



**Kilifi Hotels Limited v Ibrahim & another (Environment & Land Case
130 of 2020) [2024] KEELC 13880 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13880 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 130 OF 2020
LL NAIKUNI, J
DECEMBER 17, 2024**

BETWEEN

KILIFI HOTELS LIMITED PLAINTIFF

AND

OMAR GUMA IBRAHIM 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by the Kilifi Hotels Limited the Plaintiff herein. It is through an amended Plaint dated 15th September, 2020 and filed on court on 21st September, 2020 against the Omar Guma Ibrahim and the Chief Land Registrar Defendants herein.
2. Upon service of the Summons to Enter Appearance and the Plaint to the Defendants, the 1st Defendant filed a Memorandum of Appearance dated 26th April, 2021 and their Statement of Defence on the same day. Whilst, the 2nd Defendant filed their Statement of Defence dated 29th November, 2021 opposing the contents of the Plaint.
3. On 23rd September, 2021 upon all parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre - Trial conference, it was fixed for full trial on 30th November, 2021.
4. The Plaintiff as per the Plaint is described as a limited liability company duly registered under the Kenya while the 1st Defendant is described a male adult of sound mind residing and working for gain within the Republic of Kenya and the 2nd Defendant is the Chief Land Registrar of the Republic of Kenya.



5. The Plaintiff called its first witness on the same date and the 1st Defendant called his witness on 4th June, 2024 and both the 1st and 2nd Defendant's cases were closed on 17th September, 2024.

II. The Plaintiff's case

6. Based on the filed pleadings by the Plaintiff and the Plaintiff's brief facts of the case are that at all material times relevant to this suit, the Plaintiff is the lawful owner of the parcels of land known as L.R No. 10173 Grant No. CR 19906 and L.R No.10174 Grant No. CR 19907 (Hereinafter referred to as "The Suit Properties") in County of Kilifi. On 4th September, 2020 the Plaintiff's advocates on record, under the instructions of the Plaintiff, visited the said properties and were dumbfounded to find persons clearing the premises and demolishing the perimeter wall it had constructed. The Plaintiff's advocates being clear that the Plaintiff had not instructed or requested any persons to undertake any such works on the Suit Properties decided to interrogate the individuals the Suit Properties. Upon interrogation, the said persons informed him that the 1st Defendant was the current owner of the properties and he intended to sub - divide the said parcels of land.
7. The Plaintiff's advocates on record proceeded to make enquiries at the Kilifi and Mombasa Land's Registry and found that there had been fraudulent and illegal transactions undertaken over the Suit Properties known as L.R No.10173-Grant No.CR 19906 and L.R No. 10174-Grant No.CR 19907. The Defendants had orchestrated a fraudulent and unlawful scheme to dispossess the Plaintiff of its lawfully acquired property.
8. The Plaintiff relied on the following particulars of fraud, illegality, impropriety and arbitrariness on the part of the 1st and 2nd Respondents:-
- i. Illegal, wanton and unprocedural dealings, transactions and/or entries in respect of the Plaintiff's titles to the parcels of land known as L.R No.10173 - Grant No. CR 19906 and L.R No. 10174- Grant No.CR 19907
 - ii. Arbitrary, unlawful and violent encroachment and trespass of the suit properties.
 - iii. Demolition of the perimeter wall on the Plaintiff's parcels of land; and
 - iv. Denial of the Plaintiff's quiet occupation, use and enjoyment of the suit property and sanctity of Title as enshrined in *the Constitution* of Kenya 2010.
9. From the foregoing, it is clear that the 1st Defendant with the aid of the 2nd Defendant has orchestrated and executed a fraudulent scheme with the sole agenda to arbitrarily and/or unlawfully dispossess and/ disenfranchise the Plaintiff of its lawfully acquired property. The Plaintiff's right to own and use property under *the Constitution* is under threat by the 1st Defendant and thus this Honourable Court ought to intervene and curb the 1st Defendant's illegalities.
10. Despite a demand made and notice of intention to sue having been given, the Defendants had failed, refused and/or neglected to admit the Plaintiff's claim. There was no other no previous proceeding in any court between the Plaintiff and the Defendants over the subject matter herein.
11. The Plaintiff prayed for Judgment to be entered against the 1st and 2nd Defendants jointly and severally for;
- a. A declaration that the Plaintiff is the lawful owner of the parcels of land known as L.R No. 10173 -Grant No. CR 19906 and L.R No. 10174-Grant No. CR 19907 and that the Defendants' conduct in arbitrarily interfering with the Plaintiff's Titles and occupation of the said properties is unlawful, unconstitutional, fraudulent and without a colour of right;



- b. A permanent injunction be and is hereby issued restraining the 1st and 2nd Defendants herein whether by themselves, employees, servants, agents, assigns and/or any other person whatsoever from entering, encroaching onto, trespassing, interfering with the Plaintiff's quiet possession, access and/or use, alienating, advertising for sale, offering for sale, taking possession, leasing, transferring, charging, selling, disposing, sub-dividing and/or in any other way dealing with the Suit Properties known as L.R No. 10173- Grant No. CR 19906 and L.R No.10174-Grant No. CR 19907 and any resultant titles therefrom together with all other developments therein.
 - c. An order cancelling all entries and transactions made on the Titles L.R No. 10173- Grant No. CR 19906 and L.R No. 10174- Grant No.CR 19907 and any resultant titles therefrom if at all and the records held by the 2nd Defendant be rectified accordingly to reflect the Plaintiff as the lawful and registered owner of the parcels of land known as L.R No.10173-Grant No. CR 19906 and L.R No. 10174-Grant No.CR 19907.
 - d. General and exemplary Damages for fraud, Trespass, unlawful encroachment and the destruction of the suit property being L.R No.10173 Grant No. CR 19906 and L.R No. 10174 Grant No.CR 19907.
 - e. Costs of this suit.
 - f. Interest on (d) and (e) above at court rates.
12. The Plaintiff called its first witness on the 30th November, 2021 where the Witness testified as follows:

A. Examination in Chief of PW - 1 by Mr. Kago Advocate.

13. PW – 1 testified under oath and in the English language. She identified herself as M/s. MERCY KENDI MBERIA, a citizen of Kenya and with all the particulars as shown in her national identity card to Court. She was an Advocate of the High Court of Kenya and the designated Legal Adviser of the Plaintiff's company. She had recorded her witness statement dated 16th November, 2021. She wished to adopt it as her evidence in chief. There was also a list of documents dated 15th September, 2020 marked as Plaintiff Exhibit numbers 1 of the 46 paged bundle. She told the Court that there was a supplementary list of documents dated 16th November, 2021 (Page 1 to 25) marked as Plaintiff Exhibit 1. She produced them accordingly. She sought for the prayers as pleaded accordingly.
14. She testified that the Plaintiff was the legal owner to the suit parcel known as LR No. 10173 Grant No. CR 19906 and 10174 Grant numbers 19907 in the County of Kilifi after acquiring the same in the year 1988. They enjoyed quiet, undisturbed and undisputed possession up until the month of September 2020 when their guards from the local area informed them that some unknown people had invaded it and purported to eject them therefrom.

