



**Chabala v Mayabi & 2 others; Philafe Engineering Ltd (Plaintiff);
Chabala & 2 others (Defendant) (Environment and Land Case Civil Suit
80 of 2012) [2024] KEELC 194 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 194 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 80 OF 2012
SO OKONG'O, J
JANUARY 25, 2024**

BETWEEN

ALICE CHABALA PLAINTIFF

AND

TOM ONDITI MAYABI 1ST DEFENDANT

PHILAFE ENGINEERING LTD 2ND DEFENDANT

AND

HON. ATTORNEY GENERAL THIRD PARTY

AND

PHILAFE ENGINEERING LTD PLAINTIFF

AND

ALICE CHABALA DEFENDANT

THE HON. ATTORNEY GENERAL DEFENDANT

LAWRENCE OKOTH OWUOR ALIAS FESTUS OKOTH

MAYABI DEFENDANT

JUDGMENT

1. The plaintiff in the main suit brought this suit against the defendants in the main suit through a plaint dated 22nd October 2012. The plaintiff filed an amended plaint dated 18th January 2013 on 24th January 2013. In her amended plaint, the plaintiff sought judgment for;



- a. A permanent injunction restraining the defendants from entering, remaining upon, selling or offering for sale or in any other way interfering with the plaintiff's peaceful user and occupation of all that parcel of land known as Kisumu/ Kasule/1584 (hereinafter referred to only as "the suit property").
 - b. An order declaring the title deeds held by the defendants null and void and directing the defendants to surrender them for cancellation.
 - c. Costs of the suit.
 - d. Any other or further relief that the court may deem just and expedient to grant.
2. The plaintiff averred that at all material times to the suit, the plaintiff was the registered proprietor of the suit property. The plaintiff averred that on 1st October 2012, the 1st defendant entered the suit property with a surveyor and started marking the boundaries thereof and putting beacons. The plaintiff averred that on 16th October 2012, the 1st defendant returned to the suit property to fence the same.
 3. The plaintiff averred that upon being informed of the 1st defendant's presence and activities on the suit property, the plaintiff confronted the 1st defendant and informed the 1st defendant that she was the legal owner of the suit property. The plaintiff averred that the plaintiff and the 1st defendant met on 17th October 2012 when the plaintiff showed the 1st defendant documents in proof of her ownership of the suit property. The plaintiff averred that on the same day, she was shocked when the 1st defendant also produced a purported extract of the register of the suit property (Green Card) and an official search showing that the 1st defendant was the registered owner of the suit property.
 4. The plaintiff averred that on 24th October 2012, a group of people entered the suit property and began digging holes to erect a fence around the suit property. The plaintiff averred that she reported the incident at Kondele Police Station. The plaintiff averred that while still at Kondele Police Station, the 2nd Defendant's Managing Director came to the station and protested that the Police were interfering with his land. The plaintiff averred that the 2nd defendant's said director produced a copy of a title deed in the name of the 2nd Defendant as the owner of the suit property. The plaintiff averred that at no time did she sell the suit property to the 2nd defendant or anyone else. The plaintiff averred that the title deed held by the 2nd defendant was a forgery.
 5. The plaintiff averred that there was a scheme by the defendants in collusion with the officers at the Land Registry to dispossess her of the suit property. The plaintiff averred that despite demand and notice of intention to sue being issued, the defendants had failed and/or refused to comply with the terms thereof.
 6. The 1st defendant filed a defence on 15th November 2012 to the original plaint. The 1st defendant did not amend its defence following the amendment of the plaint. The 1st defendant denied all the allegations in the plaint and put the plaintiff to strict proof thereof. The 1st defendant averred that he was a stranger to the issues raised in the plaint. The 1st defendant averred that he was wrongly joined in the suit.
 7. The 2nd defendant filed a defence to the amended plaint on 7th February 2013. The 2nd defendant averred that it was not aware of the plaintiff's claim over the suit property. The 2nd defendant averred that it purchased the suit property from the immediate former registered owner thereof one, Festus Okoth Mayabi and acquired a good title in respect thereof. The 2nd Defendant averred that it was an innocent purchaser of the suit property for valuable consideration. The 2nd defendant averred that it



