

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

VIHIGA ELC LC NO. E006 OF 2024

DIVINA MORAGWA OTIENO.....PLAINTIFF

VERSUS

WILSON OTIENO OMWOM..... DEFENDANT

JUDGEMENT

Introduction

The suit herein was commenced vide the Plaint dated 6th July 2024 which was later amended and replaced with the amended plaint dated 14th January 2025. Vide the amended Plaint, the Plaintiff sought for orders of;

- a. A declaration that the registration of land parcel known as SOUTH MARAGOLI/BUYONGA/2927 after sub-division of LR SOUTH MARAGOLI/BUYONGA/2037 in the name of the Defendant as the proprietor was fraudulent and in contravention of the Plaintiff's proprietary rights who was lawfully entitled to be registered as the sole proprietor of that parcel.

- b. A declaration to issue in terms that the registration of land parcel SOUTH MARAGOLI/BUYONGA/2927 in the name of the Defendant as proprietor despite having been fraudulent was on trust for the Plaintiff and did not confer any independent proprietary interest or rights on the Defendant capable of being transferred by way of sale or otherwise to another person if not the Plaintiff and the children of the marriage.
- c. The registration of land parcel known as SOUTH/MARAGOLI/BUYONGA/2927 in the name of the Defendant be cancelled and in his place, the name of Plaintiff be substituted and registered thereof as the proprietor and a fresh title be issued in her name and on trust for the children namely; Tessa, Shirleen, Dulan Luke Omwon, Trevor Jayden and Carl Omondi Omwom.
- cc. The honorable Court do find and declare that the purported sale of the suit land to the 2nd Defendant was null and void *ab initio* or been rendered invalid on grounds of want of legally recognized proprietary interest in the suit land by the 1st Defendant capable of being transferred to the 2nd Defendant, fraud on the part of the two Defendants and absence of the mandatory Land Control Board consent or failure to secure the consent within the statutory timelines.

- d. The Plaintiff and the children of the marriage be at liberty to re-enter the suit land parcel No. SOUTH MARAGOLI/BUYONGA/2927 and access and / or occupy the family house thereon and if already in occupation to remain in occupation and use of the land and the house free of any interference from the Defendants or any other person whatsoever.
- dd. In order to give effect to prayer (d) an order of eviction do issue to remove the Defendants whether severally or jointly and any person in occupation of the suit premises and all be removed from the said premises.
- e. A permanent injunction do issue restraining the Defendant in person and by whoever else may be claiming or acting under him from entering or accessing land parcel SOUTH MARAGOLI/BUYONGA/2927 or the family house thereon or obstructing or interfering with the Plaintiff's and the children's access to, occupation and use of the said land parcel and the house and the said Defendant and those claiming or acting under them be and are so permanently restrained.
- f. Costs of or incidental to the suit be recovered from the Defendants.
- g. Any other remedy that is not punitive or prejudicial to the Plaintiff and which shall meet the ends of justice do issue in favor of the Plaintiff.

In response to the amended plaint the 1st Defendant filed amended defence dated 13th January 2025 vide which he denied the Plaintiff's claim.

The 2nd defendant filed a defence and counter claim dated 4th February 2025 vide which the 2nd defendant denied the plaintiffs claim and averred that having purchased the property, she was in physical possession of the same after getting vacant possession upon completion.

Vide the counter claim the 2nd defendant pleaded that she entered into a land sale agreement with the 1st defendant on 18th April, 2023 for the sale of land parcel known as SOUTH MARAGOLI/BUYONGA/2927 measuring 0.04 Ha. for the sum of Kshs 7,900,000 together with the improvements thereon. That of the said amount, she paid Kshs 7,648,332.46 to Letshego Kenya Limited to offset the arrears of the loan facility which Letshego Kenya Limited had advanced to the plaintiff. That the 1st and 2nd defendants agreed that the balance of ksh 251,667.54 shall be paid to the 1st defendant/vendor within 7 days of successful registration of transfer in the 2nd defendant's name.

That the 2nd defendant has been unable to complete the registration of transfer in her name as a caution was placed on the suit property by the plaintiff after completion claiming beneficial /spousal interest.