B. Cross Examination of PW - 1 by Mr. Kiplangat Advocate

15. She reiterated and affirmed being the Company Secretary and the Legal Officer of the Plaintiff's company. The suit was filed on 15th September, 2020. The resolution for the company to institute the suit had been done before but she did not have. It was dated 8th September, 2020 which she saw in Court. There was only a fence on the suit land. There were no construction. According to the contents of Paragraph 6, the witness told court that when they realized that there were people on site, they sent their advocates, Mr. Kago to the ground. He reported back to them.
16. According to her at Paragraph 7, the properties they had in mind, sometimes the titles were amalgated, sub - divided, indemnified at the land offices. They were still holding the original title deed. There was



a CID matter. The illegal activities included the sub - division and someone was alleging to be trading in the name and style of Kilifi Hotel Limited.

17. She told the Court that it started around the year 2011. There were no document from the 1st Defendant. But being a conveyancing advocate, one does conduct an official search, the L.R. No. changes. They were waiting for a report from the investigating officer to tell them what was highlighted. At paragraph 10, they had been paying for land rates to the Government – (pages 16 to 22). They had been paying rates to date.

C. Re – Examination of PW - 1 by Mr. Kago Advocate.

18. She told the Court that there were two similar titles to the suit property- L.R. No. 10173 and L.R. No. 10174. They had not transacted on the suit property since the year 1988. In September 2020 there were transactions taking place, there were two titles over the same suit property.
19. The Plaintiff closed their case on 30th November, 2021.

III. The 1st Defendant's case

20. As already indicated above, the 1st Defendant filed a Statement of Defence dated 26th April, 2021 on 11th May, 2021 where he denied the contents of Paragraph 4 of the Plaintiff. In the alternative and without prejudice to paragraph 3 above, the 1st Defendant averred as follows:
- a. At all material time relevant to this suit, he was the registered owner of all that parcel of land being Plot Number 28432/2 Kilifi (Land Title Number CR. 70282) - “the Suit Property” which the Plaintiff had christened as two plots consisting of L.R. No.10173 and L.R. No. 10174.
 - b. The 1st Defendant acquired the Suit Property in the year 2016 from Arvic Tours and Travelers Limited which was previously the registered owner of the Suit Property and caused the Suit Property to be transferred to his name on 19th July, 2017.
 - c. Since its acquisition, the 1st Defendant has been in quiet and peaceful occupation of the Suit Property.
 - d. The 1st Defendant has been paying, and continues to pay land rates and other outgoings in respect of the Suit Property.
21. The 1st Defendant was a stranger to the Plaintiff's averments under Paragraphs 5, 6, 7, 13 and 14 of the Plaintiff. The 1st Defendant was a stranger to the contents of Paragraph 8 of the Plaintiff and puts the Plaintiff to strict proof of allegations of the alleged illegal transactions. The 1st Defendant denied the contents of paragraph 9 of the Plaintiff and puts the Plaintiff to strict proof of each of the allegations of fraud, illegality, impropriety and arbitrariness particularized thereunder. He further contended that the Plaintiff having no proprietary interests in the Suit Property, could not invoke the Constitutional right to own and use the Suit Property.
22. The 1st Defendant prayed that the Plaintiff's suit against him to be dismissed with costs.
23. The 1st Defendant called his witness on 4th June, 2024 who testified as follows:-

A. Examination in Chief of DW - 1 by Mr. Lorot Advocate:-

24. DW - 1 sworn and testified in Swahili language. He identified himself as OMAR GUMA IBRAHIM, a citizen of Kenya and holder of the national identity card with all the particulars as shown to Court.



He was born on 28th February, 1982. He lived in Nyali estate with the County of Mombasa. He had recorded a witness statement dated 30th September, 2021 and filed 8 documents. The number 8 being the survey and map dated 27th May, 2021. They were marked as “1st Def. MFI - 8” while the 1st Defendant documents produced as 1st Defendant Exhibit 1 to 7.

25. Further he told the court that he filed a supplementary list of documents dated 11th March, 2024(2) which was produced as 1st Defendant Exhibit numbers 9 and 10. In the year 2016 he bought the parcel of land. He conducted an official search dated 11th November, 2015 and he found it was in the name of Arvic Tours. Hence he bought it; he had a sale agreement dated 29th November, 2016. In the year 2017 he completed paying the purchase price and they got him title. It was 5 acres but he bought ½ which was 2.5 acres. He did not know Kilifi Hotels Limited. There was no development on the ground. He would go to the land all the time. He paid rent and rates to the government and the Municipal Council. He bought the land at a sum of Kenya Shillings Fifteen Million (Kshs 15,000,000/-). At first he paid a sum of Kenya Shillings Seven Million (Kshs 7,000,000/-) and then later on he paid them a sum of Kenya Shillings Eight Million (Kshs. 8,000,000/-) and completed the transfer to him. He was given the title deed. He had never received any warning to vacate the land.

B. Cross examination of DW - 1 by Mr. Wambua Advocate.

26. DW - 1 told the court that he bought the land from Arvic Tours & Travels Limited. He conducted an official search for purposes of establishing the ownership of the land. He conducted the search to establish that Arvic Tours were incorporated as a company but did not have the certificate of incorporation. He wrote a letter to his advocate on 21st May, 2020 asking for a report for the identification which was produced as 1st Defendant exhibit.
27. DW - 1 further stated that he saw the report by the surveyor he did not know whether the parcel L.R. 11073 and 11074 were together and hence they were consolidated. He did not have knowledge of the same. He knew it was 5 acres; he bought 2.5 acres from Arvic Tours & Travels. With reference to the 1st Defendant Ex 7 which was a letter dated 21st May, 2021; he told the court that he instructed his advocate in the year 2017 to conduct investigations. He was not aware that he ought to have conducted investigations in the year 2016. He was the one who brought Arvic Tours Limited. He did know about Kilifi Hotels Limited and that they were still the owners of the land.
28. DW - 1 argued that he did not know that the Government of Kenya had claimed the land. He did not know that he could only sell what he owned. He did not know Kilifi Hotels Ltd claimed to have sub – divided or sold the land to anyone including Arvic Tours and Travels who were located both in Mombasa and Nairobi and hence would have been able to be joined in the suit.

C. Cross - examination of DW - 1 by Mr. Makuto Advocate.

29. DW - 1 confirmed that he was a business man. He was aware that all registration of companies were done at the Bureau and one got the information which could be checked from e- Citizen including the status of the company. He did that to find that Arvic Tours and Travel Ltd was registered. He did not produce the document. From the sale agreement there was no number of Arvic Tours and Travel Ltd. He had not produced the CR – 12 to establish the Directors of Arvic Tours and Travel Ltd. From the sale agreements there were no names of the directors.
30. In the agreement the land being sold was L.R. no. 28432/2. He had not produced a copy of the Certificate of incorporation in the name of Arvic Tours and Travels from papers/ documents he had produced. With reference to paragraph 4 of the 1st Defendant’s defence he stated that he was not aware of Plots No. 10173 and 10174 by Kilifi Hotel Limited. He bought plot number 28432/2 (CR No.



