



**Baya & 2 others v Baya & another (Land Case 57 of 2017)  
[2024] KEELC 1676 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1676 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
LAND CASE 57 OF 2017  
MAO ODENY, J  
MARCH 19, 2024**

**BETWEEN**

**BAYA YAA BAYA ..... 1<sup>ST</sup> PLAINTIFF  
RICHARD BINNS ..... 2<sup>ND</sup> PLAINTIFF  
FELICITYANN BINNS ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**SIMEON KAZUNGU BAYA ..... 1<sup>ST</sup> DEFENDANT  
ENGLISH VOICE REAL ESTATE LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 14<sup>th</sup> March 2017 the Plaintiffs sued the Defendants seeking for the following orders:
  - a. A declaration that the sale and transfer of Gede/Dabaso/576 and Gede Dabaso /578 from the 1<sup>st</sup> Plaintiff to the 2<sup>nd</sup> defendant is unlawful and fraudulent.
  - b. An order cancelling the titles number Gede/Dabaso/576 and Gede Dabaso /578 in the name of the 2<sup>nd</sup> defendant and reverting them to the 1<sup>st</sup> Plaintiff or his nominees and thence to the 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiffs.
  - c. A permanent injunction restraining the 2<sup>nd</sup> defendant from disposing, charging, alienating or evicting any of the named Plaintiffs or in any way interfering with the Plaintiffs lawful use of parcels known as Gede/Dabaso/576 and Gede Dabaso /578
  - d. Such other or further relief that this Honourable court shall deem fit and proper to grant.
  - e. Costs



## **Plaintiffs' case**

2. PW1 adopted his Witness Statement dated 14<sup>th</sup> March 2017 and produced a list of documents as Pex No. 1 to 10. PW1 stated the 1<sup>st</sup> Plaintiff executed an agreement in 2005 and sold the suit parcels of l and to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs who thereafter took possession. He further stated that the 1<sup>st</sup> Plaintiff due to old age and infirmity instructed the 1<sup>st</sup> Defendant to oversee the transfer process to complete the sale.
3. It was PW1's evidence that in 2009, the 2<sup>nd</sup> Defendant acting through the 1<sup>st</sup> Defendant fraudulently caused the 1<sup>st</sup> Plaintiff who had by then lost his eye sight to execute another Sale Agreement purporting to sell the exact same suit parcels to the 2<sup>nd</sup> Defendant to whom the parcels were transferred, necessitating the present suit.
4. PW1 further stated that in 2005, vide agreement dated 20<sup>th</sup> May 2005, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs agreed to buy the suit properties Gede Dabaso 576 and 578 at a sum of Ksh 600,000/-witnessed by the 1<sup>st</sup> Defendant with stipulations in the contract that were meant to ensure that the 1<sup>st</sup> Plaintiff's family would share in the inevitable growth in value of the suit l and . The 1<sup>st</sup> Plaintiff was to surrender the title to the 2<sup>nd</sup> and 3<sup>rd</sup> constructively based on trust.
5. PW1 stated that the 1<sup>st</sup> Plaintiff died on 26<sup>th</sup> May 2018 and Letters of Administration ad litem were issued to Baraka Ngoka Kazungu (gr and son of the 1<sup>st</sup> Plaintiff and incidentally son to the 1<sup>st</sup> Defendant) on 11<sup>th</sup> April 2019. That he filed a Witness Statement dated 1<sup>st</sup> April 2022 where he accused his father of double-dealing and affirming the accusations in the plaint.
6. On cross- examination by Ms Omondi for the 2<sup>nd</sup> Defendant, PW1 confirmed that he entered into an agreement in 2005 for the sale of the suit properties but knew that the 1<sup>st</sup> Defendant was not the owner of the l and . Further, that he found out in 2010 that the same had been transferred to other parties.