That the 2nd defendant incurred expenses in payment of stamp duty fees of Ksh 300,090/-.

The Plaintiff's evidence

The Plaintiff testified as PW1. She adopted the contents of her witness statement dated 6/6/2024 as her evidence in Chief. She had stated in the witness statement

that she lived in their matrimonial /family home on land parcel No. SOUTH MARAGOLI/ BUYONGA/2927 which she bought from one Francis Angueyah Ominde in January 2019. That the land was a sub-division of land parcel No. SOUTH MARAGOLI/BUYONGA/2037. That upon buying the property she constructed a house thereon in the same year. That they cohabited with the 1st Defendant as husband and wife and had 4 children, all of who were minors.

That she signed agreements namely; in respect of L.R. No. SOUTH MARAGOLI/BUYONGA/2037 where she was the buyer and the 1st Defendant a witness and WEST BUNYORE/EBUSIKHALE/2998 where the Plaintiff was a witness and the 1st Defendant the buyer.

That the purchase price for SOUTH MARAGOLI/BUYONGA/2037 was Kshs. 2,200,000 which she paid in full in two instalments.

That the purchase price for WEST BUNYORE /EBUSIKHALE/2998 was Kshs. 1,600,000/- which the 1st Defendant undertook to pay but never paid hence the Plaintiff was forced to pay albeit by small installments but fell in arrears when she lost her employment and businesses.

That on 23rd February 2022 at 1:45 am, the 1st Defendant threatened to kill her and forcefully ejected her from the house forcing her and the children to seek shelter in a rental house of low scale in Kisumu.

That she later learnt that the 1st Defendant had secured the sub-division of SOUTH MARAGOLI/BUYONGA/2037 to create SOUTH MARAGOLI /BUYONGA/2927 where the family house was situated and transferred it to his name and obtained title as the proprietor. That she also learnt that the 1st Defendant was in the process of disposing of the land by way of sale to a third party.

That she never swore the Affidavit allowing the 1st Defendant or anybody to sell her home which she struggled to put up for her children. That she and the children have no other home and that if the suit land is sold, they will be rendered destitute.

That the 1st Defendant is holding the land in trust for her and the children. She also adopted the contents of her further witness statement dated 14/1/2025 as her evidence.

The Plaintiff produced the documents listed on the list of documents dated 6th June 2024 as exhibits p.1 to p.11 these were; sale agreement for SOUTH MARAGOLI/BUYONGA/2037, sale agreement for WEST BUNYORE/EBUSIKHALE/2998, certificate of official search for SOUTH MARAGOLI/BUYONGA/2037, certificate of official search for SOUTH MARAGOLI/BUYONGA/2927, photographs of the house, birth certificates for the four children, judgment in Kisumu CM Maintenance Cause NO. E033 of 2022, Children Officer's report, Affidavit, tenancy agreement and tenancy notice for rent.

On cross examination the Plaintiff stated that in the sale agreement in respect of SOUTH MARAGOLI/BUYONGA/2027, the purchaser was Wilson Otieno and that she was the purchaser of WEST BUNYORE/EBUSIKHALE/2998. That she did not know the 2nd Defendant. That she made a report about her forged signature on the Affidavit at Vihiga Police Station on 17/5/2024.

That she took a loan of Kshs 7.5 million from Letshego Kenya Limited, repaid for 2 ½ years and a balance of Kshs. 5.1 million was outstanding. That at the time of filing suit, the loan had been fully repaid by Wilson. That the properties with which she secured the loan were owned by Wilson Otieno Omwom.

And on re-examination she stated that the 1st Defendant had no right to sell the land without informing her because it belonged to the children.

Defence evidence:

The 1st Defendant testified as DW1 he adopted the contents of his witness statement dated 17/9/2024 as his evidence in chief.

The 1st Defendant produced the documents listed on his list of documents dated 17th September 2024 as exhibits p.1 to p.7. These were title deed in respect of SOUTH MARAGOLI/BUYONGA/2037, agreement dated 21/1/2019 for SOUTH MARAGOLI /BUYONGA/2037, agreement dated 21/1/2019 for WEST

BUNYORE/EBUSIKHALE/2998, loan statement, statutory notice dated 24/5/2021, notice to sell dated 6/9/2021 and letter dated 8/2/2023.