- conducted reasonable due diligence on the title of the suit property and obtained confirmation from the District Land Registrar, Kisumu before purchasing the property that the seller was the registered owner thereof.
8. The 2nd defendant averred that if there was any illegality, unlawfulness or irregularity in the acquisition of the suit property from the plaintiff by Festus Okoth Mayabi, the plaintiff's relief would be against the said Festus Okoth Mayabi and not the 2nd defendant.
 9. With leave of the court, the 2nd defendant took out a third-party notice against the Attorney General on 10th April 2014 seeking indemnity in respect of the plaintiff's claim. The 2nd defendant averred that it purchased the suit property based on the documents that originated from and were processed at the Kisumu Land Registry. The 2nd defendant averred that if it was established at the trial that the transfer of the suit property from the plaintiff to Festus Okoth Mayabi alias Tom Onditi Mayabi was fraudulent and illegal and likewise the sale of the property by Festus Okoth Mayabi alias Tom Onditi Mayabi to the 2nd defendant, the said fraud and illegalities were hatched, activated and actuated by the officers, personnel and servants of the Republic of Kenya who should be held responsible for the consequences of their actions and/or omissions in the transaction. The 2nd defendant averred that in reliance on the said documents from the Land Registry, the 2nd defendant paid a sum of Kshs. 8,000,000/- to the said Festus Okoth Mayabi alias Tom Onditi Mayabi for which the 2nd defendant held the Government of the Republic of Kenya liable together with interest and costs.
 10. The 2nd defendant filed a mended defence and counter-claim against the plaintiff and two new parties, the Attorney General and Lawrence Okoth Owuor alias Festus Okoth Mayabi who were joined in the counter-claim as the 2nd and 3rd defendants. In its counter-claim against the plaintiff, the Attorney General (hereinafter referred to only as "2nd defendant to the counter-claim") and Lawrence Okoth Owuor alias Festus Okoth Mayabi (hereinafter referred to only as "3rd defendant to the counter-claim"), the 2nd defendant averred that the plaintiff became registered as the owner of the suit property on 29th January 1999 while the 3rd defendant to the counter-claim became registered as the owner of the property on 4th January 2006. The 2nd defendant averred that the 3rd defendant to the counter-claim transferred his interest in the suit property to the 2nd defendant on 3rd October 2012.
 11. The 2nd defendant averred that at all material times, the Land Registrar, Kisumu was the custodian of all the records relating to the suit property and all the transactions involving the transfer of the suit property were registered by its officers. The 2nd defendant averred that the 3rd defendant to the counter-claim presented himself as the owner of the suit property and that he was disposing of the suit property to a willing purchaser. The 2nd defendant averred that it paid the 3rd defendant to the counter-claim a sum of Kshs. 8,000,000/- as a consideration for the suit property after which the property was transferred from the 3rd defendant to the counter-claim to the 2nd defendant.
 12. The 2nd defendant averred that the plaintiff sued it claiming that the 3rd defendant to the counter-claim did not have a good title to the suit property that he could pass to the 2nd defendant and that the entries in the land register kept at the Land Registry were fraudulent. The 2nd defendant averred that it acquired the suit property as an innocent purchaser for value without notice of any defect in its title. The 2nd defendant averred that if he did not acquire a good title then the defendants in the counter-claim jointly and severally fraudulently made entries in the register of the suit property to reflect that the suit property had been transferred to the 3rd defendant to the counter-claim to defraud and obtain money from the 2nd defendant. The 2nd defendant pleaded several particulars of fraud against the plaintiff and the 2nd and 3rd defendants to the counter-claim.



13. The 2nd defendant sought judgment against the plaintiff and the 2nd and 3rd defendants to the counter-claim for; a declaration that the 2nd defendant having lawfully acquired the suit property for valuable consideration through purchase without notice of any defect in its title was the owner of the property, and in the alternative, a refund of Kshs. 8,000,000/- paid to the 3rd defendant to the counter-claim and interest thereon at the rate of 14% per annum with effect from 3rd October 2012 until payment in full. The 2nd defendant also sought the costs of the counter-claim together with interest.
14. The plaintiff filed a defence to the 2nd defendant's counter-claim on 22nd July 2016. The plaintiff reiterated the contents of the amended plaint. The plaintiff admitted that she was registered as the proprietor of the suit property on 29th January 1999. The plaintiff averred that she was still the registered owner of the property. The plaintiff denied that she had transferred the suit property to the 3rd defendant to the counter-claim on 4th January 2006 or at all. The plaintiff denied that the 3rd defendant to the counter-claim transferred the suit property to the 2nd defendant as claimed or at all.
15. The plaintiff admitted that the Land Registrar was the custodian of the records relating to the suit property. The plaintiff averred however that she was the one who had the custody of the document of title for the suit property on the strength of which any disposition of the suit property could be effected. The plaintiff averred that the purported disposition of the suit property without the knowledge and consent of the plaintiff was null and void. The plaintiff averred that she was a stranger to the transaction that the 2nd defendant entered into with the 3rd defendant to the counter-claim. The plaintiff denied that the 2nd defendant acquired a good title to the suit property.
16. The plaintiff denied that individually or in collusion with the other defendants to the counter-claim, she fraudulently made entries in the register of the suit property to reflect that the same was owned by the 3rd defendant to the counter-claim to defraud the 2nd defendant and obtain its money. The plaintiff denied all the particulars of fraud pleaded against her. The plaintiff denied that any of her documents were used in the scheme to defraud the 2nd defendant. The plaintiff averred that from the documents filed in court, she learnt that the 2nd defendant was a victim of fraud perpetrated by the 3rd defendant to the counter-claim and his cohorts.
17. The plaintiff averred that the 2nd defendant was made aware that he had been defrauded and it lodged a complaint against the 3rd defendant to the counter-claim with the Police. The plaintiff averred that the 3rd defendant to the counter-claim was arrested and charged with the offence of receiving money by false pretence in Kisumu Chief Magistrate's Criminal Case No. 246 of 2014. The plaintiff averred that the 2nd defendant's claim against the plaintiff was in the circumstances frivolous, vexatious and malicious. The plaintiff averred that the 2nd defendant was not entitled to the reliefs sought against the plaintiff. The plaintiff urged the court to dismiss the counter-claim with costs and to enter judgment for the plaintiff as prayed in the amended plaint. The 2nd defendant filed a reply to the plaintiff's defence to counter-claim on 28th July 2016.
18. The 2nd defendant to the counter-claim filed its defence on 13th September 2016. The 2nd defendant to the counter-claim denied all the allegations made against it in the counter-claim. The 2nd defendant to the counter-claim denied that it was involved in the making of fraudulent entries in the register of the suit property to defraud the 2nd defendant in the main suit of its money. In the alternative and without prejudice to the foregoing, the 2nd defendant to the counter-claim averred that all the transactions relating to the suit property were legal, procedural and above board. The 2nd defendant to the counter-claim urged the court to dismiss the counter-claim with costs. The 3rd defendant to the counter-claim did not defend the counter-claim.