## **Defence Case**

7. It should be noted that the 1<sup>st</sup> Defendant Simeon Kazungu did not file a defence but filed a Witness Statement which by law is not anchored on any statement of defence. He also gave evidence, which the court will not consider.
8. DW2 Christine Constable adopted her Witness Statement dated 1<sup>st</sup> April 2022 and stated that she is a director of the company of the 2<sup>nd</sup> Defendant which is involved in real-estate investments and sometime in 2009 opted to purchase l and for purposes of building a holiday home around Mida creek area.
9. It was her testimony that they conducted due diligence through one Mr. Hargreaves a representative of Access Kenya Ltd who was contracted to facilitate the transaction whereby they paid Ksh 8.14M. She further stated that in 2010 after the transfer had been concluded he went on site to fence the property whereupon he met the 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiffs who claimed to be owners of the suit l and .
10. DW3 Patrick Shujaa Wara-advocate also adopted his statement dated 1<sup>st</sup> April 2022 where he confirmed witnessing the Sale Agreement which was signed by the 1<sup>st</sup> Plaintiff who was blind, willingly affixing his thumbprint, having received legal counsel over the nature of the transaction. DW3 stated that he witnessed neither any money exchanging h and s nor any application for L and Control Board signed by the 1<sup>st</sup> Plaintiff.
11. DW4 Joseph Karisa Mwar and u advocate adopted his Witness Statement dated 1<sup>st</sup> April 2022 and testified that he received the purchase price but neither saw nor witnessed the application of L and Control Board consent.



## Plaintiffs' submissions

12. Counsel relied on Section 26 of the [L and Registration Act](#) and the cases of Kawaljeet Singh Rekhi v Peter Wainaina Kamau & 2 others [2016] eKLR, Joseph Murithi Njeru v Mary Wanjiru Njuguna & another [2018] eKLR and McFoy v United Africa Company Ltd [1961] 2ALL ER 1169 and submitted that the suit l and was transferred illegally and fraudulently. Counsel further submitted that the 2<sup>nd</sup> Defendant did not carry out due diligence.
13. Counsel further submitted that the 2<sup>nd</sup> sale was a controlled transaction governed by Section 6(1) of the [L and Control Act](#) Cap 302 whereby a consent of the L and Control Board is required but the same was neither sought nor granted. She stated that the two advocates who h and led the transaction confirmed that there was no L and Control Board consent.
14. Ms. Chepkwony further submitted that the directors/shareholders of the 2<sup>nd</sup> Defendant company were not Kenya Citizens and the [L and Control Act](#) Cap 302 Section 9(1) (c) prohibits non citizens from getting consents in transaction for lease or transfer. Counsel relied on the cases of Mohamed Siaka Ali (Through Mohamed Shaibu Shosi – Personal Legal Representative) v Sunpalm Limited & 3 others [2015] eKLR , David Ole Tukai v Francis Arap Muge & 2ors; [2014] eKLR and submitted that there being no valid consent the transaction was null and void.
15. It was counsel's submission that there was no resolution by the company authorizing Christine Constable DW1 to sign a verifying affidavit or testify on behalf of the company although she claimed to be a major shareholder of the company. Counsel relied on the case of Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd, Nairobi (Milimani) HCCC No 391/2000.
16. Counsel therefore urged the court to find that the Plaintiffs have proved their case on a balance of probabilities and grant the orders as prayed.

## 2<sup>Nd</sup> Defendant's Submissions

17. Counsel reiterated the evidence of parties and submitted that the 2<sup>nd</sup> Defendant holds indefeasible Titles to the suit properties, having lawfully purchased the properties and obtained certificates of title. Further that the Plaintiff's have not proven any fraud to warrant the cancellation of the titles.
18. On the issue of authority to swear a verifying affidavit by Ms Constable, counsel submitted that the legal requirement under Order 4 Rule 1 of the Civil Procedure Rules is that it is a Plaintiff company required to demonstrate having issued requisite authority to a person to swear affidavits or adduce evidence for the company and that it does not apply to the Defendant companies. That a resolution is only needed where the suit is instituted for and or on behalf of a company.
19. Counsel relied on the cases of Spire Bank Limited v L and Registrar & 2 others [2019] eKLR, Makupa Transit Shade Limited & another v Kenya Ports Authority & another [2015] eKLR, and Livestock Research Organization v Okoko & another [2022] KEHC 3302 (KLR). Counsel also stated that the Plaintiffs did not raise any objection to Ms. Constable's authority through their pleadings and adduce any evidence during the hearing to challenge her authority.
20. Ms Omondi submitted that the rules of evidence require that all evidence being relied upon by a party must be produced by a witness so that its authenticity and relevance to the facts can be proven and relied on the case of Billiah Matiangi v Kisii Bottlers Limited & another [2021] eKLR.
21. It was counsel's submission that the Plaintiffs extensively relied on the Witness Statements of the 1<sup>st</sup> Plaintiff – Baraka Ngoka Kazungu, Mangi Yaa Baya and the joint affidavits of Baya Ya Baya Mangi