64391 – for Arvic Tours and Travel); he had brought the official search to show how Arvic Tours & Travels were the owners of the land but the same did not show how they acquired it before they sold it to him.

31. With reference to the land surveyors report. He had not brought any proof to show the consolidation of the two plots number 10173 and 10174 to 28432. Upon buying land one required a consent; from either NLC or land officer; he never got such a consent. With reference to the certificate of title – 1st Defendant Exhibit No. 1 which was for 99 years. He was never given the actual lease from ministry of land; he did not know he needed the lease from Government.

D. Re - examination of DW - 1 by Mr. Lorot Advocate.

32. He was referred to the Certificate of the title deed – lease for LR. 28432/2 (CR. No. 64591/5) and the letter dated 21st May, 2021 the witness confirmed that it was because of the court case. He had never known about the two parcels no. 10173 and 10174. He came to know about it from the Court case/ proceedings.
33. The 1st Defendant case was called to a close on 17th September, 2024 as it was the last adjournment by the Court.

IV. The 2nd Defendant's case

34. As stated above, the 2nd Defendant filed their Statement of Defence dated 29th November, 2021. The the 2nd Defendant admitted the contents of paragraph 4 of the Plaintiff which averred that the Plaintiff was the registered owner of the suit parcels of land marked L.R.No.10173 Grant No. CR 19906 and L.R. No. 10174 Grant No. CR 19907. The 2nd Defendant denied the contents of Paragraphs 5, 6, 7 and 8 and 9 of the Plaintiff.
35. In specific response to paragraph 9 of the Plaintiff in which the Plaintiff outlined the alleged fraud and illegalities of the 1st and 2nd Defendants in engaging in dealings, transactions and entries that resulted in registering the suit parcels in the 1st defendant's name, the 2nd Defendant denied these allegations.
36. The 2nd Defendant averred that at all material times to this suit the registration process was conducted with due diligence and based on the properly executed documents presented and without the intention to defraud the plaintiff.
37. The 2nd Defendant relied on the following particulars of statutory duty of the 2nd Defendant with specific reference to this case:-
 - a. To facilitate law and order in all land survey and registration matters.
 - b. To register land in the manner and in accordance with documents lodged at the registry and the law.
 - c. To ensure that all land allocation and registration is conducted properly and the relevant documents and law followed.
38. The 2nd Defendant averred that currently, the registered owner of the suit parcel was the Plaintiff and the records at the Lands Office did not recognize the 1st Defendant's interest in the suit property. The 2nd Defendant denied the contents of Paragraphs 13, 14 and 15 of the Plaintiff. The 2nd Defendant admitted the contents of Paragraph 16 of the Plaintiff stating that there had been no previous proceedings nor was there any suit pending over this subject matter and that the Plaintiff being the lawful registered owner



of the suit parcel may be entitled to the orders sought as against the 1st Defendant but not against the 2nd Defendant.

39. The 2nd Defendant averred that they had fully ascribed to be in support of the Plaintiff's case.
40. The 2nd Defendant did not call any witness to tender their evidence in Court. The 2nd Defendant case was called to a close on 17th September, 2024 as it was the last adjournment by the Court.

V. Submissions

41. On 17th September, 2024 the Honourable Court in the presence of all the parties gave directions on the disposition plaint dated 15th September, 2020 by way of written submission. Pursuant to that on 22nd October, 2024 after the Honourable Court confirming compliance set the Judgment date on 16th November, 2024. Eventually, it was delivered on 17th December, 2024 accordingly.

A. The Written Submissions by the Plaintiff

42. On 28th October, 2022, the Plaintiff through the Law firm of Messrs. H. Kago & Company Advocates, filed their written submissions dated 28th October, 2022. Mr. Wambua Advocate submitted that the submissions are tendered on behalf of the Plaintiff herein for the suit filed vide a Plaint dated 15th September 2020 and the same having being filed in this Honourable court.
43. On the brief facts, the Learned Counsel submitted that the Plaintiff filed a suit on 15th September 2020 with regards to a parcel of land legally owned by him known as L.R No. 10173 Grant No. CR 19906 and L.R 10174, Grant No. CR 19907 (suit properties) located in Kilifi County. On 4th September, 2020 the Plaintiff's advocates on record, under the instructions of the Plaintiff, visited the said properties and were dumbfounded to find persons clearing the premises and demolishing the perimeter wall it had constructed.
44. The Learned Counsel averred that upon interrogation, the said persons informed the Plaintiff's advocates that the 1st Defendant was the current owner of the properties and he intends to sub-divide the said parcels of land. The Plaintiff's advocates on record proceeded to make enquiries at the Kilifi and Mombasa Land's Registry and found that there had been fraudulent and illegal transactions undertaken over the said parcels of land known as L.R No. 10173 -Grant No. CR 19906 and L.R No. 10174 -Grant No. CR 19907. Pursuant to such revelations, the plaintiff instructed its Advocate on record to institute a suit in order to recover its land that as at the moment the subject of illegal transfers. The Plaintiff sought for Judgement against the Defendants as stated herein above.
45. The 1st and 2nd Defendant entered appearance on the matter with the and filed a defence on the same. The court directed that the matter proceed to full trial after which the Plaintiffs case was done and the court gave a date for the defence case. The 1st Defendant thereafter, through his advocate sought several adjournments and the same was granted by court in the interests of justice and to allow him appear in court. Nevertheless and on several occasions, the 1st Defendant failed to appear and give any reason for such actions and the same was noted by the Honourable court which in turn dismissed the 1st Defendants case and directed that the plaintiff and the 2nd Defendant do file their submissions to the case.
46. On the issues for determination, the Learned Counsel relied on the following issues:-
 - i. Whether the Honourable court should enter the Judgement sought in the Plaint dated 15th September 2020 as prayed that;
 - a. The Plaintiff is the legal owner of the suit properties



- b. A permanent injunction to be issued restraining the defendants and their agents from any activity on the suit properties.
- c. That the court do cancel all illegal titles to the properties.
- d. The Honourable court do award damages to the Plaintiff herein for the damages occasioned by the defendant on the suit properties.

47. On whether the Plaintiff is the legal owner of the suit properties. The Learned Counsel asserted that the Plaintiff had throughout in this case proved that it is the legal and rightful owner of the suit properties L.R No. 10173 -Grant No. CR 19906 and L.R No.10174 - Grant No. CR 19907. The Plaintiff had without a doubt since the illegalities of the Defendants and inception of this suit been deprived of the peaceful enjoyment of his property. This had to say the least infringed on his rights as a property owner as per the provision of Article 40 of *the Constitution* of Kenya, 2010. It protects property owners from expropriation as it states:-

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property
 - a. of any description; and
 - b. in any part of Kenya.
2. Parliament shall not enact a law that permits the State or any person
 - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).’