19. At the trial, the plaintiff in the main suit, Alice Chabala (hereinafter referred to only as “the plaintiff”) gave evidence as PW1. PW1 adopted her witness statement dated 22nd October 2012 as her evidence in chief. She told the court that she was the owner of the suit property and that she purchased the same in 1999. She produced her title deed for the suit property dated 29th January 1999 as PEXH. 1, a Certificate of Official Search dated 11th May 2010 as PEXH. 2(a), a receipt for the payment that was made for the said search as PEXH.2(b), and a copy of the extract of the register for the suit property certified on 25th February 2013 as PEXH. 3. PW1 stated that she sued the 1st defendant in the main suit because he showed her a title deed for the suit property in his name. She stated that she did not sell the suit property and had never parted with any of her title documents. She stated that she took a loan in 2002 on the security of the suit property. She stated that she cleared the loan and had the property discharged in 2006. PW1 urged the court to enter judgment in her favour as prayed in the plaint.
20. The next witness was PW1’s husband, Herbert Chabala E. Andambi (PW2). PW2 adopted his witness statement dated 14th November 2019 and filed on 22nd November 2019 as his evidence in chief. He stated that the suit property was owned by PW1. He stated that he was the one who reported the fraud involving the property to the Police on 12th October 2012. He produced a copy of a letter dated 24th September 2019 addressed to the Land Registrar by the plaintiff’s advocates on record as PEXH. 4, a copy of the adjudication record/sketches as PEXH. 5, a copy of the Mutation Form registered on 19th January 2006 as PEXH. 6, a copy of the receipt dated 4th January 2006 as PEXH. 7, a copy of the receipt dated 14th September 2006 as PEXH.8, a copy of the receipt dated 9th April 2014 as PEXH.9, a copy of Official Search dated 16th April 2014 as PEXH. 10, a copy of the receipt dated 4th August 2015 as PEXH. 11, a copy of an application for official search dated 12th August 2015 as PEXH. 12, a copy of a title deed dated 24th June 1994 in respect of Title No. Kisumu/Kasule/3124 as PEXH. 13, a copy of Rates Demand Notice dated 10th January 2019 as PEXH. 14, and a copy of the Charge Sheet in Criminal Case No. 246 of 2014 as PEXH. 15. He stated that he testified as a prosecution witness in the said criminal case.
21. After the close of the plaintiff’s case, the 2nd defendant in the main suit tendered its evidence in its defence to the plaintiff’s claim and in support of its counter-claim. The 2nd defendant called one witness, Portas Akida Oloo (DW1). DW1 told the court that he was the executive chairman of the 2nd defendant. DW1 adopted his witness statement dated 9th December 2022 as his evidence in chief and produced the 2nd defendant’s bundle of documents filed in court on 9th January 2023 as DEXH.1. DW1 stated that he went to the Land Registry at Kisumu with a copy of the title deed for the suit property and carried out a search on the title. He stated that he was given a Certificate of Official Search with the same details which were on the title deed. He stated that he also applied for a copy of the extract of the register of the suit property which was also supplied to him. He stated that the extract of the register of the suit property also showed that the person who wanted to sell the suit property was the owner thereof.
22. He stated that he thereafter went to an advocate with the seller of the suit property and they entered into an agreement of sale. After they had entered into an agreement of sale, they obtained consent of the Land Control Board for the transaction. He stated that if the plaintiff succeeded in her claim against the 2nd defendant then the 2nd defendant’s claim against the Attorney General, the 2nd defendant to the counter-claim should also succeed. He stated that he had no reason to doubt the information that he obtained from the Land Registry.
23. On cross-examination, he stated among others that as far as he was concerned, he was defrauded by the Government. He stated that he reported the fraud to the Police and after investigations, Edward Ochieng Alingo and Lawrence Obonyo Owuor alias Festus Okoth Mayabi were arrested and charged



with the offence of obtaining money from the 2nd defendant by false pretence. He stated that he was the complainant in the criminal case. He stated that the said criminal case had not been finalised. On examination by the court, DW1 stated that he paid Kshs. 8,000,000/- and not Kshs. 4,000,000/- as indicated in the instrument of transfer dated 1st October 2012 which was submitted to the court on 30th June 2014 as part of the 2nd defendant's list and bundle of documents. He stated further that the search was carried out on his behalf by his agent Tom Onditi Nyakach and that he did not carry out the search himself.

