third party at a significant profit, have already gained from the transaction. It would be unjust to allow them to recover again from the Defendant. Therefore, the Plaintiffs’ claim for special damages is dismissed.

33. In setting aside an award for general damages granted by the High Court, the Court of Appeal in **Kenya Power & Lighting Co. Ltd v Abel M. Momanyi Birundu [2015] KECA 861 (KLR)** stated that it is a general rule that no damages are usually awarded for breach of contract. The Court of Appeal referred to the case of **Oharamshi v Karsam [1974] EA 41**, which was cited with approval in **Provincial Insurance Co. East Africa Ltd v Nandwa [1995-98] 2 EA 288**.

34. In this case, although the Plaintiffs experienced disappointment and inconvenience due to the defective title and misrepresentation, they have not provided enough evidence of measurable non-pecuniary damages directly caused by the Defendant's breach. Additionally, the subsequent sale to a third party reduces any claim for loss of use or occupation of the property. Therefore, an award of general damages is not supported under these circumstances.

35. Regarding the Interested Party's claim, Mr. Murgor, representing the Defendant, argued that the Interested Party has no ongoing claim over the suit property. He pointed to an

acknowledgment dated July 9, 2012, indicating that Kshs. 500,000/- is the complete and final payment. The Interested Party also confirmed he has no other claims against the Defendant concerning the suit property. To his counsel, this constitutes a binding release of all claims. He cited the case of **Wambui & 2 Others v Waweru [2024] KEELC 4226**.

36. On his part, the Interested Party stated that, as the original allottee of the suit property and because his letter of allotment has never been revoked, he is entitled to the order he seeks. He argued that the Defendant failed to prove how he acquired the suit property; therefore, he claimed that the registration of the property was fraudulent and, consequently, that the Plaintiffs' title was fraudulent. He referenced the cases of **Joseph Arap Ng'ok v Moiyo Ole Keiwua [1997] eKLR** and **Republic v Land Registrar, Malindi Ex parte Kamau [2017] eKLR**, as well as sections 26(1)(b) and 80(1) of the Land Registration Act. He also invoked the protection guaranteed under Article 40 of the Constitution.

37. A careful review of the Interested Party's claim shows that the main reliefs sought include declarations of ownership,

vacant possession, mesne profits, and costs. However, the Interested Party did not testify, did not provide any evidence in court to support his claims, and relied solely on his written submissions. In civil cases, claims need to be supported by evidence. The lack of oral testimony or documentary evidence presented in court significantly weakens the Interested Party's case. The Defendant's proof that the Interested Party recognized receipt of full payment for the property, long before selling it to the Plaintiffs, remained uncontested. Therefore, the Interested Party's counterclaim is not justified and fails due to a lack of evidence.

38. In conclusion, the Court makes the following findings and orders:

a) The Plaintiffs' claim for special and general damages is dismissed.

b) The Interested Party's counterclaim is dismissed.

c) Each party to bear its own costs.

**Dated, signed, and delivered virtually at Malindi on
November 26, 2025.**

E. K. MAKORI

JUDGE

In the presence of

Ms. Mwangi for the plaintiff

Mr. Murgor for the Defendant

Happy: Court Assistant

In the absence of:

Omar Ngonyo (Interested Party in person)