On cross-examination DW1 stated that the Plaintiff was not his wife though they had stayed together for 16 years. That the house on the suit land was not built by the Plaintiff. That he cohabited with the Plaintiff and the children in the house. That the loan was advanced on title No. SOUTH MARAGOLI/BUYONGA/2927 which was a sub-division of No. SOUTH MARAGOLI/BUYONGA/2037 which was registered in the name of the seller.

That he was a guarantor to the Plaintiff because the property was in his name. That there was a balance of 7.5 million on the loan and that by the time he was looking for a prospective buyer he had received notices from the financial institution about the default.

That the 2nd Defendant who was one of the prospective buyers who approached him paid the balance of the loan. That the transfer to the 2nd Defendant was not completed because the Plaintiff placed a caution.

That the 2nd Defendant occupied the house sometime in the year 2023 that the Affidavit sworn on 29/3/2023 was signed by the Plaintiff at a cyber at Kisumu.

DW2 was the 2nd Defendant. She adopted the contents of her witness statement dated 4/2/2025 as her evidence in chief. She had stated in the witness statement that on or about 18th April, 2023 she entered into an agreement for the sale of property known as SOUTH MARAGOLI/BUNYORE/2927 measuring 0.04 Ha for a sum of Kshs.7,900,000/-.

That from a search on the said land the 1st Defendant was still the registered proprietor of the suit land and that the land was charged to Letshego Kenya Limited to secure a sum of Kshs.7,500,000/- advanced to the Plaintiff.

That the 1st Defendant informed her that the Plaintiff had defaulted n repayment of the loan and that they had been served with statutory notices of sale by the bank in exercise of statutory power of sale. That the 1st Defendant informed her that he had agreed with the bank to sell the suit land by private treaty and the proceeds be applied to discharge the suit property.

That pursuant to the sale agreement, she proceeded to make a deposit of the purchase price of Kshs.7,648,332.46 to Letshego Kenya Limited at Equity Bank Kilimani Supreme Branch Account number 0180292447854 after execution of the agreement. That they also agreed that the balance of the purchase price of Kshs.251,667.54 shall be paid to the 1st Defendant/Vendor within 7 days of successful registration of transfer in her favour.

That the 1st Defendant made a warranty that there were no rights or privileges vested in third parties or adverse interests that affect the property and that the title to the property was transferred free from any encumbrances after discharge of the charge with Letshago Kenya Limited.

That the 1st Defendant's advocate duly registered the discharge, obtained the original title from the bank and released it with other completion documents to her advocate for registration of transfer.

That she had been unable to complete the registration of transfer since a caution was placed on the suit property by the Plaintiff.

She testified further that she was in actual and/or physical possession of the suit property after getting vacant possession upon completion although she had been restrained from transfer. That she had further incurred expenses in payment of stamp duty fees of Kshs.300,090. That she was a bona fide purchaser of the suit land for value which she purchased in good faith with no knowledge of fraud that the 1st Defendant appeared to have valid title.

She produced the documents on her list of documents dated 4/2/2025 as exhibits D2. 1 to D2. 10.

She denied that she was involved in any fraud, forgery or collusion.

On cross examination DW2 stated that she settled the loan to discharge the title. That she did due diligence and found that the only encumbrance on the title was the loan owed to Letshego. That she had so far paid about Kshs 7.6 million. That she was not present when the contested Affidavit was prepared and commissioned. That her claim was that the money she paid be repaid or she gets title to the land.

Submissions

At the close of the evidence, parties filed written submissions on the case.

Submissions for the Plaintiff

Written submissions dated 16th July 2025 were filed by the firm of ABL Musiega & Company Advocates for the Plaintiff. Counsel framed the issues for determination to be;

- a. whether fraud has been established in respect of registration of land parcel No. SOUTH MARAGOLI/BUYONGA/2927 in the name of the 1st Defendant.
- b. whether a trust in favour of the Plaintiff and her children was created with the registration of the 1st Defendant as proprietor of the suit land parcel.
- c. whether the 2nd Defendant has any legitimate claim to the suit parcel.