24. The Attorney General did not turn up for the hearing. Its case was therefore closed without it tendering any evidence. The court thereafter directed the parties to make closing submissions in writing.
25. The plaintiff in the main suit who was also the 1st defendant in the counter-claim filed her submissions dated 10th July 2023 while the 2nd defendant in the main suit who was also the plaintiff in the counter-claim filed its submissions dated 5th July 2023. The Attorney General did not file submissions.
26. The plaintiff submitted that she was the bona fide proprietor of the suit property and that she had not sold the suit property to anyone. The plaintiff submitted that the 2nd defendant purported to acquire the suit property through a corrupt scheme whereby the original genuine register for the suit property was made to disappear and in its place, a fake one was brought in to facilitate the purported transfer of the suit property to the 2nd defendant. The plaintiff submitted that although the 2nd defendant was not a party to the corrupt scheme, the scheme tainted the title that was issued to it. The plaintiff submitted that since the 3rd defendant to the counter-claim did not have a good title to pass to the 2nd defendant, the 2nd defendant did not obtain a valid title in respect of the suit property.
27. In support of this submission, the plaintiff cited section 26(1) of the [Land Registration Act, 2012](#) and the case of *Jonah Omoyoma v. Benson Oure & 2 others* [2021]eKLR. The plaintiff submitted that the title held by the 2nd defendant in respect of the suit property should be cancelled and a permanent injunction issued restraining the 2nd defendant from in any manner interfering with the plaintiff's quiet occupation and enjoyment of the suit property as prayed in the plaint. The plaintiff submitted that she was also entitled to the costs of the suit and the counter-claim. The plaintiff contended that the 2nd defendant's claim against her was driven by malice since it was aware that it had been conned and that he had instituted criminal proceedings against those who conned him.
28. In its submissions, the 2nd defendant submitted that it acquired the suit property lawfully in good faith for valuable consideration and as such it was entitled to the protection of the law. The 2nd defendant cited Section 26(1) of the [Land Registration Act, 2012](#), Section 3(3) of the [Law of Contract Act](#), Chapter 23 Laws of Kenya, Section 38 of the [Land Act, 2012](#), and Article 40 of [the Constitution](#) of Kenya 2010 in support of this submission. The 2nd defendant submitted that it was the current registered owner of the suit property and as such its title to the property was indefeasible save where fraud or misrepresentation in acquisition of the title was established. The 2nd defendant cited Black's Law Dictionary 8th Edition and *Katende v. Haridar & Company Limited* [2008]2 E.A 173 and submitted that it was a bona fide purchaser of the suit property. The 2nd defendant submitted that the plaintiff did not establish fraud against the 2nd defendant which in any event was not pleaded. The 2nd defendant cited several authorities in support of this submission.
29. In conclusion, the 2nd defendant submitted that it was an innocent purchaser of the suit property for valuable consideration without notice of any defect in its title and as such it acquired indefeasible title in respect thereof. The 2nd defendant averred that the allegations of fraud and forgery made against the Attorney General and the 1st defendant in the main suit in the manner in which the suit property was transferred to the 2nd defendant could not affect the 2nd defendant's title as it was not privy to the same



neither did it have knowledge of the same. The 2nd defendant submitted that it had proved its counter-claim on a balance of probabilities. The 2nd defendant urged the court to dismiss the plaintiff's suit with costs and to allow the counter-claim also with costs.

30. Analysis and determination
31. I have considered the pleadings by the parties, the evidence tendered in proof of their respective cases and the submissions on record. The plaintiff's case is that she is the registered proprietor of the suit property and that she has never sold the property to anyone. The plaintiff has contended that the 1st and 2nd defendants in the main suit purporting to hold parallel titles to the suit property attempted to forcefully take possession of the suit property. This is what prompted the plaintiff to come to court. The plaintiff has sought an injunction to permanently restrain the defendants in the main suit from interfering with her quiet occupation and enjoyment of the suit property and the cancellation of the said parallel titles.
32. On its part, the 2nd defendant in the main suit who is also the plaintiff in the counter-claim has contended that he acquired the suit property for valuable consideration from the 3rd defendant to the counter-claim without notice of any defect in the title that was held by the said 3rd defendant to the counter-claim. The 2nd defendant has contended that it is an innocent purchaser of the suit property for valuable consideration without notice of any defect in respect thereof.
33. The 2nd defendant's case is based on the Torrens System of land registration which guarantees sanctity of title to any person acquiring land from a registered proprietor in good faith. The 2nd defendant cited a number of authorities on the effect of the Torrens System of land registration and Section 26(1) of the [Land Registration Act, 2012](#).
34. The parties did not agree on the issues for determination by the court. Each party framed its own issues. In my view, the issues arising for determination in the main suit and the counter-claim are the following;
 - a. Whether the plaintiff is the lawful proprietor of the suit property and as such entitled to quiet possession and enjoyment thereof.
 - b. Whether the 3rd defendant to the counter-claim held a lawful title to the suit property.
 - c. Whether the 2nd defendant in the main suit who is also the plaintiff in the counter-claim acquired a good title to the suit property from the 3rd defendant to the counter-claim and as such holds a valid title to the property and is entitled to possession thereof.
 - d. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.
 - e. Whether the 2nd defendant is entitled to the reliefs sought in its counter-claim.
 - f. Who should bear the costs of the suit?
35. Whether the plaintiff is the lawful proprietor of the suit property and as such entitled to quiet possession and enjoyment thereof.
36. From the totality of the evidence before the court, I am satisfied that the plaintiff is and has always been the registered proprietor of the suit property at all material times to this suit. The plaintiff produced in evidence a copy of a title deed issued on 29th January 1999 showing that she was registered as the owner of the property on the said date. The title deed also shows that the plaintiff charged the suit property on 25th July 2002 to Kenya Commercial Bank Limited on 25th July 2000 to secure a loan facility of Kshs. 200,000/-. The said charge was discharged on 4th January 2006. In her evidence and in the evidence of her witness PW2, the plaintiff explained how she acquired the suit property from the previous owners.



