



Kihoro v Kang’ethe; Kang’ethe v Kihoro & 4 others (Countclaim) (Environment & Land Case 776 of 2012) [2024] KEELC 7302 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 776 OF 2012
OA ANGOTE, J
OCTOBER 31, 2024**

BETWEEN

ESTHER NJAMBI KANG’ETHE PLAINTIFF

AND

JULIUS IRUNGU KIHORO 1ST DEFENDANT

COMPANY LIMITED 2ND DEFENDANT

MAINA KARANJA 3RD DEFENDANT

ALIAS MICHAEL 4TH DEFENDANT

ONGETA HESBON MOMANYI 5TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of a Plaint dated 31st October 2012, in which they sought judgment against the Defendant, Esther Njambi Kang’ethe in the following terms:
 - a. An order declaring that the Plaintiff is the legal and beneficial owner of the suit property comprised in and known as New Roysambu Housing Company Limited Plot No. 22.
 - b. That a permanent injunction and eviction order do issue against the defendant, her agents, servants, employees and/or representatives stopping them from sub-dividing, erecting structures, selling, alienating, excavating, fencing and/or trespassing onto the suit properties and more particularly known as New Roysambu Housing Company Limited Plot No. 22.
 - c. An order demolishing the temporary structures that are being erected on the suit properties known as New Roysambu Housing Company Limited Plot No. 22.
 - d. Costs of the suit.



2. The Plaintiff's case is that he is the legal and registered owner of the parcel of land known as New Roysambu Housing Company Limited Plot No. 22 (the suit property) which it purchased from the Housing Company in 1976; that the Defendant, Esther Njambi Kangethe, encroached on his property and began to excavate, fence and erect structures on it, claiming ownership, and that she blocked access to the said property.
3. Through her Re-Amended Statement of Defence and Counterclaim dated 17th November 2015, the Defendant denied that the Plaintiff was the registered owner of the suit property and admitted to the acts of excavation, fencing and erecting a structure, as the legal owner of Nairobi/Block 116/276 formerly known as New Roysambu Housing Company Limited Plot No. 22.
4. She avers that she acquired the suit property from its previous owner, Julius Irungu Kihoro not the Plaintiff and that the transaction was facilitated and verified by the officials of New Roysambu Housing Company Limited for the sum of Kshs. 2 million, and that the sale agreement was executed on 9th December 2009 by herself and the Vendor in the presence of OH Momanyi Advocate, the 5th Defendant in the Counter claim and two other witnesses.
5. The Defendant asserted that she paid land rent to the Ministry of Lands amounting to Kshs. 58,848 on 16th December 2009; that she paid Kshs. 1,875,000 to the vendor's advocate, OH Momanyi & Co. Advocates, by way of direct funds transfer on 16th December 2009 and that the balance of Kshs. 125,000 was paid in cash to the vendor.
6. According to the Defendant, upon payment of the entire purchase price, the vendor released all the documents to her in the presence of his advocate including the allotment letter, receipts issued by New Roysambu Housing Company Limited for purchase of shares, the transfer of lease form and the agreement for sale.
7. The Defendant averred that she then proceeded to the offices of New Roysambu Housing Company where its secretary, Martin Karanja, gave her the original lease and certificate of lease in the name of Julius Irungu Kihoro, which he allegedly obtained from the Ministry of Lands at Nairobi.
8. She stated in her Defence that she agreed with the officials of the Housing Company that she pays them Kshs. 270,000 for them to process the transfer of the property and title documents in her name. However, she averred, before the property could be transferred, the Plaintiff served her with the Plaint in this suit.
9. In the alternative and without prejudice, the Defendant contends that if the Plaintiff is the legal or registered owner of the suit property, then she is innocent of a fraudulent scheme initiated by the officers of New Roysambu Housing Company Limited and other persons acting as their agents and impersonators of the Plaintiff.

Counterclaim

10. In her Counterclaim, the Defendant, who is the Plaintiff in the counterclaim, asserted that she is the beneficial owner of Nairobi/Block 116/276 formerly known as New Roysambu Housing Company Limited Plot No. 22 having purchased the same from the owner, going by the same name as the Plaintiff and that the Defendants to the counterclaim jointly acted with negligence, deceit, misrepresentation and fraud with the aim of depriving her of the suit property.
11. According to the Plaintiff in the counter claim, the 5th Defendant acted negligently and in breach of his duties as an advocate acting for the vendor and purchaser, causing her to suffer loss. Alternatively,



she asserts that the Plaintiff fraudulently sold the suit property to her through third party proxies and then claiming the plot, and falsely claiming to be Julius Irungu Kihoro.