- Yaa Baya sworn on 9 December 2013 but non were called to testify to be cross examined by the 2<sup>nd</sup> Defendant. That as such they remain hearsay, untested and an unauthenticated account of events. Counsel cited the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR.
22. On the issue of indefeasibility of title, counsel relied on Section 26 of the *L and Registration Act* and the case of Arthi Highway Developers Limited v West End Butchery Limited and Others [2015] eKLR, and submitted that the 2<sup>nd</sup> Defendant's title is protected by the law and that it is illogical for the Plaintiffs to wait for over 10 years to claim ownership on account of their sale agreement.
  23. Ms Omondi relied on the Court of Appeal case in Civil Appeal No. 71 of 1997 Wreck Motors Enterprises v Commissioner of L and s (unreported), Civil Appeal No. 130 of 2003 Faraj Maharus v J.B. Martin glass Industries and 3 others (unreported) and Gitwany Investment Limited v Tajmal Limited & 3 others [2006] eKLR and submitted that where there are competing ownership claims, the first in time procured without fraud or misrepresentation takes precedence.
  24. On the issue of a foreigner, holding freehold title, counsel submitted that the freehold title held by the 2<sup>nd</sup> Defendant was automatically converted by law to a ninety-nine-leasehold interest under Article 65(2) of *the Constitution* and a foreigner who had previously held freehold title is not deprived of their title and property rights. Counsel cited the case of Koome Mwambia & 3 others v Deshun Properties Company Limited & 4 others [2014] eKLR.
  25. Ms Omondi submitted that the 2<sup>nd</sup> Defendant is a bona fide purchaser and relied on the cases of Kitui Ole Yiamboi & Another v Agricultural Finance Corporation & 102 others [2016] eKLR, Mbiiri Kamau (Representing A.C.K Kitharaini Church, the Church Commissioners for Kenya Trustees of the Anglican Church of Kenya) v Munyanga Njoka & 2 Others(2021) eKLR.
  26. Counsel therefore urged the court to dismiss the Plaintiffs' case with costs to the 2<sup>nd</sup> defendant.

### **Analysis and Determination**

27. The issues for determination are whether the Plaintiffs entered into a valid Sale Agreement in respect of the suit parcels of l and , whether the Plaintiff has proved fraud by the Defendants, whether the court should cancel the titles in the name of the 2<sup>nd</sup> Defendant, whether the 2<sup>nd</sup> Defendant is a bona fide purchaser for value, and who is to pay costs of the suit.
28. It was the Plaintiff's case that the 1<sup>st</sup> Plaintiff executed an agreement in 2005 and sold the suit parcels of l and to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs who thereafter took possession. He further stated that the 1<sup>st</sup> Plaintiff due to old age and infirmity instructed the 1<sup>st</sup> Defendant to oversee the transfer process to complete the sale.
29. PW1 stated that 2009, the 2<sup>nd</sup> Defendant acting through the 1<sup>st</sup> Defendant fraudulently caused the 1<sup>st</sup> Plaintiff who had by then lost his eye sight to execute another Sale Agreement purporting to sell the exact same suit parcels to the 2<sup>nd</sup> Defendant to whom the parcels were transferred.
30. On the issue whether there was a valid Sale Agreement for the sale of the suit parcels of l and , Section 3 of the Law of Contract stipulates that the agreement must be in writing and should be signed by all the parties. The Plaintiffs herein entered into an agreement dated 20<sup>th</sup> May 2005, for the sale of the suit parcels of l and at a consideration of Kshs 600,000/ which was paid in full.



31. The Sale Agreement was in writing and witnessed by the parties which makes it a valid agreement as was held in the case of Nelson Kivuvani ..Vs.. Yuda Komora & Ano. Nairobi HCCC No.956 of 1991 that:-

“The agreement for sale of l and which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligation express or implied of each of the parties and signed and witnessed by two witnesses who signed against their names amounts to a valid contract.”

32. The 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff had a history together where the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs gave assistance to the family and that is what led to the sale of the suit parcels of l and . The 1<sup>st</sup> Plaintiff had earlier entered into a Sale Agreement and sold to them Plot No. Gede/Dabaso/ 520 vide an agreement dated 22<sup>nd</sup> January 1994 which was as a result of a subdivision of plot No Gede/Dabaso/285.