48. To support his case, he cited the case of: “Kenya Industrial Estates – Versus - Jamonya Investments & 3 others [2021] eKLR ELC case No. 144 of 2017”, the Honourable court in declaring the rightful ownership of the Plaintiff in the matter, quoted Article 40 of the 2010 constitution and further stated that;

“Since the Plaintiff’s evidence was not challenged at the hearing, it is my finding the Plaintiff is the absolute proprietor of the suit property. She is therefore entitled to protection of the said title as provided for under the *Land Registration Act* No. 3 of 2012.”

49. The Learned Counsel further submitted that the Plaintiff’s evidence had not been challenged in whatever manner including and not limited to the use of documents. With leave of the Honourable Court, the Plaintiff did issue a notice to produce pursuant to the provision of Section 69 of the *Evidence Act*, Cap. 80. The same was dated 19th October 2021 and was issued to compel the 1st Defendant to produce the documents he had alleged to have as proof of ownership of the suit property. The 1st Defendant failed to prove how he acquired the properties by failure to produce the documents requested.



50. On this point, the Learned Counsel referred Court to the case of “Rajendra Sanghani & another (Both Suing in their Capacities as Administrators of the Estate of Ratilal Gordhandas Sanghani) – Versus - Fairmile Investments Limited & another [2021] eKLR ELC case 35 of 2009” the Court held:-

“The process of acquiring a title is as important as the title itself. A title acquired through an irregular and fraudulent process is not a valid title in law. In Munyu Maina – Versus - Hiram Gathiha Maina [2013] eKLR, the Court of Appeal stated 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.... 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....”

The same reasoning was adopted in the case of Daudi Kiptugen – Versus - Commissioner of Lands & 4 Others [2015] eKLR where the court stated that:

“.....the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

It has been demonstrated by the Plaintiffs that the acquisition of title for the suit property by the 2nd Defendant was marred with irregularities and fraud”.

51. The Learned Counsel submitted that the Plaintiff however, pursuant to direction from the Honourable court proceeded to produce evidence by way of viva voce as well as through presentation of a certificate of title, sale of shares agreement and any other documents as and when required to prove ownership. The same being part and parcel of the Plaintiffs bundle of documents as well as this Honourable courts records.
52. Additionally, the Counsel cited the case of:- “Abdullahi Sheikh Ahmed – Versus - Mandera County Government [2020] eKLR ELC No.27 of 2018”, the Plaintiff sought orders that he was the legal and rightful owner of the suit property. In granting the said order, the court quoted the law and stated the following;

“The title deed in respect of the suit land was issued under the Registration of Titles Act Cap. 281 Laws of Kenya (now repealed). Section 23(1) of the said Act which is now repealed is similar with Section 26 (1) of the Land Registration Act No. 3 of 2012 which provides as follows:-

“23

- (1) The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not



be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

In the case of Propwa Company Limited – Versus - Justus Nyamo Gatondo & another [2020] eKLR ELC No.649 of 2017, the Plaintiff sought orders that it was the legal proprietor of the suit property, the court was seen to draw its determination by quoting a section of the registration land act as below:

‘the Registered Land Act, Cap 300 (now repealed) which states:-

“The rights of a proprietor, whether acquired on first registration or whether acquired 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.....”

B. The Written Submissions by 1st DIVISION - st} DIVISION - Defendant

53. The 1st Defendant through the Law firm of Messrs. H & K Law Advocates filed his written submissions dated 6th December, 2024. Mr, Lorot Advocate commenced his submissions by stating that the 1st Defendant’s claim was that he was the registered owner of Land Reference Number 28432/2Kilifi (Land Title Number CR. 70282), referred to as “the Suit Property” which they acquired in year 2016 from Arvic Tours and Travelers Limited for a purchase price of a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-) and which he paid in two instalments. They referred to pages 8-10 of the List and Bundle of Documents, which included the Certificate of Title and Certificates of Postal Search dated 11th August 2020 and 26th April 2021.
54. The Learned Counsel submitted that the 1st Defendant stated that after paying the purchase price, Arvic Tours and Travels Limited, the then registered owner of the Suit Property, transferred the title to their name on 19th July 2017.(Refer to pages 11-13 of the Plaintiff’s Bundle of Documents for a copy of the registered Transfer.). It was stated that when the Suit Property was sold to the 1st Defendant, it was free from all encumbrances and vacant. As a result, he immediately took possession and occupation of the property. The 1st Defendant explained that since acquiring the Suit Property, he had consistently paid all land rates, land rent, and other associated charges. He referred to pages 14 - 23 of the Defendant’s Bundle of Documents, which included copies of land rates receipts and clearance certificates.(see 1st Defendants Exhibit 5 and Exhibit 6).
55. The 1st Defendant also noted that he had enjoyed uninterrupted and peaceful possession of the Suit Property from the year 2016 until November 2020, when the Plaintiff deployed private security officers to guard the property and prevent his entry. The Plaintiff only gained occupation and possession of the Suit Property following ex parte orders issued by the Court on 23rd November 2020, which restrained them from entering the property pending the hearing and determination of the suit.
56. Upon reviewing the court documents, the 1st Defendant learned that the Plaintiff’s claim was related to two parcels of land, namely Land Reference Numbers 10173 and 10174, and not the Suit Property, Land Reference Number 28432/2, for which he held the title. On 21st May, 2021, the 1st Defendant, through his Advocates on record, instructed Messrs. Edward Kirugu, a professional Licensed Land Surveyor based in Mombasa, to conduct a ground identification survey of L.R. No. 28432/2 and the Plaintiff’s L.R. Nos. 10173 and 10174. They referred to page 27 of the 1st Defendant’s Bundle of Documents for a copy of the instruction letter dated 21st May 2021. (see 1st Defendants Exhibit 7 and Exhibit 10).



57. According to the Topo Cadastral Survey and Report dated 27th May 2021, the 1st Defendant reported that the Suit Property was confirmed to be the same parcel of land that the Plaintiff had claimed. The survey further revealed that the Plaintiff's Certificates of title had been extinguished following the consolidation of parcels in the year 2010, which resulted in the creation of L.R. No.28432. The report indicated that L.R. No. 28432 was sub - divided in the year 2017 into L.R. Nos.28432/1 and 28432/2, with the latter being transferred to the 1st Defendant. They referred to pages 27 - 34 of the 1st Defendant's Bundle of Documents for a copy of the Topo Cadastral Survey and Report by Messrs. Edward Kirugu Land Surveyors.
58. The Learned Counsel submitted that the 1st Defendant concluded by stating that he purchased the Suit Property from Arvic Tours and Travels Limited for valuable consideration, and at the time of the purchase, the property had a valid certificate of title. He emphasized that they had no knowledge of any defects or disputes regarding the title.
59. On whether there was fraud in the acquisition of land Parcel LR No.10173 Grant CR. 19906and L.R 10174 Grant No.19907 and whether the Plaintiff was a party to the fraud. The Learned Counsel submitted that the Plaintiff had pleaded fraud vide the Plaint dated 15th September 2020. The plaintiff listed the following particulars of fraud on the part of the 1st Defendant, Omar Guma Ibrahim and the Chief Land Registrar.
- i. illegal wanton and unprocedural dealings, transactions and/or entries in respect of the Plaintiff's titles to the parcels of land known land Parcel LR No.10173 Grant Cr.19906 and L.R 10174 Grant No. 19907.
 - ii. Arbitrary unlawful and violent encroachment and trespass of the suit properties.
 - iii. Demolition of the perimeter wall on the Plaintiff's parcels of land.
 - iv. Denial of the Plaintiff's quiet occupation use and enjoyment of the suit property and sanctity of the title as enshrined in *the Constitution* of Kenya 2010.
60. The Learned Counsel humbly submitted that it was trite law that whoever alleges fraud must specifically prove it. In the instant case, the Plaintiff had not offered any evidence in support of the allegations of fraud particularized in the Plaint to show that the 1st Defendant took part in any fraudulent activity in acquiring title to the suit land herein. To buttress on this point, the Counsel relied on the case of:- "Eunice Grace Njambi Kamau and another – Versus - The Hon. Attorney General and 5 others ELC Civil Suit No. 976 of 2012" where the court cited the decision of Tunoi JA (he then was) In "Vijav Morjaria – Versus - Nansingh Madhusingh Darbar & another [2000] eKLR", thus:-
- "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."
61. According to the Learned Counsel, fraud was a serious allegation; the onus was on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by this Court in the case of:- "Central Bank of Kenya Limited – Versus - Trust Bank Limited & 4 Others