12. The Plaintiff in the counterclaim asserts that she consequently suffered the following losses in pursuing the title to the suit property:

- i. Purchase price from a bank loan obtained with interest at the rate of 20% per annum Kshs. 2,000,000/-
 - ii. Legal fees on sale Kshs. 25,000/-
 - iii. Agency fees Kshs. 30,000/-
 - iv. Transfer/ Stamp duty Kshs. 43,340/-
 - v. Land rent Kshs. 58,480.60/-
 - vi. Further Land rent Kshs. 1,494/-
 - vii. Building materials/ metal bars Kshs. 170,000/-
 - viii. Digging trenches Kshs. 150,000/-
 - ix. Building stones Kshs. 56,000/-
 - x. Sand Kshs. 68,000/-
 - xi. Ballast Kshs. 23,000/-
 - xii. Watchmen two months Kshs. 27,000/-
 - xiii. Removal of garbage 200/- per day Kshs. 12,000/-
 - xiv. Cash payment to 2nd -4th Defendants Kshs. 200,000/-
- TOTAL Kshs. 2,864,682.60/-

13. The Defendant/ Plaintiff in the Counterclaim has sought for the following reliefs:

- a. A declaration do issue that the Plaintiff in the counterclaim is the beneficial owner and is entitled to legal ownership of plot number Nairobi/block 116/276 formerly known as New Roysambu Housing Company Limited Plot No. 22 and an order do issue that the said plot be transferred to the said plaintiff Esther Njambi Kang'ethe.
- b. An order do issue directing the Land Register Nairobi to rectify the land records to replace the name of the Plaintiff/ 1st Defendant in the counterclaim herein Julius Irungu Kihoro with that of the Defendant/Plaintiff in the counterclaim Esther Njambi Kangethe.
- c. Alternatively, and entirely without prejudice to the foregoing that the plaintiff and the other defendants to the counterclaim be ordered jointly and severally to refund to the defendant the sum of Kshs. 2,864,682.60 together with interest mentioned at paragraph 19 of the counterclaim.
- d. That the said amount to be paid with interest at court rates from 9th December 2009 to payment in full.
- e. Costs of the suit.



14. In their Reply to Defence and Defence to Counterclaim, the Plaintiff denied the Defendant's counterclaim and asserted that he is the bona fide registered owner of the suit property.
15. The 2nd and 3rd Defendants in the counter claim filed their Defences dated 23rd March 2021 6th May 2024 respectively. They asserted that plot no. 22 was only used by New Roysambu Housing Co-operative Society for balloting purposes in plot allocation and that upon change of user and subsequent survey, Plot No. 22 became land parcel Nairobi Block 116/276.
16. According to the 2nd and 3rd Defendants, if there was a dispute between the Plaintiff and the Defendant, then the matter should have been adjudicated over by the Co-operative Tribunal; that the official receipt relating to land parcel Plot No. 22 dated 31st August 1990 relates to one Julius Irungu Kihoro ID No. 1865472/60 and that the Plaintiff has neglected to distinguish himself from Julius Irungu.
17. The 2nd Defendant averred that the lease by the Plaintiff as proof of ownership of land parcel Nairobi Block 116/276 is invalid as such leases were not being issued by the President of the Republic of Kenya and that no such lease is issued under Form 13 (RLA-Government General) as shown in the Plaintiff's lease and that valid leases are issued with the identity number of the lease, which is not the case in the purported lease.
18. According to the Defendants, such leases were ordinarily signed by the Land Registrar and not by the Commissioner of Lands as shown in the submitted lease and that the lease appears to be fraudulent.
19. The 3rd Defendant filed a Reply to Defence and Counterclaim and denied the Plaintiff in the counterclaim's case that he received Kshs. 270,000/- for transfer purposes. He asserted that if any amount was paid by the Plaintiff in the counterclaim, the same was repaid in full when the genuine owner, Julius Irungu Kihoro resurfaced.
20. The 5th Defendant, through his Defence dated 10th February 2016, averred that the Kshs. 50,000 was paid by the Plaintiff in the counter claim in his presence and Kshs. 75,000 was paid elsewhere, before Esther Njambi Kangethe and Julius Irungu Kihoro made a formal agreement. He averred that the Plaintiff, who was the seller, had in his possession an allotment letter dated 14th September 1992 and various receipts issued by New Roysambu Housing Co. Ltd to the vendor and a share certificate.
21. The 5th Defendant admitted that the Defendant/Plaintiff in the Counterclaim bought the plot from the real owner; that he (5th Defendant) never confirmed the seller as the genuine owner of the plot; that the parties went to his office after they had agreed on everything and that he was to oversee further payment and drawing of the agreement.
22. The 5th Defendant denied that he was working with the 1st-4th Defendants to defraud the Plaintiff in the counter claim and that he never acted for the Plaintiff or the 1st Defendant.
23. According to the 5th Defendant, the Plaintiff and the Defendant knew each other very well as they came from the same area and were members of the New Roysambu Housing Company Ltd and that he gave the parties concerned time and necessary advice from 9th-16th December to do due diligence by ascertaining ownership and identity from the relevant authorities because his role was limited to drawing the agreement. He therefore denied any liability enumerated in the counterclaim.