33. It is also on record that the 1<sup>st</sup> Plaintiff further subdivided plot No. Gede/Dabaso/518 with result plots No. Gede/Dabaso/578 and 579, and a subdivision of Plot No. Gede/Dabaso/ 519 with resultant plot Nos, 576 and 577 of which the 1<sup>st</sup> Plaintiff sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs plot Nos. 577 and 579 in 1995.

34. The 1<sup>st</sup> Defendant Simeon Kazungu Baya the eldest son of the 1<sup>st</sup> Plaintiff was authorized to oversee the transactions to ensure that the titles were transferred to the Plaintiffs as the father was aging. This is where the current problems started with the parcels being sold by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant.

35. It should be noted that the 1<sup>st</sup> Defendant never filed any defence to anchor his testimony on. The court allowed him to testify but his evidence cannot be given any weight as it had not been pleaded. If he was able to file a Witness Statement, then what precluded him from filing a defence, which is a legal and procedural requirement within a stipulated period? Is it that he had something to hide after selling the suit l and to the 2<sup>nd</sup> Defendant without authority.

36. The Plaintiffs bought the l and and took occupation of the same, they were awaiting the transfer after fulfilling the terms of the agreement. This was well within the knowledge of the 1<sup>st</sup> Defendant who through misrepresentation sold the l and to the 2<sup>nd</sup> Defendant who should have found out the true position on the ground.

37. In the case of Embakasi Properties Limited & Anor. vs. Commissioner of L and & Another. [2019] eKLR the Court of Appeal held as follows:

“Although it has been held time without end that the certificate of title is: “... conclusive evidence that the person named therein as proprietor of the l and is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party.

See section 23 of the repealed Registration of Titles Act. Section 26 of the [Land Registration Act](#), 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”.



38. Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

39. The 1<sup>st</sup> Defendant acted fraudulently by entering into another Sale Agreement with the 2<sup>nd</sup> Defendant, receiving the purchase price while knowing that the suit parcels of land had already been sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in which transactions he participated.

40. The court cannot turn a blind eye to misrepresentation, fraud and illegality all in the name of indefeasibility of title. That is why Section 26 was put in place to deal with such scenarios where people sell land to unsuspecting land buyers only to be told about indefeasibility of title. A person waving a title that was procured fraudulently or through misrepresentation holds a mere paper, which does not pass proprietary interests. People who engage in such conduct should be held accountable, apart from being asked to refund the purchase price together with interest. I find that the 2<sup>nd</sup> Defendant's title was procured fraudulently through misrepresentation hence it cannot stand.

41. In the case of *Elijah Makeri Nyangwara –Vs- Stephen Mungai Njuguna & Another* [2013] the court held as follows

“it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme.. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

42. Having found that the title held by the 2<sup>nd</sup> Defendant was procured through misrepresentation by the 1<sup>st</sup> Defendant it follows that the 2<sup>nd</sup> Defendant cannot rely on the doctrine of innocent purchaser for value. The 2<sup>nd</sup> Defendant's remedy lies with the 1<sup>st</sup> Defendant who took advantage and took money without disclosing that the suit parcels were not available for sale as they had been sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.

43. Section 80 of the *Land Registration Act* empowers this Court to order the rectification of the register. The said section provides that'

- (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, 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.
44. In the case of *Alberta Mae Gacci – vs – 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 way 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....”
45. I have considered the pleadings, the evidence of record and the submissions by counsel and find that the Plaintiffs have proved their case on a balance of probability. I therefore enter judgment for the Plaintiffs against the Defendants with the following specific orders:
- a. A declaration is hereby issued that the sale and transfer of Gede/Dabaso/576 and Gede Dabaso /578 from the 1<sup>st</sup> Plaintiff to the 2<sup>nd</sup> defendant is unlawful and fraudulent.
  - b. An order is hereby issued cancelling the title Nos. Gede/Dabaso/576 and Gede Dabaso /578 in the name of the 2<sup>nd</sup> defendant and reverting them to the 1<sup>st</sup> Plaintiff or his nominees and thence to the 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiffs.
  - c. A permanent injunction is hereby issued restraining the 2<sup>nd</sup> defendant from disposing, charging, alienating or evicting any of the named Plaintiffs or in any way interfering with the Plaintiffs lawful use of parcels known as Gede/Dabaso/576 and Gede Dabaso /578
  - d. Costs to the Plaintiffs

**DATED, SIGNED and DELIVERED AT MALINDI THIS 19<sup>TH</sup> DAY OF MARCH 2024.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 p and emic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

