



Jonathan Munyua Gichigi Obadiah W Kangethe Joseph Ruchuu Githobe (Suing as Officials of Karinga Udungu Self Help Group) & another v Kihoi & another (Environment & Land Case 1423 of 2016) [2025] KEELC 276 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELC 276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1423 OF 2016
OA ANGOTE, J
JANUARY 30, 2025**

BETWEEN

**JONATHAN MUNYUA GICHIGI OBADIAH W KANGETHE JOSEPH RUCHUU GITHOBE (SUING AS OFFICIALS OF KARINGA UDUNGU SELF HELP GROUP) 1ST PLAINTIFF
GEDION GACHOKI NJERU 2ND PLAINTIFF**

AND

**GEORGE WACHIRA KIHAI 1ST DEFENDANT
CITY CHICKEN & EGGS DEALERS CO-OPERATIVE SOCIETY LTD 2ND DEFENDANT**

JUDGMENT

Background

1. Vide a Complaint dated 16th November, 2016, the Plaintiffs seek as against the Defendants jointly and severally the following reliefs:
 - i. A declaration that the 1st Plaintiff is the lawful owner of Title No Nairobi/Block/ 122/237.
 - ii. The Chief Land Registrar be ordered to cancel the Title issued to the 1st Defendant and issue a title to the 1st Plaintiff.
 - iii. A permanent injunction be issued restraining the Defendants, their agents or servants from entering, interfering, constructing, transferring or charging or in any other way dealing with Title No Nairobi/Block 122/237.
 - iv. Costs of the suit.



2. It is the Plaintiffs' case that at all material times, the 1st Plaintiff was the lawful owner of L.R No Nairobi/Block 122/237(Original plot no 80)(hereinafter the suit property), a sub-plot from the sub-division of L.R Nairobi/Block 122; that sometime in 1994, they purchased the suit property from an original shareholder of the 2nd Defendant; that after the purchase, and payment of all sums thereunder, they were given possession of the suit property and a transfer effected in the 2nd Defendant's register and that being a welfare group, the 1st Plaintiff was not in a hurry to obtain title to the suit property.
3. According to the Plaintiffs, sometime in 2014, the 1st Plaintiff decided to sell the property to the 2nd Plaintiff; that the aforesaid necessitated a visit to the lands office by the 2nd Plaintiff to obtain the title to the suit property and thereafter transfer the same to himself and that upon visiting the lands office in May, 2016, the 2nd Plaintiff was shocked to learn that the title to the suit property had been issued to the 1st Defendant who was unknown to them.
4. The Plaintiffs maintained that the transfer and issuance of the property to the 1st Defendant was actuated by the Defendant's fraud, the particulars of which include the presentation of forged documents to the land's office, fraudulently obtaining clearance certificates, purporting to own the disputed plots, and obtaining a title thereto.
5. It is their contention that on 9th November, 2016, the 1st Defendant and/or his agents and servants illegally entered onto the suit property and started digging trenches with the intent to develop the property, which actions should be restrained, and that despite their demands, the Defendants have not ceased their illegal actions.
6. The 1st Defendant filed a statement of Defence and Counterclaim on 24th June, 2019. Vide the Defence, he denied the assertions as set out in the Plaint averring that he is the legitimate proprietor of the suit property having purchased the same from one Judy Muthoni Karanja, vide an agreement of sale dated 11th September, 2013 for the sum of Kshs 4,800,000.
7. The 1st Defendant stated that the vendor had purchased the property from the 2nd Defendant who issued her with a letter to present to the Commissioner of Lands confirming that the parcel of land belonged to her and she could transfer the same; that upon conducting a search, it was affirmed by the 2nd Defendant that the vendor was the owner of the suit property, and that he relied on the 2nd Defendant's secretary's confirmation that the property belonged to the vendor and the 2nd Defendant is bound by its secretary's actions.
8. The 2nd Defendant seeks vide the Counterclaim for:
 - i. A declaration that the 1st Defendant is the lawful owner of parcel title No Nairobi/Block 122/237, and the Plaintiff and the 2nd Defendant or their agents and or servants be permanently restrained from interfering with the 1st Defendants' quiet possession of the suit land.
 - ii. Costs of the counterclaim and the entire suit.
9. The 2nd Defendant filed a Defence on 14th September, 2021. It denied the assertions as set out in the Plaint save for paragraph 5 noting that while it affirms the 1st Plaintiff's proprietorship of the property, it is a stranger to the allegations of sale from the 1st to the 2nd Plaintiff.
10. It contends that as per its records, the suit property is registered in the name of the 1st Plaintiff and that it did not sanction the purported transfer of the suit property from the 1st Plaintiff to the 1st Defendant or to any other party.