- The plaintiff told the court that she had never sold the suit property and that the 2nd defendant's claim over the property surprised her. The plaintiff produced in evidence a copy of a certificate of official search conducted on 11th May 2010 which showed that as at that date, the plaintiff was the registered proprietor of the suit property. From the evidence on record, the 2nd defendant is said to have acquired the suit property from the 3rd defendant to the counter-claim who is said to have been registered as the owner of the suit property on 4th January 2006. The plaintiff was the lawful registered proprietor of the suit prior to the purported registration of the 3rd defendant to the counter-claim as the owner thereof. This means that the 3rd defendant to the counter-claim could only acquire the suit property through a transfer from the plaintiff. As stated earlier, the plaintiff denied having sold the suit property.
37. Neither the 2nd defendant nor the 3rd defendant to the counter-claim tendered evidence on how the 3rd defendant to the counter-claim came to be registered as the owner of the suit property. If indeed the 3rd defendant to the counter-claim was registered as the owner of the suit property on 4th January 2006, there was no way a search carried out on 11th May 2010 would have indicated that as at that date, it was the plaintiff who was registered as the owner of the suit property. That search would have shown the 3rd defendant to the counter-claim as the registered owner of the suit property if he indeed acquired the property in 2006.
 38. The plaintiff tendered evidence showing that the suit property initially measured 1.0 hectare and that following creation of an access road through the property, the acreage was reduced to 0.95 of a hectare. The plaintiff produced in evidence a copy of Mutation Form dated 19th January 2006 (P.EXH.6) through which the said road was created and the measurement of the suit property reduced to 0.95 of a hectare. The said Mutation Form was registered on 19th January 2006 and it shows that as at that date the plaintiff was the registered owner of the suit property. Again, if indeed the 3rd defendant to the counter-claim was registered as the owner of the suit property on 4th January 2006, there was no way in which the plaintiff could have created a road through the property on 19th January 2006.
 39. The 2nd defendant filed a list and bundle of documents dated 28th June 2014 on 30th June 2014. Among the documents in that bundle were a copy of what was said to be an extract of the register for the suit property certified on 22nd August 2012, a copy of the purported Title Deed for the suit property dated 4th January 2006 in the name of the 3rd defendant to the counter-claim and a copy of the instrument of transfer of land in respect of the suit property dated 1st October 2012. According to the said Title Deed in the name of the 3rd defendant to the counter-claim dated 4th January 2006, the suit property is indicated as measuring approximately 0.95 of a hectare. This could not be the case.
 40. As I have stated earlier, the size of the suit property was reduced from 1.0 hectare to 0.95 of a hectare through a Mutation Form that was registered on 19th January 2006. A title deed for the suit property issued on 4th January 2006 could not therefore bear a measurement of 0.95 of a hectare. The fact that the said Title Deed showed the area of the suit property as 0.95 of a hectare is an indication that the document was prepared after 19th January 2006 and backdated to 4th January 2006.
 41. The plaintiff has proved that she was at all material times and still is the registered owner of the suit property. The plaintiff has also proved that she did not sell the suit property to the 3rd defendant to the counter-claim who purportedly sold the property to the 2nd defendant. The plaintiff has also proved that there was no way the 3rd defendant to the counter-claim could have been registered as the owner of the suit property with an area of 0.95 of a hectare on 4th January 2006.
 42. In light of the foregoing and in the absence of any evidence on how the 3rd defendant came to be registered as the owner of the suit property, it is my finding that the purported registration of the 3rd



defendant to the counter-claim as the owner of the suit property and the subsequent issuance to him of a purported title were irregular, unlawful, fraudulent, null and void. In the circumstances, the plaintiff remained the lawful proprietor of the suit property. As the lawful proprietor of the suit property, the plaintiff was entitled to enjoy quiet possession thereof.