[1996] eKLR” as being beyond that of a balance of probabilities. In that Appeal, the court rendered itself as follows:-

“ The Appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

62. Therefore, the Learned Counsel submitted that in the present suit, no evidence of or any misrepresentation has been tendered to link the 1st Defendant herein with any fraud or misrepresentation in regard to the acquisition of the subject title. In addition, no evidence had been put forward to suggest that acquisition of the title was illegally procured. As of the date of purchase of Land Reference Number 28432/2, on 18th July 2017, by the 1st Defendant, the sub - division of the parent parcels of land had already been undertaken and finalized. Consequently, it was wholly untenable to assert that the 1st Defendant participated in or was party to any fraudulent activities concerning the sub - division of the said parcels of land.
63. Furthermore, while the Plaintiff averred that a complaint was lodged with the Directorate of Criminal Investigations (DCIO) in relation to the alleged fraud. It was noteworthy that no criminal charges or indictments for fraud had ever been preferred against the 1st Defendant. This fact was a compelling indicator that no credible evidence had been adduced to implicate the 1st Defendant in any fraudulent dealings.
64. With respect to the Plaintiff's contention regarding the existence of Arvic Tours and Travel Limited, particularly the alleged absence of proof through a CR – 12 Form, the same assertion was equally devoid of merit. The Plaintiff's failure to enjoin Arvic Tours and Travel Limited as a third party to these proceedings could not, in any manner, be attributed to the 1st Defendant. This omission was particularly relevant given the orders issued on 5th December 2023, which, following the 1st Defendant's application dated 1st December 2022, permitted the Defendant only to proceed with the presentation of their case during the Defence hearing scheduled for 4th June 2024. No leave was granted for the filing of any additional documents or applications beyond the scope of the orders.
65. The Learned Counsel submitted that the 1st Defendant, in good faith and compliance with procedural requirements, issued witness summons to Arvic Tours and Travel Limited at their last known address, P.O. Box 45390-80100, Mombasa. The summons, accompanied by the court order issued on 26th August 2024, was served via EMS Courier Services, as evidenced by the Affidavit of Service dated 16th September 2024. The failure of Arvic Tours and Travel Limited to appear in court pursuant to the summons could not, under any circumstances, be construed as indicative of fraud or collusion on the part of the 1st Defendant.
66. According to the Learned Counsel, it was a well – established principle of law that fraud must be distinctly pleaded and strictly proven. Fraud cannot be inferred from unrelated facts, mere conjecture, or circumstances lacking direct evidentiary support. The allegations levelled against the 1st Defendant remain unsubstantiated, and it is respectfully submitted that the Plaintiff had failed to discharge the burden of proof required to establish fraud in the present matter.
67. On whether the 1st Defendant qualifies as a bona fide purchaser for value without notice. The Learned Counsel referred to the Black's law Dictionary (10th Edition) which defines a ‘bona fide purchaser’.
68. In the case of “Dina Management Limited – Versus - County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)”, the Supreme Court stated that, for a court to establish whether a party was a bona fide purchaser for value, the court must first establish the root



of the title right from the first allotment. The Court upheld the dicta in “Samuel Kamere – Versus - Lands Registrar, Kajiado, (supra)” and stated that:

“...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....”

69. This position has recently been reaffirmed by the Supreme Court of Uganda in “Lwanga – Versus - Mubiru and Others (Civil Appeal 18 of 2022) [2024] UGSC 7”, where the court held:-

“The principle of bona fide purchaser for value without notice is a general defence in any transaction of sale or purchase of any property particularly land.”

70. According to the Learned Counsel, it was trite law that a person who relied on the defence of bona fide purchaser for value without notice had the burden to prove that he or she acted in good faith. The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice cover both actual and constructive notice of fraud. In the case of “Jones – Versus - Smith [1841] I Hare 43”, the Chancery Court held:

“a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...then the defence cannot be available to him or her.” (See “Yakobo M. N Senkungu & Others – Versus - Cresencio Mukasa Civil Appeal No 17 of 2014”).

71. The court reaffirmed the law regarding the importance of due diligence in land transactions holding that:-

“...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase.”

72. And as in the Supreme Court decision in “Dina Management Limited – Versus - County Government of Mombasa (supra)”, the Court went on to hold that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of bona fide purchaser. In this connection, one should also carefully bear in mind the provisions of Section 28 of the Registered Land Act, which reads as follows:

“Section 28...The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall be rights not 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 interests and claims whatsoever, but subject... provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

73. The Learned Counsel submitted that the 1st Defendant’s evidence was that at no time had he authorized or consented to the subdivision of his land, and neither had he transferred any portion to the 2nd Defendant. For his part, the 2nd Defendant testified that the 1st Defendant had authorized the subdivision and signed mutation forms, and that a Government Surveyor had visited and surveyed the