- d. whether fraud on the part of the two Defendants over the suit land parcel has been established.
- e. Whether the 2nd Defendant's counter claim is valid and if so, against whom?
- f. The relief available to the Plaintiff.

On the first issue Counsel submitted that the agreements the Plaintiff produced as exhibit were copies shared by the surveyor who surveyed the land. That the facts favour the 1st Defendant as the architect of the exchange of the pages of the agreement so as to appear as if the 1st Defendant was the purchaser of SOUTH MARAGOLI /BUYONGA/2037 while the Plaintiff was the purchaser of WEST BUNYORE/EBUSIKHALE/2998.

On the 2nd issue of whether a trust in favour of the plaintiff and the children was created with the registration of the 1st defendant as proprietor of the suit parcel, Counsel submitted that trust over land parcels governed by the Land Registration Act are created under Section 28 of the said legislation.

Relying on the case of Kituva vs Kikului ELC No, E011 of 2023 (2024) KEELC 984(KLR) (21 Februarys 2024) Judgement, where it was held that the law never implies, the court never presumes a trust, Counsel invited the court to examine the intention of the parties when they were purchasing the suit land parcel that the same was to house the family and enable the children to attends school at Mudasa

Academy. That no other intention has been demonstrated by the 1st Defendant to convince the court otherwise.

On whether the 2nd defendant has any legitimate claim to the suit land, Counsel submitted that the 1st Defendant has no capacity whatsoever to engage the 2nd Defendant with respect to the sale of the land and more so after notification of the sale where the procedure to be followed does not allow private sale without forced valuation to determine the value of the property. Counsel relied on the case of *Githinji Vs Kenya Commercial Bank Limited & Another (Civil Case E006 of 2021) (2023) KEHC (KLR) 26th January 2023 (Ruling)* to support the submission. Counsel submitted further that the sale agreement and the purported settlement of the loan arrears by the 2nd defendant had no impact of conferring property interest in the suit land from the 1st Defendant to the 2nd defendant.

Counsel submitted further that occupation of the suit land by the 2nd defendant is an act of trespass.

On whether there was fraud on the part of the defendants, Counsel relied on the definition of fraud in Black's Law Dictionary 10th Edition and submitted that the two defendants were severally and jointly engaged in fraud in the transactions of the purported loan settlement and illegal occupation of the suit land parcel.

On whether the 2nd defendant's counter claim was sustainable, Counsel submitted that the 2nd defendant was involved in private treaty to buy land which was under charge after notice of sale had been issued by the Chargee. That this was unauthorized. That the suit land was subject to the provisions of the Land Control Act and that as consent under section 6 thereof had not been obtained, it puts the 2nd defendant's claim to the land to rest. Further that the 2nd defendant cannot recover the money from the plaintiff as he did not pay any money to her. Counsel referred the court to the provisions of section 7 of the Land Control Act.

Counsel submitted that the reliefs being sought by the plaintiff are within the law and urged the court to grant the same.

Submissions for the 1st defendant

Written submissions dated 22nd July 2025 were filed by the firm of Wekesa S. Wekesa & Co advocates for the 1st defendant.

Counsel submitted that the plaintiff produced the original agreement that showed that the plaintiff was never the purchaser of SOUTH MARAGOLI/BUYONGA/2037 but that she was only a witness.

That it is upon the plaintiff to proof her case as against the Defendants on a balance of probabilities. That parties are confined to their pleadings. That the plaintiff was

bound to prove that she was the purchaser of land parcel No, SOUTH MARAGOLI/BUYONGA/2037.

Counsel urged the court to dismiss the claim against the 1st defendant with costs.

Submission for the 2nd defendant

Written submissions dated 31st October 2025 were filed by Chege Kibathi & Company Advocates for the 2nd Defendant. Counsel submitted that the 2nd defendant is a bona fide purchaser for value of the suit property without notice of any defects in the title to the said property and this deserves the protection of the law.