43. Whether the 3rd defendant to the counter-claim held a lawful title to the suit property.
44. Since the 3rd defendant to the counter-claim acquired the suit property in an irregular, unlawful and fraudulent manner, the 3rd defendant to the counter-claim did not have a good title to the suit property. The title that he purported to have was a nullity.
45. Whether the 2nd defendant in the main suit who is also the plaintiff in the counter-claim acquired a good title to the suit property from the 3rd defendant to the counter-claim and as such holds a valid title to the property and is entitled to possession thereof.
46. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). At the time the 2nd defendant purported to acquire the suit property from the 3rd defendant to the counter-claim, the Registered [Land Act](#) had been repealed by the [Land Registration Act](#), 2012. Sections 24, 25, and 26 of the [Land Registration Act](#), 2012 provides as follows:

24. Subject to this Act—

- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
 - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
47. The 2nd defendant had contended that it was an innocent purchaser for value of the suit property without notice of any defect in the title that was held by the 3rd defendant to the counter-claim, and as such, it was the lawful owner of the suit property. The 2nd defendant averred that under Section 26(1) of the *Land Registration Act*, 2012, its title to the suit property was indefeasible.
48. In *Alberta Mae Gacie v. Attorney General & 4 Others* [2006] eKLR the court stated as follows:
- “Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”
49. In the Court of Appeal case of *Arthi Highways Developers Limited v. West End Butchery Limited & 6 others*[2015]eKLR, the court stated as follows on the applicability of the doctrine of “bona fide purchaser without notice”:
- “67. Furthermore, the protection accorded by law in the event of fraud, is to a “bona fide purchaser without notice” and even then, only against equitable interests. We have seen the definition of “bona fide purchaser” from Black’s Law Dictionary and from the Katende case (supra). The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. Snell’s Principles of Equity (supra) illustrate the issue, thus:-
- “An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests. The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B’s right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser’s conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.”
50. In *Dina Management Limited v. County Government of Mombasa & 5 Others*, Supreme Court Petition 8 (E010) of 2021 [2023] KESC 30 (KLR) (21st April 2023) (Judgment), the Supreme Court stated as follows:
- “(92) On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado* Civil Appeal No. 28 of 2005 [2015] eKLR stated as follows:



“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a Valid and Legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

51. I have held that the 3rd defendant to the counter-claim from whom the 2nd defendant purported to purchase the suit property had a null and void title that he acquired fraudulently. In fact, the 2nd defendant realised immediately he paid the balance of the purchase price and met resistance from the plaintiff when he went to take possession of the suit property that he had been defrauded by the 3rd defendant to the counter-claim. The 2nd defendant reported the fraud to the Police and the fraudsters who included the 3rd to the counter-claim were arrested and charged with the offence of obtaining money from the 2nd defendant by false pretence in Kisumu Chief Magistrate’s Criminal Case No. 246 of 2014. In view of the 3rd defendant to the counter-claim’s fraud that tainted the title that he passed to the 2nd defendant, the 2nd defendant did not get a valid and legal title to the suit property. It follows therefore that although the 2nd defendant may have acquired the suit property in good faith without any notice of the defect that was in the purported title held by the 3rd defendant to the counter-claim, the 2nd defendant’s innocence could not confer upon it a valid interest in the suit property. The purported interest that the 2nd defendant acquired from the 3rd defendant to the counter-claim could not defeat the plaintiff’s legal interest in the suit property which was enforceable against the 2nd defendant irrespective of whether or not the 2nd defendant had notice of the same.
52. In *Wambui v. Mwangi & 3 others*, Civil Appeal 465 of 2019, [2021] KECA 144 (KLR) the Court of Appeal stated as follows:
70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void abinitio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.
71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.
72. In light of all the above, we reiterate that the Judge’s reasoning as to why appellant’s title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable.”
53. In view of the foregoing, it is my finding that the 2nd defendant in the main suit which is also the plaintiff in the counter-claim did not acquire a valid interest the suit property from the 3rd defendant to the counter-claim. The 2nd defendant did not therefore have a valid title to the suit property. In the absence of a valid title to the suit property, the 2nd defendant did not have a right to possession of the suit property.



54. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.
55. The plaintiff has proved that she is the lawful proprietor of the suit property. The plaintiff has also proved that the 3rd defendant to the counter-claim created a fraudulent parallel title in respect of the suit property that he passed to the 2nd defendant. The plaintiff has also proved that on the basis of the null and void title that it acquired from the 3rd defendant to the counter-claim, the 2nd defendant attempted to forcefully take possession of the suit property.
56. Section 143(1) and (2) of the Registered [Land Act](#) provides as follows:
- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”
57. Section 80 of the [Land Registration Act](#), 2012 provides as follows:
- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
58. The foregoing provisions of the Registered [Land Act](#), Chapter 300 Laws of Kenya(now repealed) and the [Land Registration Act](#), 2012 provide that a register of land may be rectified by the cancellation of any entry thereon where such registration has been obtained by fraud, mistake, illegality, misrepresentation, corruption or any other impropriety subject to the rights of an innocent purchaser for value without notice provided for in section 143(2) of the Registered [Land Act](#) and section 80(2) of the [Land Registration Act](#) 2012. Neither the 3rd defendant to the counter-claim nor the 2nd defendant in the main suit is in possession of the suit property. The 3rd defendant to the counter-claim never took possession of the suit property while the 2nd defendant’s attempt to take possession was resisted by the plaintiff. The 2nd defendant was subsequently restrained by the court from taking possession of the property until the hearing and determination of this suit.
59. The court having found that the 3rd defendant to the counter-claim acquired title to the suit property fraudulently and as such he had no valid interest in the suit property that he could pass to the 2nd Defendant in the main suit, a case had been made by the plaintiff for the cancellation of the registration of the 3rd defendant to the counter-claim and the 2nd defendant in the main suit as proprietors of the suit property. Since the 3rd defendant to the counter-claim and the 2nd defendant in the main suit have no valid interest in the suit property, they have no right to interfere with the plaintiff’s quiet enjoyment of the suit property. In the circumstances, the plaintiff is entitled to a permanent injunction to restrain such interference.