- land so as to sub - divide the original parcel. However, on cross-examination, he admitted that he had not produced any survey or mutation form signed by the 1st Defendant and that, therefore, nothing showed that the sub - divided portion he held originally belonged to the 1st Defendant.
74. Furthermore, the 1st Defendant produced transfer document dated 18th July 2017 (marked as Exhibit 4 of the 1st Defendants Documents), evidencing from whom the sub - divided portion was transferred. Accordingly, it became evident how he came to be the title holder of the suit property. As to whether he was a bona fide purchaser for value without notice, they urged this Honourable Court to form the view that, had the 1st Defendant conducted sufficient enquiry into the title held by Arvic Tours and Travels Limited, as evident from the postal search dated 11th August 2020. (Exhibit 2 of the 1st Defendants bundle of documents).
75. The contention that the company; Arvic Tours & Travels Company Limited was non - existent was false and contrived for reasons that the company bears a Company KRA PIN of P0513258965 and a registration number of C.15797. This was evident in the KRA payment receipt of serial number 0929178. (Furthermore the 1st Defendant produced proof of payment of the land rents by Arvic Tours & Travel Limited see exhibit 5.)
76. The Learned Counsel submitted that Arvic Tours and Travels Limited was a legal entity, duly registered both under the companies Registry under the aforementioned name and number, and have a recognized as tax payer by the Kenya Revenue Authority under the Pin number P0513258965 is because a title to land is not contrived out of oblivion, and nor is it created from a vacuum. In Kenya, land was classified as either public land, community land or private land. Article 64 of *the Constitution* defines private land as any land that has been designated private by an Act of Parliament, as well as land that is registered and held by anyone under a freehold or leasehold tenure. A title to land denotes a registered ownership of land, and every title has a root in one or another of the classifications. A good root of title means that a title to land was traceable back to its origins.
77. The Learned Counsel relied on the case of “Kukan & another (Administrators of the Estate of the Late Jason Kukan Lila) – Versus - Kibutha (Civil Appeal 339 of 2018) [2023] KECA 742 (KLR)” this Court affirmed the standards of due diligence laid out by Mutungi, J in the case of “Esther Ndegi Njiru & Another – Versus - Leonard Gatei [2014] eKLR” where the Learned Judge held as follows:
- “The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of *the constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the title.”
78. In conclusion, the Learned Counsel asserted that in light of the foregoing submissions, it was evident that the Plaintiff had failed to discharge the burden of proof required to establish fraud on the part of the 1st Defendant in the acquisition of Land Reference Number 28432/2 (the Suit Property). Fraud, as a serious allegation, must be distinctly pleaded and strictly proven to a standard higher than the balance of probabilities. The Plaintiff had neither substantiated the allegations particularized in the Plaint nor demonstrated any nexus between the 1st Defendant and any fraudulent dealings regarding the acquisition or title of the Suit Property.



79. The evidence tendered by the 1st Defendant, including the Transfer dated 18th July 2017, the Certificate of Title, and supporting documentation of payments for land rates and rents, established that the 1st Defendant acquired the Suit Property lawfully, for valuable consideration, and without notice of any defect in title or adverse claims. The due diligence undertaken by the 1st Defendant was sufficient, and the root of the title traces back to legitimate origins, as confirmed by the Topo Cadastral Survey and Report.
80. The Learned Counsel submitted that furthermore, the claims regarding the alleged non-existence of Arvic Tours and Travel Limited were unfounded and unsupported by evidence. The records produced by the 1st Defendant, including tax and registration details, clearly establish the legal status of the entity and its role as the prior registered owner of the Suit Property. As to the Plaintiff's assertion of bona fide ownership of the Suit Property, the evidence, including the survey findings, unequivocally indicates that the Plaintiff's parcels of land, L.R. Nos. 10173 and 10174, were extinguished following the consolidation in 2010 and subsequent subdivision in 2017. The claim by the Plaintiff was therefore, without merit and could not defeat the 1st Defendant's lawful title to the Suit Property.
81. The Learned Counsel concluded by saying that the 1st Defendant had demonstrated that they were a bona fide purchaser for value without notice of any adverse claims. It was respectfully submitted that this Honorable Court should dismiss the Plaintiff's claims in their entirety, with costs awarded to the 1st Defendant.

VI. Analysis and Determination

82. I have carefully read and considered the pleadings herein by the Plaintiff, the 1st & 2nd Defendants herein, the written submissions, the myriad of cases cited herein by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
83. The suit has not been contested by the 2nd Defendant who has joined issued with the Plaintiff and therefore the Plaintiff's evidence remains uncontroverted and unchallenged when it comes to the defence of the 2nd Defendant. In "Linus Nganga Kiongo & 3 Others – Versus - Town Council of Kikuyu (2012) eKLR", Odunga, J (as he was then) held as follows on the consequences of failure by a party to call evidence: -

“What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002* Justice Lesiit, citing the case of *Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998* stated: -

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

84. Again in the case of "Trust Bank Limited – Versus - Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001" the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein



the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

85. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has framed five (5) salient issues for its determination. These are:-
- a. Whether the Plaintiff is the lawful owner of the parcels of land known as LR No. 10173 - Grant No. CR 19906 and L. R No. 10174 - Grant No. CR 19907?
 - b. Whether the Plaintiff should be granted an order of cancelling all entries and transactions made on the Titles L.R No. 10173- Grant No. CR 19906 and L.R No. 10174- Grant No. CR 19907 and any resultant titles therefrom if at all and the records held by the 2nd Defendant be rectified accordingly to reflect the Plaintiff as the lawful and registered owner of the parcels of land known as L.R No.10173-Grant No. CR 19906 and L.R No. 10174-Grant No. CR 19907?
 - c. Whether the 1st Defendant trespassed onto the suit properties without authority of the Plaintiff
 - d. Whether the Plaintiff is entitled to the prayers at the foot of the Plaint?
 - e. Who will bear the Costs of suit instituted on 15th September, 2020.

ISSUE No. a). Whether the Plaintiff is the lawful owner of the parcels of land known as LR No. 10173 - Grant No. CR 19906 and LR No. 10174 - Grant No. CR 19907

86. Before embarking on the analysis of this sub – title, it is imperative that the starting point be to undertake the background of the case at hand. The Plaintiff filed a suit on 15th September 2020 with regards to a parcel of land legally owned by him known as L.R No. 10173 Grant No. CR 19906 and L.R 10174, Grant No. CR 19907 (suit properties) located in Kilifi County. The Plaintiff through its witness and company secretary averred that the Plaintiff is the lawful owner of the parcels of land known as L.R No. 10173 Grant No. CR 19906 and L.R No.10174 Grant No. CR 19907 (the Suit Properties) in Kilifi County. On 4th September, 2020 the Plaintiff's advocates on record, under the instructions of the Plaintiff, visited the said properties and were dumbfounded to find persons clearing the premises and demolishing the perimeter wall it had constructed. The Plaintiff's advocates being clear that the Plaintiff had not instructed or requested any persons to undertake any such works on the Suit Properties decided to interrogate the individuals the Suit Properties. Upon interrogation, the said persons informed the Plaintiff's advocates that the 1st Defendant is the current owner of the properties and he intends to sub-divide the said parcels of land.
87. The Plaintiff's advocates on record proceeded to made enquiries at the Kilifi and Mombasa Land's Registry and according to them they found that there had been fraudulent and illegal transactions undertaken over the Suit Properties known as L.R No.10173-Grant No. CR 19906 and L.R No. 10174-Grant No. CR 19907. The Defendant had orchestrated a fraudulent and unlawful scheme to dispossess the Plaintiff of its lawfully acquired property.
88. The registration of person as a proprietor vests in them the absolute rights and privileges. However this registration is not absolute as a person must prove that the said registration was one that was in accordance with the law and the laid down procedures. Section 26(1) of the Land Registration Act, No. 3 of 2012 provides:-

“the Certificate of Title issued by the Registrar upon registration, 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 the 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.