Relying on the decisions in Dina Management Limited vs County Government of Mombasa & 5 others (2023) KESC 30 (KLR) and Sehmi & Another vs Tarabana Company Limited & 5 Others (2025) KESC 21 (KLR) Counsel submitted that the 2nd defendant purchased the suit property in good faith without notice of any defect or claims against the title.

Counsel submitted further that the plaintiff failed to establish fraud on the part of the 2nd defendant over the suit parcel of land. Counsel relied on the case of Urmila w/o Mahadra Shah vs Barclays Bank International Ltd & Another (1979) eKLR where the court held that the onus to prove fraud in a matter is on the party who

alleges, and on the case of *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another [2000]eKLR* where it was held that in case where fraud is alleged it is not enough to simply infer fraud from the facts and that the acts alleged to be fraudulent must be set out. Counsel submitted that the plaintiff has not met the standard of proof required to prove fraud. And further that the court has jurisdiction to order specific performance as there is a valid sale agreement coupled with evidence of payment.

Relying on the case of *Millicent Perpetua Otieno (2013) eKLR* Counsel urged the court to find without prejudice to the claim for specific performance, that the 2nd defendant is entitled to recover damages including the return of all the deposit paid by the purchaser with interest and the expenses he incurred and stamp duty amounting to ksh 300,090/=

Counsel urged the court to allow the 2nd defendant's claim.

Issues for determination.

The issues that flow from the pleadings, the evidence and submissions herein are:-

- i) whether or not the plaintiff was the owner of land parcel No, SOUTH MARAGOLI/BUYONGA/2927.

- ii) whether or not the sale of the suit land by the 1st defendant to the 2nd defendant was fraudulent
- iii) whether the plaintiff is entitled to the relief sought in the amended plaint
- iv) whether the 2nd defendant is entitled to the relief sought in the counterclaim.
- v) what orders to make regarding costs of the suit and counterclaim?

Analysis and determination

The first issue is whether the suit land parcel no. SOUTH MARAGOLI/BUYONGA/2037 belongs to the plaintiff.

The plaintiff's case is that she bought the land through land sale agreement dated 21st January 2019 and as part of her evidence thereof the plaintiff produced a copy of land sale agreement dated 21st January 2019. The agreement is for sale of part of land parcel No. SOUTH MARAGOALI/BUYONGA/2037. The seller was Francis Angwueyah Ominde while the purchaser was Wilson Otieno Omwom, the 1st defendant.

The plaintiff signed the agreement as a witness. There is nothing on the agreement to suggest that the plaintiff was the purchaser.

It was common ground that land parcel No. SOUTH MARAGOLI/BUYONGA/2037 was later sub-divided to carve out the suit land which was subsequently registered in the 1st defendant's name. The submissions that the 1st defendant altered the agreement and replaced the name of the plaintiff with his name or exchanged the pages was not supported by the evidence.

The 1st defendant produced title deed in respect of the suit land in his name. Under the provisions of section 26(1) of the Land Registration Act, a certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer 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 of the subject land.

The Plaintiff claimed that the registration was fraudulent. She pleaded in paragraph 16 of the amended plaint that the 1st defendant had fraudulently registered the portion of the land and the home in his name as the sole proprietor. The plaintiff itemized the particulars of fraud under section 17 of the amended plaint. The 1st defendant denied involvement in any fraud.

Indeed, under section 26 of the Land Registration Act fraud is one of the grounds under which title to land can be impeached. It provides that the title of a proprietor shall not be subject to challenge except on ground of fraud or misrepresentation to which the person is proved to be a party.

It was therefore paramount to prove fraud and secondly to prove that the 1st defendant was party to the fraud. And as submitted on behalf of the 2nd defendant, the degree of proof in cases based on fraud is higher than proof on a balance of probabilities.