Hearing and Evidence

11. The matter proceeded for hearing on the 29th October, 2024. PW1 was Jonathan Munyao Gichiga, a farmer and a former chair member of Karinga Udungu Self Help Group, the 1st Plaintiff. He adopted his witness statement dated 16th November, 2016 as his evidence in chief and produced the documents of an even date as PEXHB1.
12. It was his oral testimony that after they sold the property to the 2nd Plaintiff, they went to the Ministry of Lands to acquire a title deed upon which they discovered that the land had been grabbed by the 1st Defendant, a person unknown to them. According to PW1, the land was sold to them by Joseph who had purchased the same from the 2nd Defendant, and that after they purchased it, they went to the 2nd Defendant who changed the register and indicated the 1st Plaintiff as the property's owner.
13. During cross-examination, he stated that he does not have the sale agreement between themselves and Joseph who has since deceased; that he does not have the transfer documents or any of the other documents given to them by Joseph in respect of the suit property; that while a criminal charge was instituted against the 2nd Defendant's secretary, no charges were filed against the 1st Defendant, and that apart from its fraudulent secretary, the 2nd Defendant is not to blame for the fraudulent transfer of their property.
14. It was his evidence on re-examination that he has adduced the documents given to them by the 2nd Defendant; that they did not in any way transact with the 1st Defendant and that the 2nd Defendant has never denounced their proprietorship.
15. The 1st Defendant, George Wachira Kihoi, testified as DW1. He adopted his witness statement dated 24th June, 2019 as his evidence in chief and produced the documents of an even date as DEXHB1.
16. He testified that he purchased the property from one Judy Muthoni who was introduced to him by brokers; that they went to the 2nd Defendant and conducted a search through its books which confirmed Ms Judy's proprietorship; that they dealt with the 2nd Defendant's officers, specifically one Ibrahim, who gave them all the documents which he took to the lands office and that he only signed the agreement and went to pick the title documents, and that his purchase of the property was procedural.
17. It was his evidence on cross-examination that it is Judy and not the 2nd Defendant who sold the property to him; that Judy purchased the property from the 1st Plaintiff; that he learned that the 1st Plaintiff denied ever selling the land to Judy; that after the transfer at the 2nd Defendant's office, he was given a transfer receipt which he did not adduce in court, and that his name is not on the 2nd Defendants' plot ownership list.
18. He conceded on cross-examination that he is aware that Hussein was charged in court with fraud in respect of the suit property noting that he did not follow up to know how the matter concluded; that by the time orders were issued, he had already constructed a wall; that he has not called Judy to testify as he has no claim against her; that he is a Plaintiff in another case and that ELC 1534 of 2013 is on appeal
19. DW2 was Duncan Kioni, the 2nd Defendant's secretary. He adopted his statement dated the 16th September, 2019 as his evidence in chief and adopted the documents of an even date as DEXHB2. It was his evidence that the 2nd Defendant conducts its business through resolutions passed and adopted by its management committee and all communications from it have to be signed by the chairman/vice chairman, treasurer, secretary and chief executive officer.