60. From the evidence on record, I am not satisfied that there was anyone by the name Tom Onditi Mayabi who participated in the purported purchase of the suit property from the 3rd defendant to the counter-claim and attempted forceful takeover of possession of the suit property. Tom Onditi whom the 2nd defendant's director (DW1) referred to was Tom Onditi Nyakach who acted as his agent. The suit against Tom Onditi Mayabi was in the circumstances, a suit against a non-existent person. The plaintiff is therefore not entitled to any relief against such person. I am even surprised that an unconditional appearance was entered and a defence filed for Tom Onditi Mayabi although he never existed.
61. Whether the 2nd defendant is entitled to the reliefs sought in its counter-claim.
62. In *Shimoni Resort v. Registrar of Titles & 5 others* [2016] eKLR, the court cited the Court of Appeal decision in *Charles Karathe Kiarie & Others v. Administrators of Estate of John Wallace Mathare (deceased) & 5 Others* [2013] eKLR where the court had stated as follows on the Torrens System of land registration:
- “The Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation...”
63. From the evidence on record, I am satisfied that the 2nd defendant did all that was within its power to establish the lawful registered owner of the suit property before he entered into a sale agreement with the 3rd defendant to the counter-claim who presented himself as the owner of the suit property. I agree with the 2nd defendant that the fraud against it was committed by the 3rd defendant to the counter-claim in collusion with the officers at the Land Office at Kisumu who were privy to the fraud. The officers at the Land Office in collusion with the 3rd defendant to the counter-claim and his cohorts caused the original genuine land register (Green Card) for the suit property which had the name of the plaintiff as the owner of the suit property to disappear and replaced it with a fake one that bore the name of the 3rd defendant as the owner of the property. When the 2nd defendant did a search on 14th August 2012, the official search that he was given on 16th August 2012 conveniently showed the information from the fake Green Card that had been planted in the Land Registry with the name of the 3rd defendant as the registered owner of the suit property. An application for a copy of the extract of the register made by the 2nd defendant on 22nd August 2012 equally yielded the information from the fake Green Card. Armed with the search and a copy of the Green Card, the 2nd defendant's directors who appear to have been very excited about the suit property went ahead to enter into a sale agreement with the 3rd defendant to the counter-claim who was the lead fraudster. I have said that the directors of the 2nd defendant were excited about the suit property because they appeared to have ignored the telltale signs that all may not have been as they were presented to be. The 2nd defendant's directors were duped by the 3rd defendant to the counter-claim that he had a sick mother in South Africa and as such he required the money urgently. Because of this, the 2nd defendant agreed to pay to the 3rd defendant to the counter-claim the full purchase price even before the suit property was transferred to the 2nd defendant.
64. From the correspondence that the 2nd defendant exchanged with the advocate who represented it in the transaction, the 2nd defendant was even prepared to pay the full purchase price before the consent of the Land Control Board was obtained. The other telltale sign was when the 3rd defendant demanded that