Under the provisions of section 107 of the Evidence Act, the plaintiff has the burden to prove the alleged particulars of fraud pleaded namely; that the 1st defendant dishonestly caused the land parcel No. SOUTH MARAGOLI/BUYONGA/2037 to be subdivided to create number 2927 with a pre-determined mind to transfer and register the later in his name as a sole proprietor, that the 1st defendant swapped the sale agreement for S .M/B/2037 and W/B/E/1998 to dishonestly appear to be the purchaser of the former parcel and not the later parcel in order to enable him to fraudulently transfer the title to his name and that the 1st defendant concealed from the plaintiff the fact of having registered the land in his name as a sole proprietor and obtained title to the same.

Such evidence was however not adduced. It is on record that the 1st defendant using the title deed in respect of the suit land guaranteed the plaintiff's loan with Letshego Kenya Limited and that the plaintiff was given the loan.

It cannot therefore be true that the 1st defendant concealed the fact of registration of the suit land in his name from the plaintiff. It was not proved as required under

section 26 Land Registration Act that the 1st defendant participated or was a party in any fraud in the registration of the suit land in his name.

The plaintiff also pleaded trust as a way to challenge the fact that the 1st defendant was registered as absolute proprietor of the suit land. In paragraph 17 of the amended plaint, the plaintiff pleaded that registration of the suit land in the name of the 1st defendant was not meant to confer any exclusive rights or ownership against the plaintiff and the children but rather as a trustee for the plaintiff and the children and that the 1st defendant hence has no proprietary interest in the land capable of being transferred by way of sale.

As particulars of the trust in her favour and children's favour, the plaintiff pleaded that she was the one who initiated the process of purchase of the suit land, identified the suit land traced the owner, did negotiations and paid the consideration. That she was the one who constructed the family house on the land, that the 1st defendant forged an Affidavit and that the plaintiff and the children have been residing on the land. However, there was no evidence to prove these allegations except the fact that before they separated the 1st Defendant and the plaintiff and the children resided on the suit land, which fact was admitted by the 1st defendant.

On cross –examination the plaintiff stated that the properties with which she secured the loan belonged to the 1st defendant.

I find that from the evidence placed before the court, the suit land did not belong to the plaintiff.

The next issue is whether or not the sale of the suit land from the 1st defendant to the 2nd defendant was fraudulent.

The plaintiff pleaded in paragraph 16 of the amended plaint that the 1st defendant fraudulently offered the suit land for sale to the 2nd defendant and that jointly with the 2nd defendant forged and falsely swore an Affidavit in the name of the plaintiff purporting to disclaim any interest in the land and granting him the authority to sale. The plaintiff itemised the particulars of the 1st and 2nd defendant’s fraud in paragraph 17 (f) to (l) of the amended plaint.

There was however no evidence tendered to prove these particulars. It was common ground that the plaintiff had taken a loan from a financial institution which was secured by, inter alia, the suit property. It was also common ground that there was default by the plaintiff in repayment of the loan. It was the 1st defendant ‘s case that upon default, the financial institution served him as the guarantor with notices to realize the property (ies). The 1st defendant produced statutory notice dated 24th May 2024, notice to sell dated 6th September 2021 and letter dated 8th

February 2023 as exhibit. The 1st defendant testified as to how he sold the land by private treaty so as to settle the loan. The 2nd Defendant produced documents to show that she paid the consideration directly to the bank.

A land sale agreement between the defendants was produced as exhibit. The plaintiff acknowledged that the loan had been repaid and also stated on cross-examination that it was alright for the 1st defendant to repay the loan and to secure the properties, but it was wrong for him to sell the property. She did not however allude to any efforts by her to repay the outstanding loan and redeem the property to avoid the imminent sale.

I find that the sale of the suit property by the 1st defendant to the 2nd defendant was not fraudulent. The property was in any event up for sale by the financial institution.

The next issue is whether or not the plaintiff is entitled to the relief sought in the amended plaint.

The relief sought by the plaintiff is anchored on the claim by the plaintiff that the Suit land belonged to the her, that registration of the suit land in the name of the 1st defendant was fraudulent, that the 1st defendant held the land in trust for the plaintiff and the children and that the sale of the suit land to the 2nd defendant was fraudulent. Having found that the suit land belonged to the 1st defendant, trust was

not proved as alleged and that the sale to the 2nd defendant was not fraudulent, I find no basis to award the relief sought in the amended plaint.