Hearing and Evidence

24. The Plaintiff, PW1, relied on his statement dated 31st October 2012 and three bundles of documents, which he produced as PEXB1 dated 31st October 2012, PEXB2 dated 14th February 2013, PEXB3 dated 18th February 2020 and PEXB4 dated 18th March 2022.



25. In his statement, PW1 averred that in 1993, he was issued with a lease duly signed by the then Commissioner of Lands, but he mistakenly failed to submit the said lease for registration; that he later processed the lease for Plot No. 22 which became Nairobi Block 116/276 in December 2012 and that upon registration, he was issued with the registered lease and certificate of lease. PW1 denied selling his land to the Defendant.
26. PW1 testified that he bought the suit property from the 2nd Defendant. When he found the land fenced, he confronted the 2nd Defendant who told him that they worked for the person who had fenced. He asserted that he had a title deed and the original lease.
27. In cross-examination, he stated that he bought the land in 1977/ 1978 and the title was issued to him in 1993; that he was later asked to return the lease so that he could be given a signed lease, which he was later issued with in December 2012; that he never met the 4th Defendant, Joshua Maina Kabuthia and that he testified in a criminal case against Joshua and Momanyi.
28. DW1, the Defendant/ Plaintiff in the Counterclaim, Esther Njambi relied on a bundle of documents dated 6th February 2022, produced as DEXB1. In her witness statement, the Defendant asserted that in 2009, she was introduced to the owner of the suit property through land brokers cJohn Kamau Mwangi and one Mr. Mugo, introduced to her by her painter Kyalo and that the seller going by the same name as the Plaintiff agreed to sell her the suit property for Kshs. 2 million.
29. She asserts that she, together with Sammy Gathugu Manderu, in carrying out due diligence, visited the offices of New Roysambu Housing Company Limited; that it was confirmed that the owner of the plot was John Irungu Kihoro and that she later appeared with the seller before the New Roysambu Housing Company officials where he presented his plot ownership documents including the share certificate, letter of allotment and receipts from the 2nd Defendant.
30. According to DW1, the 3rd Defendant then verified the documents in the presence of other witnesses including the broker, John Kamau, Sammy Mandela, her painter Kyalo and one Mugo.
31. She testified that she requested a copy of the original allotment letter and a copy of the vendor's identity card; that she personally went to the office of the Registrar of Persons with a photocopy of the ID which was certified as a true copy of the original and that the Ministry of Lands confirmed that Julius Irungu Kihoro was the owner of the suit property by virtue of the allotment letter issued to him.
32. It was the evidence of DW1 that they then proceeded to the 5th Defendant/Advocate who prepared two agreements, signed by Julius Irungu Kihoro and witnessed by John Kamau Mwangi and Sammy Mandela and one agreement was for Kshs 2 million and the other was for Kshs. 800,000 to enable her to pay a lesser amount for stamp duty.
33. DW1 stated that thereafter, she lodged transfer documents for the suit property at the lands office, but was then informed that the documents had problems; that she however failed to trace the seller and went to the Secretary of New Roysambu Co Ltd, Mr. Karanja, who requested for Kshs. 200,000 to process the documents and that she paid him Kshs. 100,000 in cash in the presence of her friend Mandela; that she was later approached by the 4th Defendant who sought for Kshs. 70,000 for payment of stamp duty and other payments, which she asserts she paid in installments of Kshs. 45,000/-, Kshs. 13,000/- and Kshs. 12,000/-.
34. It was the testimony of DW1 that the two officials of the 2nd Defendant later presented to her the certificate of lease and the lease in the name of Julius Irungu Kihoro, and indicated that the transfer to her name was pending; that they handed over the documents to her and demanded she pays Kshs.