- the purchase price be paid to him in cash. Although the 2nd defendant insisted on the payment being made through the bank, this request which raised eyebrows should have warned the 2nd defendant that the 3rd defendant to the counter-claim wanted to hide his tracks.
65. The 2nd defendant did not produce in court proof of payment of the full purchase price of Kshs. 8,000,000/- to the 3rd defendant to the counter-claim. It is therefore not clear how the payment which is said to have been made through cheques was made. The 3rd defendant to the counter-claim has however not disputed that he was paid Kshs. 8,000,000/- by the 2nd defendant as the purchase price for the suit property.
66. I have set out earlier in the judgment the reliefs that were sought by the 2nd defendant in its counter-claim and third-party notice. For the reasons that I have stated earlier, I am unable to grant the declaration sought by the 2nd defendant to the effect that the 2nd defendant acquired the suit property lawfully. The 2nd defendant is however entitled to a refund of Kshs. 8,000,000/- from the 3rd defendant to the counter-claim together with interest. Since the payment of Kshs. 8,000,000/- was made by the 2nd defendant to the 3rd defendant to the counter-claim and not to the Land Registrar, the Attorney General is not liable to refund the payment to the 2nd defendant. The 2nd defendant has however proved that he has suffered loss to the tune of Kshs. 8,000,000/- as a result of the fraud that was committed against him by the 3rd defendant to the counter-claim and the officers at the Land Registry Kisumu.
67. The 2nd defendant having proved that it put reliance on the information that was given to it by the officers at the Land Registry Kisumu to his detriment, the 2nd defendant is entitled to recover from the Government of the Republic of Kenya compensation for the loss that it has incurred as a result of the involvement of its officers in the fraud that was committed against the 2nd defendant.
68. I am concerned that in the pending criminal case, none of the officers from Kisumu Land Registry was charged. I have noted from the evidence on record that it was the same land registrar who issued the 2nd defendant with the fake official search and fake extract of the register for the suit property. The same land registrar also registered the 2nd defendant as the owner of the suit property and issued it with a title deed. It is not clear whether this particular land registrar was investigated for his role in this particular fraud. I do not think that the taxpayers should pay for the illegal and fraudulent activities of public officers. I strongly believe that the fraudulent activities in our land registries will only stop when the Land Registrars and other public officers working in the land registries are made to personally pay for their criminal acts. In this case, however, I have noted that the particular officer was not made a party to the suit. He is also not one of those charged in the pending criminal case. Sadly, the public will have to bear the burden of this claim on behalf of the fraudulent Government employees. The Attorney General will be at liberty to recover the money paid from the employees concerned.
69. In *West End Butchery Limited v. Arthi Highway Developers Limited & 6 Others*[2012] eKLR the court stated as follows:
- “Indemnity by the 1st and 4th Defendants under section 24 of the Registration of Titles Act is a proper remedy in the event of any loss occasioned to the 5th and 6th Defendant for reasons of their complicity in and participation in the fraud perpetrated by the 2nd and 3rd Defendant...Indemnity by the 1st Defendant will in addition be determined by the provisions of the sale agreements entered into with the 5th and 6th Defendants”
70. The 2nd defendant is entitled to be indemnified by the Government in the sum of Kshs. 8,000,000/- that it paid to the fraudsters who included that land registry staff together with interest. The claim against the plaintiff in the main suit who is the 1st defendant to the counter-claim is not proved. The 2nd



defendant did not prove that the plaintiff was involved in any wrongdoing either by participating in the fraud against the 2nd defendant or in resisting the 2nd defendant's attempt to forcefully take possession of the suit property.

71. Who should bear the costs of the suit?
72. Under section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of and incidental to a suit is in the discretion of the court. The plaintiff has succeeded in her claim against the 2nd defendant. The 2nd defendant shall pay the plaintiff's costs of the suit and the counter-claim. As mentioned earlier, the 1st defendant in the main suit, Tom Onditi Mayabi does not exist. The plaintiff is therefore not entitled to any costs against a non-existent party.
73. The 2nd defendant has proved its counter-claim against the 2nd and 3rd defendants to the counter-claim. The 2nd defendant shall have the costs of the counter-claim as against the 2nd and 3rd defendants to the counter-claim.
74. Conclusion

In conclusion, I hereby make the following orders in the matter;

- (a) I declare that the registration of the 3rd defendant to the counter-claim, Festus Okoth Mayabi as the proprietor of Title No. Kisumu/Kasule/1584 on 4th January 2006 and the issuance to him of a title deed in respect of the property on the same date were unlawful, null and void, and the same are cancelled.
- (b) I declare that the registration of the 2nd defendant in the main suit, Philafe Engineering Limited as the proprietor of Title No. Kisumu/Kasule/1584 on 3rd October 2012 and the issuance to it of a title deed in respect of the property on the same date was were unlawful, null and void, and the same are cancelled.
- (c) The 2nd defendant in the main suit, Philafe Engineering Limited shall surrender the title deed for Title No. Kisumu/Kasule/1584 to the Land Registrar Kisumu County within 30 days from the date hereof for cancellation.
- (d) A permanent injunction is issued restraining the 2nd defendant in the main suit by itself or through its agents or employees from entering, remaining upon, selling or interfering with the plaintiff in the main suit, Alice Chabala's peaceful use and occupation of Title No. Kisumu/Kasule/1584.
- (e) The Attorney General, and Lawrence Okoth Owuor alias Festus Okoth Mayabi, the 2nd and 3rd defendants to the counter-claim shall jointly and severally pay to the 2nd defendant in the main suit which is also the plaintiff in the counter-claim, Philafe Engineering Limited a total sum of Kshs. 8,000,000/- together with interest at court rates from 2nd June 2016 until payment in full.
- (f) The plaintiff in the main suit who is also the 1st defendant in the counter-claim, Alice Chabala shall have the costs of the main suit and the counter-claim.
- (g) The 2nd defendant in the main suit which is also the plaintiff in the counter-claim, Philafe Engineering Limited shall have the costs of the counter-claim as against the Attorney General, and Lawrence Okoth Owuor alias Festus Okoth Mayabi, the 2nd and 3rd defendants to the counter-claim.

DATED AND DELIVERED AT KISUMU ON THIS 25TH DAY OF JANUARY 2024

S. OKONG'O



JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Onyango for the Plaintiff

Mr. Onsongo for the 2nd Defendant

Mr. Kajo for the Attorney General

Ms. J.Omondi-Court Assistant