89. In this case through, the 1st Defendant has contended that the Plaintiff's title had been extinguished through consolidation of the suit properties to the property that he held in his name. Surprisingly, this very significant legal aspect with very severe consequences to the Plaintiff's property was never addressed at all by the Plaintiff. As far as the Court is concerned, the Plaintiff has only proved that they owned L.R No.10173 Grant No. CR 19906 and L.R No. 10174 Grant No.CR 19907. Through any empirical oral or documentary evidence, the Plaintiff never demonstrated that they own Plot Number 28432/2 Kilifi (Land Title Number CR. 70282). As of the date of purchase of Land Reference Number 28432/2, on 18th July 2017, by the 1st Defendant, the sub - division of the parent parcels of land had already been undertaken and finalized.
90. Therefore, based on the above legal and factual inferences, I discern, and rightfully so, that the property known as L.R No. 10173- Grant No. CR 19906 and L.R No. 10174- Grant No.CR 19907 ceased to exist. In a nutshell, the rights of the Plaintiff stopped existing immediately after there was the consolidation of the two title deeds and which they failed, neglected and/or refused to challenge legally.

ISSUE No. b). Whether the Plaintiff should be granted an order of cancelling all entries and transactions made on the Titles LR No. 10173- Grant No. CR 19906 and LR No. 10174 - Grant No.CR 19907 and any resultant titles therefrom if at all and the records held by the 2nd Defendant be rectified accordingly to reflect the Plaintiff as the lawful and registered owner of the parcels of land known as L.R No.10173-Grant No. CR 19906 and L.R No. 10174- Grant No.CR 19907

91. Under this sub - title, the trite law – Article 40 (1) & (2) of *the Constitution* of Kenya, 2010, Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012 protects the sanctity of title to land. However, based on the relevant provision of the Law, there are two instances wherein such title can be challenged. The first is where the title is obtained by fraud or misrepresentation, to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The Court of Appeal in the case of “Munyu Maina – Versus - Hiram Gathiha Maina [2013] eKLR”, 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.”

92. It is well stabled law that fraud is a serious allegation that can lead to cancellation of a title. The provision of Section 26 (1) of the *Land Registration Act* states that a Certificate of Title, which is ‘prima facie’ conclusive evidence can be challenged on the ground of fraud or misrepresentation to which the person



is proved to be party to. The Court of Appeal of Uganda held in “Katende – Versus - Haridas and Company Limited (2008) EA 173” held that:-

“for a party to plead fraud in registration of land a party must first prove fraud was attributed to the transferee. It must attribute either directly or by necessary implications that is, the transferee must be guilty of some fraudulent act or must have known such act by someone else and taken advantage of such act. Fraud can be participatory that is, the party participates in the fraudulent dealings. Fraud can also be imputed on a person, that is, when he or she was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. All those people who actually participate in the fraudulent transactions and who had knowledge of it are privy and had notice of fraud.”

93. As already submitted so elaborately by the Learned Counsel for the 1st Defendant, “the burden of proof” dictates that the Plaintiffs must specifically plead fraud and prove it, since it’s a question of evidence as stated in the provision of Sections 107, 108 & 109 of the *Evidence Act*, Cap. 80. While on this point, I seek refuge from the case of:- “R. G Patel – Versus - Lalji Makanji (1957) EA 314” it was stated: -

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

94. In the instant case, the evidence placed before this Court is that on 4th September, 2020 the Plaintiff’s advocates on record, under the instructions of the Plaintiff, visited the said properties and were dumbfounded to find persons clearing the premises and demolishing the perimeter wall it had constructed. The Plaintiff’s advocates being clear that the Plaintiff had not instructed or requested any persons to undertake any such works on the Suit Properties decided to interrogate the individuals the Suit Properties. Upon interrogation, the said persons informed the Plaintiff’s advocates that the 1st Defendant is the current owner of the properties and he intends to sub-divide the said parcels of land.

95. In their statement of defence, the 1st Defendant averred that his registration as the proprietor of their respective parcels of land was done in strict adherence to the law.

96. Fraud has been defined in Black’s Law Dictionary 11th Edition as:-

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”

It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. Fraud was specifically pleaded in paragraph 8 of the Joint Statement of Claim and the particulars thereof itemised. The Court of Appeal in Vijay Morjaria – Versus - Nansingh, Madhusingh Darbar & another [2000]eKLR held that:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”



97. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In the case of “Koinange & 13 others – Versus - Charles Karuga Koinange 1986 KLR at page 23” the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

98. Also in the case of “Kinyanjui Kamau – Versus - George Kamau [2015] eKLR” the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo – Versus - Ndolo [2008] 1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...” In case where fraud is alleged it is not enough to simply infer fraud from the facts.

99. I reiterate the point that under the provisions of Sections 107 to 109 of the *evidence Act*, the burden of proof is on the Plaintiff to prove that the transactions were fraudulent. The Plaintiff has stated that the 1st Defendant fraudulently acquired titles to the suit properties and prayed to court to cancel the titles. To succeed in claiming fraud, the Plaintiff not only need to plead but also particularize it by laying out water tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the Court of Appeal in case of “Kuria Kiarie & 2 Others – Versus - Sammy Magera [2018] eKLR” where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

100. The Plaintiff never called the Land Adjudication and Settlement Officer (DLASO) to support its case and tender evidence on how the property was illegally consolidated to form the property held by the 1st Defendant. Further the Plaintiff has not disputed the survey that was done. According to the Topo Cadastral Survey and Report dated 27th May 2021, the 1st Defendant reported that the Suit Property was confirmed to be the same parcel of land that the Plaintiff had claimed. The survey further revealed that the Plaintiff's certificates of title had been extinguished following the consolidation of parcels in 2010, which resulted in the creation of L.R. No.28432. The report indicated that L.R. No. 28432 was



subdivided in 2017 into L.R. Nos.28432/1 and 28432/2, with the latter being transferred to the 1st Defendant.

101. Further the Plaintiff did not provide evidence to show that the signatures were forged. I believe it should have called a Document Examiner expert witness to shed light on whether the title produced by the 1st Defendant was illegal or not. This opportunity was squandered.
102. Land transactions especially where land is acquired through purchase involves two parties: the seller and the purchaser. The risk in the property as is the norm passes on to the buyer and in my view, the buyer ought to exercise due diligence and caution when buying land. In my humble opinion, the allegations of fraud must be proved through cogent evidence whose degree of proof must be higher than the ordinary proof of balance of probabilities. In this case, I find that the allegations of fraud alleged by the plaintiff had not been proved. Fraud being a serious allegation calls for investigation. In as much as the Plaintiff had alleged to have logged a report with the DCI and that there were investigations with regards to the land; there was no progress of the investigations reported by the Plaintiff.
103. In this case, I need not belabor the point that the Plaintiff has not tendered sufficient evidence that prove the particulars of fraud against the 1st Defendant to the satisfaction of the court. I find that on the prove of fraud, the Plaintiff did not prove its case and therefore on the aspect of fraud, the Plaintiff's claim fails.