- 100,000 which she did and that he was later informed by the lands office that she had been given forged documents.
35. According to DW1, a year later, she approached the 3rd and 4th Defendants who demanded for Kshs. 600, 000 for them to allocate her another land in Thika as a replacement; that she gave them Kshs. 50,000 in cash and Kshs. 150,000 was deposited into the New Roysambu Co. Ltd account on 18th and 21st September 2012 and that they later informed her that the genuine Julius Irungu Kihoro had approached them and demanded that his land be transferred to him.
 36. She asserts that she reported the matter at Kasarani police Station and later at CID Headquarters; that the Plaintiff later summoned her to the chief's office, showed her his certificate of lease and offered to sell the same plot to her at Kshs. 8 million which she declined and that she believes that all defendants in her counterclaim were acting in collusion to defraud her.
 37. DW1 stated that while she paid the brokers Kshs. 400,000 for them to give her the title, they have only refunded Kshs. 200,000 and the balance of Kshs. 200,000 has never been refunded and that although the 4th Defendant was not around when she signed the agreement in the office, he took her to the lands office.
 38. DW2, Maina Karanja, adopted his statement and produced a bundle of documents, both dated 20th February 2017 as DEXB1 and another bundle dated 26th October 2018 marked as DEXB2. In his statement, he testified that he was the secretary of the 2nd Defendant; that Julius Irungu Kihoro had shares with the 2nd Defendant and was allotted Nairobi Block 116/276 and that the Defendant purportedly acquired title from another Julius Irungu Kihoro but the transfer process was paralyzed when the genuine Julius Kihoro Irungu resurfaced.
 39. DW2 averred that the vendor of the property was not known to him and he never colluded with him and that the vendor was known to the Defendant as she sourced for him. He denied ever verifying the identity card of Julius Irungu Kihoro and stated that Esther Njambi Kang'ethe never exercised due diligence in confirming ownership of the property before she purchased it.
 40. According to DW2, he checked the register and confirmed that the land belonged to the Plaintiff, Julius, then he handed her to Joshua to assist her; that he did not know if she had met Julius and she did not come with him when she went to visit him; that he never received the purchase price, and that the company received Kshs. 200,000 which has since been refunded to the Defendant. He testified that when the real Julius appeared, they could not transfer the land to Esther.
 41. DW3, the 4th Defendant, Joshua Maina Kabuthia adapted his witness statement, in which he averred that he was the Treasurer of Roysambu Housing Society; that in November 2011, Esther Njambi Kang'ethe informed him that she had purchased the suit property from Julius Irungu Kihoro but was yet to transfer the same to her name; that she then gave him an agreement dated 9th December 2009, a transfer and receipts for the Land Rates payments for the suit property and that he undertook to pursue the transfer and he charged her Kshs. 50,000 as it was an extraneous duty beyond his role in the Roysambu Housing Company.
 42. According to DW3, he presented the documents to the Ministry of Lands where he was informed that the payments owing which included land rent and other fees was Kshs. 48,000; that the Defendant had only paid him Kshs. 45,000 at that time, so he paid the extra Kshs. 3,000, which was never refunded to him and that he later accompanied the Defendant to Ardhi House where she produced the title deed.



43. It was the evidence of DW3 that the Defendant later informed him that the Lands Officer had confiscated the documents and requested her to present the registered owner of the property to appear before the land registrar in person.
44. The 4th Defendant testified that another person then presented himself to the 2nd Defendant's offices claiming the same parcel; that he produced his identity card and an old lease for the plot, which was confirmed to be authentic by the society's board member; that a meeting at the Chief's Office was thereafter called with the Plaintiff and the Defendant in attendance and that they were then advised to report the matter to the Criminal Investigations Department for investigations.
45. He claimed that the 2nd Defendant's Committee asked the Plaintiff in the counterclaim to pay Kshs 615,000 which she owed the company; that the Plaintiff in the counterclaim gave the 3rd Defendant and the 4th Defendant Kshs. 50,000 which they acknowledged; that the Plaintiff made a further deposit of Kshs. 150,000 to the Society's account; and that the Kshs. 200,000 paid to the Society by the Plaintiff in the counterclaim was refunded to her in the PCIO's office in the presence of the police officers after it was established that the person who sold her the property was not its owner.
46. He indicated that he never met the Plaintiff. He stated that he was the 1st accused in Criminal Case No. 255 of 2013, where he was charged with several counts and was only convicted on Count 10. He denied being there when the parties entered into an agreement and denied signing the same.
47. DW4, the 5th Defendant, relied on his statement dated 10th February 2016 and his further witness statement. In his statement, he averred that he was engaged by the Defendant and Julius Irungu to draft the sale agreement. He claimed that the two knew each other and they were from the same locality, and that the purchaser confirmed that she had ascertained the identity of the vendor from the Registrar of Persons and had confirmed the vendor's ownership of the plot from the 2nd Defendant.
48. It was the evidence of DW4 that his work was just to draw a sale agreement and the rest was to be done by the parties themselves, who claimed they had people to assist him. He testified that he was struck off from the roll of advocates in 2023, before the judgement in the criminal court.
49. He stated that the Plaintiff only became known to him when he came to testify in the criminal case; that the Plaintiff had never been to his office, as the person who purported to sell the land to Esther Njambi was not in court and was not the Plaintiff, and that he was the 3rd accused person in the criminal case and was convicted of three counts.
50. He stated that he received Kshs. 1,875,000 in his client's account from the Defendant, and he transmitted the same to the seller who acknowledged receipt. He denied knowing the seller, who was introduced to him by a different party.