The next issue for determination is whether or not the 2nd Defendant is entitled to the relief sought in the counter claim.

The relief sought in the counter claim is for;

- a) A declaration that the 2nd defendant/Plaintiff is the rightful and bonafide purchaser for value of all that property known as SOUTH MARAGOLI/BUYONGA/2927.
- b) A declaration that the 2nd defendant/Plaintiff is entitled to the whole of all that property known as SOUTH MARAGOLI/BUYONGA/2927.
- c) An order directing and/or cancelling the caution entry placed on Title No. SOUTH MARAGAOLI/BUYONGA/2927 by the plaintiff/Defendant.
- d) An order directing the Land Registrar to effect the transfer of land Parcel No. SOUTH MARAGAOLI/BUYONGA/2927 to the 2nd defendant/Plaintiff and in default the Deputy Registrar of this honorable court be authorized to execute all relevant documents to give effect to the orders of this court and to issue the 2nd Defendant/Plaintiff with a new title in her name.
- e) A permanent injunction restraining the Plaintiff/Defendant whether by herself or through her agents, employees, servants whomsoever from claiming sole ownership of Title No. SOUTH MARAGAOLI/BUYONGA/2927 and/or interfering with the 2nd Defendant/Plaintiff's quiet possession and/or having any dealing with the same.

- f) In the alternative to (a), (b), (c) and (d) above, an order directing the Plaintiff/Defendant and the 1st Defendant to refund Kenya Shillings Seven Million, Six Hundred and Forty -Eight Thousand, Three Hundred and Thirty-Two and Forty Six +Cents (Ksh 7,648,332.46/=)
- g) Costs and interest at court rates

The evidence placed before court is that the 2nd defendant entered into the sale agreement with the 1st defendant, repaid the balance of the loan to the financial institution and was in the process of securing transfer of the land to her name when the caution was lodged by the plaintiff. The court having determined that no fraud has been proved in the dealings /sale agreement between the 1st defendant and the 2nd defendant, the court further finds that the 2nd defendant is entitled to the relief sought in the counter claim as a bona fide purchaser for value. In any event the suit land charged to the financial institution was up for selling so as to realize the loan.

Regarding costs, given the nature of the relationship between the parties herein and particularly the plaintiff and the 1st defendant, I find that it is in the interest of justice not to burden any of the parties with costs.

Conclusion

The result is that the court finds that the plaintiff has not proved her claim on a balance of probabilities. The same is hereby dismissed with no order as to costs.

The counterclaim is proved on a balance of probabilities and is hereby allowed. Judgement is entered in favour of the 2nd Defendant (plaintiff in the counter claim) for:

- a) A declaration that the 2nd defendant is the rightful and bona fide purchaser for value of all that property known as SOUTH MARAGOLI/BUYONGA/2927.
- b) A declaration that the 2nd defendant is entitled to the whole of all that property known as SOUTH MARAGOLI/BUYONGA/2927.
- c) An order directing and/or cancelling the caution entry placed on Title No. SOUTH MARAGAOLI/BUYONGA/2927 by the plaintiff.
- d) An order directing the Land Registrar to effect the transfer of land Parcel No. SOUTH MARAGAOLI/BUYONGA/2927 to the 2nd defendant/Plaintiff and in default the Deputy Registrar of this honorable court is authorized to execute all relevant documents to give effect to the orders of this court and to issue the 2nd Defendant/Plaintiff with a new title in her name.
- e) A permanent injunction is hereby issued restraining the Plaintiff whether by herself or through her agents, employees, servants whomsoever from claiming sole ownership of Title No. SOUTH MARAGAOLI/BUYONGA/2927 and/or interfering with the 2nd Defendant/Plaintiff's quiet possession and/or having any dealing with the same.
- f) Each party to bear own costs of the suit and counterclaim.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED
VIRTUALLY THIS 11TH DAY OF DECEMBER 2025.**

**E. ASATI,
JUDGE**

In the Presence of;-

Patricia Court Assistant

Malanda for the plaintiff

Wanda h/b for Wekesa for the 1st Defendant and appearing for the 2nd Defendant.