ISSUE No. c). Whether the 1st Defendant is a bona fide purchaser for value without notice

104. Under this title the court shall examine whether the 1st Defendant is a bona fide purchaser for value and whether he acquired a good title. Black's law Dictionary (8th Edition) defines a "bona fide purchaser" as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

105. In the case of “Dina Management Limited – Versus - County Government of Mombasa & 5 others (Supra)”, the Supreme Court stated that, for a court to establish whether a party is a bona fide purchaser for value, the court must first establish the root of the title right from the first allotment. The Court upheld the dicta in the case of:- “Samuel Kamere – Versus - Lands Registrar, Kajiado, (supra)” and stated that:

“.....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”

106. This position has recently been reaffirmed by the Supreme Court of Uganda in “Lwanga – Versus - Mubiru and Others (Supra), where the court held:

“The principle of bona fide purchaser for value without notice is a general defence in any transaction of sale or purchase of any property particularly land.

The definition of bona fide purchaser for value without notice is “that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest”.



Bona fide is a Latin word meaning good faith, without fraud, sincere, genuine. See (Black's Law Dictionary 9th Edn Page 199)

A bona fide purchaser is a buyer who buys without constructive or actual notice of any defects or infirmities against the seller's title. See (page 1355 Black's Law Dictionary 9th Edn.

It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith.

The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice cover both actual and constructive notice of fraud.

In the case of Jones – Versus - Smith [1841] I Hare 43, the Chancery Court held: “a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...

then the defence cannot be available to him or her” See Yakobo M. N Senkungu & Others – Versus - Cresencio Mukasa Civil Appeal No 17 of 2014”.

107. The court reaffirmed the law regarding the importance of due diligence in land transactions holding that, “...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase.” And as in the Supreme Court decision in the “Dina Management Limited” (Supra), the Court went on to hold that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of bona fide purchaser.
108. So did the 1st Defendant acquire a valid and legal title of the suit property? The 1st Defendant's claim was that he was the registered owner of Land Reference Number 28432/2Kilifi (Land Title Number CR. 70282), referred to as “the Suit Property” which they acquired in 2016 from Arvic Tours and Travels Limited for a purchase price of a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/-). They referred to pages 8-10 of the List and Bundle of Documents, which included the Certificate of Title and Certificates of Postal Search dated 11th August 2020 and 26th April 2021.
109. The 1st Defendant stated that after paying the purchase price, Arvic Tours and Travelers Limited, the then registered owner of the Suit Property, transferred the title to their name on 19th July 2017. (Refer to pages 11-13 of the Plaintiff's Bundle of Documents for a copy of the registered Transfer.). It was stated that when the Suit Property was sold to the 1st Defendant, it was free from all encumbrances and vacant. As a result, he immediately took possession and occupation of the property. The 1st Defendant explained that since acquiring the Suit Property, he had consistently paid all land rates, land rent, and other associated charges. He referred to pages 14-23 of the Defendant's Bundle of Documents, which included copies of land rates receipts and clearance certificates.(see 1st Defendants Exhibit 5 and Exhibit 6).
110. The 1st Defendant also noted that he had enjoyed uninterrupted and peaceful possession of the Suit Property from year 2016 until November 2020, when the Plaintiff deployed private security officers to guard the property and prevent his entry. The Plaintiff only gained occupation and possession of the Suit Property following ex parte orders issued by the Court on 23rd November 2020, which restrained them from entering the property pending the hearing and determination of the suit. A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.



111. In the end, I strongly hold that the 1st Defendant a bona fide purchaser of value without notice and the registered and legal owners to the suit property with all the indefeasible title, rights and interest vested on them by law.

ISSUE No d). Whether the Plaintiff is entitled to the reliefs sought at the foot of the Plaint

112. Based on the findings and holdings in terms of issues number 1 to 3 herein above, it must become obvious that the transfer, registration and ultimate Issuance of the certificate of lease in favor of the 1st Defendant, over and in respect of the suit property was proved not to be riddled, with illegalities, un-procedurally and hence same remains valid.

113. In the premises, it is this Honourable’s Court position that the Plaintiff herein has not laid and/or established before the court a clear-cut case for the grant of the orders sought at the foot of the Plaint beforehand. Consequently, I will not answer the third issue in the affirmative.

114. On whether the Plaintiff is entitled to compensation, under the provision of Article 23 of *the Constitution* the Honourable Court may grant appropriate relief to indicate the rights of a litigant have been infringed. The issue of damages for trespass is now settled. Trespass is actionable per se, whether harm or damage is actually caused or not. Halsbury’s Laws of England 4th ed, Vol 45 at para 26, 1503, provides as follows on computation of damages in an action of trespass: -

- a. If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c. Where the Defendant has made use of the Plaintiff’s land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
- d. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

115. On the compensation of exemplary damages, the Honourable Court in the case of:- “Obonyo & Another – Versus - Municipal Council of Kisumu [1971] EA 91” Law, JA agreeing on the position of an award of exemplary damages in actions for tort stated that:-

“...exemplary damages are appropriate in two classes of case: oppressive, arbitrary and unconstitutional action by the servants of government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, and these classes should not be extended. This raises the question whether the expression „government? should be read as meaning the central government only, and whether it should be interpreted as including a local government ...”

116. As stated by this Court in the case of:- “Godfrey Julius Ndumba Mbogori & another – Versus - Nairobi City County [2018] eKLR”,

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish



and deter. We are guided by the case of *Rookes – Versus -Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the Defendants conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

117. I have already found and held in the preceding paragraphs that the 1st Defendant, his associates, agents and all those claiming in his name were not trespassers on the Plaintiff’s suit properties. In the circumstances based on the foregoing the Plaintiff is not entitled to the damages on trespass and those on exemplary damages.
118. In this instant case, my position is that the Plaintiff did not make a case against the 1st and 2nd Defendants herein.

ISSUE No. e). Who will bear the Costs of suit instituted on 15th September, 2020

119. The issue of costs is at the discretion of Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

120. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 holds that costs ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

121. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.
122. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.



123. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

124. In this case, as this Honourable Court has opined above, the Plaintiff has not proved its claim of fraud against the 1st Defendant and therefore the Plaintiff shall bear the costs of the suit. The 2nd Defendant shall bear its own costs.

VII. Conclusion and Disposition

125. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience, finds that the Plaintiff has not established his case against the 1st Defendant herein. Thus, for avoidance of doubt, the Court proceeds to make the following specific orders:-

- a. THAT Judgment be and is hereby entered dismissing the case instituted by the Plaintiff through the Plaint dated 15th September, 2020 against the 1st and the 2nd Defendants with costs.
- b. THAT the Plaintiff shall bear the costs of the suit filed under the Plaint dated 15th September, 2020 to be paid to the 1st Defendant. The 2nd Defendant shall bear its own costs.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS17THDAY OFDECEMBER.....2024.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Fridaus Mbula, the Court Assistant.
- b. Mr. Wambua Advocate for the Plaintiff.
- c. Mr. Lorot Advocate for the 1st Defendant.
- d. No appearance for the 2nd Defendant.