Submissions

51. Counsel for the Plaintiff submitted that registration of a person over a property gives that person the rights and privileges over the property and is prima facie evidence that the person is the owner of the land; that the Plaintiff purchased the suit property in 1976 and acquired a certificate of lease on 18th December 2012, and therefore has an indefeasible right over the suit property and that he never sold his land to Esther Njambi who was conned.
52. It is their submission that the 1st Defendant has no claim over the suit property and that the photographs and signatures on the transfer produced by the Defendant are a forgery and do not match those of the Plaintiff.



53. Counsel for the Defendant/ Plaintiff in the Counterclaim submitted that the Defendant is a bona fide purchaser of the suit property; that the Defendants in the Counterclaim colluded to deny her legal and equitable rights through extreme fraud, conspiracy and illegalities and that the court should award her monetary compensation sought.
54. Counsel for the 2nd Defendant submitted that the Plaintiff has not been candid as the name in the receipts and the party suing do not agree. Counsel attached the official membership list of New Roysambu Co-operative Society Limited to his submissions, and submitted that there are two other parcels of Land Nairobi/Block 116/987 and Block 116/1077 in the name of Julius Irungu.
55. Counsel for the 4th Defendant submitted that the 4th Defendant joined New Roysambu Housing Company in 2011 as the treasurer to the company, which was validated during cross-examination; that it was not possible that the 4th Defendant participated in identifying the vendor and the sale agreement and that the Plaintiff in the Counterclaim failed to conduct the necessary due diligence and was using the 4th Defendant as a scapegoat for her failure.
56. Counsel for the 5th Defendant submitted that the Defendant, Esther Njambi, failed to distinguish clearly the Plaintiff and the 1st Defendant in the counter claim i.e. Julius Irungu Kihoro; that it is clear from the evidence, sale agreement and other documents that she bought land from Julius Irungu Kihoro who was properly identified by the Registrar of Person, Sammy Manderu, John Kamau Mwangi and the official of Roysambu Housing Company and that the said Esther Njambi had a legal right to exercise all rights of ownership on the suit property.
57. According to the 5th Defendant, the Plaintiff herein, Julius Irungu Kihoro, did not clearly state how he came to own the suit property and if at one time he wanted to sell it to the said Esther Njambi for Kshs.8,000,000.
58. Counsel submitted that the 5th Defendant, as an advocate, was limited to drafting and overseeing payments as the parties knew each other; that the Defendant had done due diligence at the Registrar of Persons office and the lands offices' registry and that the Defendant failed to prove the elements of deceit, negligence, misrepresentation and fraud involving the 5th Defendant.

Analysis and Determination

59. Before this court is a dispute with respect to the ownership of Nairobi/Block 116/276 formerly known as New Roysambu Housing Company Limited Plot No. 22 (the suit property). The issues for this court's determination arising from the Plaintiff and the Defendant's counterclaim are:
 - a. Whether the Plaintiff is the registered owner of the suit property
 - b. Whether the Defendant lawfully acquired ownership of the suit property.
 - c. The orders which this court should issue.
60. The Plaintiff's case is that he is the legal and registered owner of the parcel of land known as New Roysambu Housing Company Limited Plot No. 22, which he purchased from the New Roysambu Housing Company in 1976.
61. He asserts that he was initially issued an unsigned lease in 1993, which he neglected to register, and was later asked to return it to the Ministry of Lands, and was thereafter issued a signed lease in October 2012. He argues that the Defendant has trespassed onto his land and has unlawfully constructed temporary structures thereon. He denies ever selling the suit property to her, as she claims.



62. The Defendant, on her part, asserts that she lawfully purchased the suit property from one Julius Kihoro and has sought that the title to the property be registered in her name. In the alternative, she argues that the Defendants to the counterclaim jointly acted with negligence, deceit, misrepresentation and fraud with the aim of depriving her the suit property. The Defendant/Plaintiff in the Counterclaim has averred that she suffered losses amounting to Kshs. 2,864,682.60 which she has claimed.
63. As prescribed under Section 26 of the *Land Registration Act*, a certificate of title is to be held as conclusive evidence of proprietorship. Such title can however be challenged on grounds of fraud and misrepresentation, in which a person is proved a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
64. Where a party's title has been challenged, it is not sufficient to present such certificate of title and assert its legitimacy. Rather, a party must establish the root of their title. The Supreme Court in *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] eKLR quoted with approval the Court of Appeal's decision in *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR, where it asserted that where a title has been challenged, a party must prove the legality of how he acquired such title. The Court of Appeal held as follows:
- “We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
65. In *Lucia Wambui Kariuki & Another vs Grace Wanjiru & Another* [2022] eKLR, this court considered the question of ownership of land through a land buying company and the requisite documentation to prove that one acquired title from a land-buying company lawfully. The court stated as follows:
- “It is not in dispute that the suit land originated from Githunguri Constituency Ranching Company Limited, a cooperative Company owned through membership. It incorporated Kenyans of all walks of life in the quest to acquire land and so it was basically a land buying company which acquired large chunks of land at the advent of Independence from the white settlers who were folding up their agricultural activities to return to their native countries. The members pay a membership fee to join and acquire shares in the company. The shareholding was critical as it was the basis of allocation of land. One would then be issued with a share certificate and various receipts for all manner of payments that was demanded for by the company. At the right time, the land would be surveyed by the land buying company and subdivided into smaller portions according to the number of its members and to cater for common utilities as and when desired by the membership. Membership was therefore denoted by the share certificate. The company would maintain a register of members indicating their details, the share certificate number, plot number and such other details as may be peculiar to the membership. Allocation of land would be through balloting. Members would then be issued with a ballot denoting the plot number balloted for. The instruments required to process the title therefore would be the share certificate, the ballot, the payment receipts and the clearance certificate by the company informing the Land Registrar that the holder of these documents is the rightful proprietor



of the land. The ballot number must agree or correspond with the land reference number as shown on the Registry Index map, which denotes the land on the ground.”

66. It is then expected that a person who seeks to prove that he acquired title procedurally through a land buying company would present a share certificate; receipts of payments made to the company and the ballot and a clearance certificate from the company to the Land Registrar informing them that the holder of these documents is the rightful proprietor of the land.
67. The Plaintiff produced several documents in their bundle to support his claim of ownership. This includes a Share Certificate for Plot No. 22 issued by New Roysambu Housing Company Limited dated 28th April 1976; a letter from the Roysambu Housing Co-operative Society Limited to the Commissioner of Lands dated 7th November 2012, confirming that in their books, Nairobi Block 116/276 Ballot No. 22 is the property of Julius Irungu Kihoro; a lease with respect to the suit property dated 3rd July 2009 and registered on 18th December 2012; and a Certificate of Lease with respect to the suit property, Nairobi/Block 116/276, dated 18th December 2012 and registered in the Plaintiff's name. The validity of these documents was not disproved by any of the parties to this suit.
68. In their Defence, the 2nd Defendant, the land buying company, initially indicated that the Plaintiff had not distinguished himself from the person who purported to sell the suit property to the Defendant. However, the testimony adduced by the 3rd and 4th Defendants, who are officials of the 2nd Defendant, established that the owner of the suit property is indeed the Plaintiff, Julius Irungu Kihoro. It is also an uncontested fact that an imposter carried himself in the Plaintiff's name and purported to sell the suit property to the Defendant.
69. This is evident from the chronicled evidence of the 3rd and 4th Defendants and from the Judgment of Criminal Case No. 355 of 2013 Republic v Joshua Kabuthia alias Maina Michael, Maina Karanja & Hesbon Ongetta Momanyi.
70. This court is therefore satisfied that the Plaintiff is lawfully registered as the owner of the suit property.
71. The Defendant has argued that she acquired lawful ownership of the suit property from Julius Irungu Kihoro, which transaction was facilitated and verified by the officials of New Roysambu Housing Company Limited for the sum of Kshs. 2 million, and that the sale agreement was executed on 9th December 2009 by the Defendant and Vendor in the presence of OH Momanyi Advocate and two other witnesses. She avers that the transfer of the suit property was however stalled following opposition from the Plaintiff.
72. She asserts that she is a bona fide purchaser and has relied on the definition of bona fide purchaser set out in *Katende vs Haridar & Company Limited* [2008] 2 E.A. 173 and *Samuel Odhiambo Oludhe & 2 others vs Jubilee Jumbi Hardware Limited & another* [2018] eKLR. It is however key to note that the import and tenor of the doctrine of bona fide purchaser for value and in particular the decision in *Katende vs Haridar & Company Ltd* (2008) 2 E.A 173, has since been reviewed by the Court of Appeal in *Mwangi James Njehia vs Janetta Wanjiku Mwangi & Another* [2021] eKLR, as follows:

“...In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014* this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine as was held in the



case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether. We have no hesitation in concluding that the appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First, because as we have demonstrated in this judgment, the deceased had no good Title to pass to anybody; second because the appellants were not innocent purchasers for value without notice and they cannot call in aid the provisions of Section 26 (1) of the [Land Registration Act.](#)”

73. The Court of Appeal consequently proclaimed that for a party to rely on the doctrine of bona fide purchaser, they must establish that the vendor did indeed have valid title to pass.
74. From the evidence adduced by the Defendant, it is clear that the Defendant is an innocent victim in an elaborate fraudulent scheme. While the mastermind in the rouse is not wholly apparent, there is no doubt that the brokers, John Kamau Mwangi and one Mr. Mugo and the officials of the 2nd Defendant, Maina Karanja, the 3rd Defendant and Joshua Maina, the 4th Defendant were party to the scheme.
75. I say so because it is clear that the person who purported to sell the suit property to the Defendant, was an impersonator and was not the Plaintiff. The impersonator went by the Plaintiff’s name, Julius Irungu Kihoro, and had an identification card with the same names and number as the Plaintiff.
76. Curiously, the Defendant asserted that she confirmed the validity of the identity card at the Office of the Registrar of Persons. The Defendant has however adduced a report from the Registrar of Persons which confirms that the Plaintiff is indeed the legitimate Julius Irungu Kihoro. The court in Criminal Case No. 255 of 2013, also received evidence from the Registrar of Persons who found that the person who purported to sell the land to the Defendant was an imposter.
77. Consequently, the purported vendor had no legal right nor did he have any title to the property. The Defendant could therefore not get a good title to the property, and cannot be said to be a bona fide purchaser without proof of defect.
78. There is then the matter of the culpability of the 2nd, 3rd, 4th and 5th Defendants. The Defendant asserted and testified that she approached the 2nd Defendant in the company of the impersonator, who confirmed the plot was owned by Julius Irungu Kihoro. The 3rd Defendant has denied ever meeting the impersonator and indicated that the Defendant failed to conduct adequate due diligence.



79. He testified that the Defendant came to him with a certificate. He checked the register and confirmed that the land belonged to the Plaintiff, Julius, then handed her to Joshua to assist her.
80. This court takes judicial notice that land buying companies in Kenya are fraught with fraud, with officials of the companies abusing their positions to the detriment of land buyers. It is trite that a land buying company ought to know its members and what land it has assigned to the members. It was therefore upon the 3rd and 4th Defendants, as officials of the 2nd Defendant, a land buying company, to verify the identity of the alleged vendor and to guard against fraud within the company.
81. In failing to take all measures to verify the identity of the purported seller, the 2nd, 3rd and 4th Defendants failed to discharge their fiduciary duty to the Plaintiff and the Defendant.
82. The conduct of the 3rd and 4th Defendants in this scheme, in failing to prevent the fraud by the impersonator amounts to negligence. With respect to procuring a fraudulent lease and certificate of lease, which they gave the Defendant, the 3rd and 4th Defendants are culpable for fraud.
83. This court therefore agrees with the judgment of the criminal court, which considered the evidence of a land registrar who confirmed that the transfer of lease dated 16th June 2010 and the transfer document were fake and did not originate from their office. The criminal court also received evidence from a chief inspector who carried out forensic examination of the Plaintiff's known signature against the forged documents. The criminal court was persuaded that the 2nd and 3rd Defendants were guilty of forging the transfer of lease. This court draws a similar conclusion.
84. With respect to the 5th Defendant, the Defendant asserts that he was party to the fraud and that the 5th Defendant confirmed the identity and proprietorship of the impersonator. The 5th Defendant denied the he confirmed the seller as the genuine owner of the plot. He claimed that the parties went to his office after they had agreed on everything and that he was to oversee further payment and drawing of the agreement.
85. This court takes note that the Defendant undertook to conduct due diligence in her personal capacity through verifying the validity of the seller's identity at the Registrar of Persons and ascertaining the validity of the title through visiting the offices of the 2nd Defendant. This court is not persuaded that the 5th Defendant was involved in the fraudulent transmission. All the 5th Defendant did was to draft the agreement, and released the money to the person who was introduced to him as the vendor.
86. The 5th Defendant could not have established the difference between the genuine owner of the land and the fake one. This is so considering that the two people had an identical identity card. It is the Defendant who introduced the fraudster to the 5th Defendant. The 5th Defendant could therefore not be blamed for the role he played in the entire transaction.
87. This court has established that the Plaintiff is the lawfully registered proprietor of the suit property and that the Defendant is a victim of fraud, and therefore did not obtain good title to the suit property. The Plaintiff's suit is therefore wholly established and is hereby allowed.
88. As to the Defendant's counterclaim, she has sought for an order of special damages for Kshs. 2,864,682.60. It is trite that special damages must be specifically pleaded and proved. This was held by the Court of Appeal in *Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd* [2013] eKLR as follows:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that



degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

89. Special damages are those damages that are ascertainable and can be proved at the point of filing suit. The distinction between general and special damages was explained by the Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs Electrocom International Ltd* [1992] KLR 177 as quoted in *China Wu Yi Limited & Another vs Irene Leah Musau* [2022] eKLR as follows:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

90. In her bundles of documents, the Defendant has annexed copies of stamp duty cash payment receipt dated 16th June 2010, of KShs. 32,040/- and a further KShs 13,100/- as stamp duty; pay-in-slip for land rent dated 17th July 2012 for KShs. 1,494/-; bank records showing transfer of KShs. 1,875,000/- to the 5th Defendant and pay-in-slip for payment of land rent in arrears KShs. 58,848.

91. The Defendant’s claims for KShs. 200, 000 which she paid to the 3rd and 4th Defendants have not been supported with documentary evidence. The Defendant also failed to produce receipts or proof of payment to support her claims for monies spent on sand, ballast, digging trenches building materials, removal of garbage and paying watchmen.

92. The Plaintiff in the counterclaim has consequently proved that she suffered losses as follows:

Payment of stamp duty KShs. 32,040/-
Further payment of stamp duty KShs. 13,100/-
Payment for land rent KShs. 58,848/-
Further payment of land rent KShs 1,494/-
Purchase price KShs. 1,875,000/-
TOTAL KShs. 1,980,482/-

93. Having found the 2nd, 3rd and 4th Defendants culpable for fraud and negligence, the said Defendants shall indemnify the Defendant of the sum of KShs. 1,980,000 jointly and severally.

94. In conclusion, this court has found the Plaintiff’s suit to be merited. It has also found partial merit in the Defendant’s counterclaim. The following orders shall hereby issue:

- a. An order be and is hereby issued declaring the Plaintiff the legal and beneficial owner of the suit property comprised in and known as Nairobi/Block 116/276 formerly known as New Roysambu Housing Company Limited Plot No. 22.
- b. A permanent injunction and eviction order does hereby issue against the Defendants, their agents, servants, employees and/or representatives stopping them from sub-dividing, erecting structures, selling, alienating, excavating, fencing and/or trespassing onto the suit property known as Nairobi/Block 116/276 formerly known as New Roysambu Housing Company Limited Plot No. 22.



- c. An order be and is hereby issued for the demolition of the temporary structures that have been erected on the suit property known as of Nairobi/Block 116/276 formerly known as New Roysambu Housing Company Limited Plot No. 22.
- d. The 2nd, 3rd and 4th Defendants in the counterclaim are hereby ordered jointly and severally to refund to the defendant the sum of Kshs. Kshs. 1,980,000 with interests at court rates accruing from the date of this Judgment until payment in full.
- e. Costs of the suit and the counter claim to be borne by the 2nd, 3rd and 4th Defendants in the counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Maosa for 2nd Defendant

Mr. Macharia for 4th Defendant

Mrs Muihaki Ngengi for 1st Defendant

Mr. Njeru for 1st Defendant

Mr. Ngatia for Plaintiff

Mr. Momanyi for 5th Defendant

Court Assistant: James

ELC NO. 776 OF 2012

JUDGMENT

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