20. According to him, sometime in 2013, they discovered that their secretary, Mr Ibrahim Hussein Maingi was involved in fraudulent activities in respect to block 122 and that he had among others, written to the Assistant Commissioner arrogating himself the responsibility of signing documents in respect of block 122 and written to the Commissioner advising that the suit property initially belonged to Kamau Nge'the who had purportedly transferred it to Judy Muthoni Karanja who subsequently transferred it to the 1st Defendant.
21. He stated that Mr. Maingi further wrote to the Commissioner advising that the property originally belonged to the 1st Plaintiff who transferred it to the 1st Defendant. He stated that upon this realization, they wrote to the Commissioner denouncing Mr. Maingi's' letters and requesting a stop to all transactions with respect to the parcel of land.
22. Further, DW1 stated, they summoned Mr. Maingi before the management committee, reported the matter to the police and placed a caveat notice in the newspaper informing the public of the fraudulent transactions initiated by Mr. Maingi.
23. He stated that in May 2016, the 1st Plaintiff visited the society complaining that its title had been issued in favour of the 1st Defendant; that its executive committee sat and affirmed through its records that the suit property belongs to the 1st Plaintiff, and did a letter in this respect to the Commissioner of Lands; that the society did not sanction, neither was it privy to the fraudulent transfer of the suit property; that the DCI undertook investigations and that after its completion, Mr. Maingi was charged with conspiracy to defraud and convicted of the offence.
24. According to him, sometime in December 2013, the 1st Defendant instituted a suit being ELC 1354 of 2013 claiming block 122/31; that the society filed a Defence denying the allegations and that vide a judgment on the 23rd January, 2018, the aforesaid suit was dismissed.

Submissions

25. The Plaintiffs filed submissions on the 27th June, 2024. Counsel submitted that Section 26 of the [Land Registration Act](#) provides that whereas a certificate of title is prima facie evidence of proprietorship, the same can be impugned on the grounds of fraud or misrepresentation to which the person is proved to be a party or where a certificate has been acquired illegally, procedurally or through a corrupt scheme.
26. According to Counsel, as affirmed by the court in *Munyu Maina vs Hiram Gathitha Maina*, [2013]eKLR, where a registered proprietor's title is under challenge, he must go further than merely dangling the same by showing the root of his acquisition and that in the circumstances, the 1st Plaintiff having denied selling the suit property to the vendor who thereafter sold it to the 1st Defendant, her acquisition was fraudulent and she had no property to pass. Reliance in this respect was also placed on the case of *Elijah Matheri Nyangwera vs Stephen Mungai Njuguna & Another* [2013]eKLR.
27. It was submitted that the 1st Defendant cannot similarly rely on the plea of bonafide purchaser and that the Plaintiffs have proved their case on a balance of probabilities and are entitled to the orders sought.
28. The 1st Defendant filed submissions on 20th September, 2024. Counsel submitted that the 1st Defendant is the legitimate owner of parcel no Nairobi/Block 122/237 having lawfully purchased the same from one Judy Muthoni, which sale was overseen by the 2nd Defendants' secretary, and that the allegations of fraud against the 1st Defendant have not been demonstrated.
29. Counsel submitted that the 1st Defendant's title to the suit property should not be cancelled as he was not a party to the alleged fraud and that section 143 of the Registered [Land Act](#), reproduced in the [Land Registration Act](#) only allows cancellation of a title where the registered owner is a party to the fraud.



30. Reliance in this respect was placed on the cases of Job Muriithi Waweru vs Patrick Mbatia [2008] eKLR and EMFIL Limited vs Registrar of Titles Mombasa & 2 Others [2014] eKLR. It was submitted that ultimately, the 1st Defendant has established its case and is entitled to the orders sought in the Counterclaim.
31. The 2nd Defendant filed submissions on the 20th September, 2024. Counsel associated himself with the submissions by the Plaintiffs, further stating that Section 26(1) stipulates that a certificate of title issued by the Registrar is indefeasible unless there is proof that the same was acquired illegally, un-procedurally or through a corrupt scheme.
32. It was submitted that it has been proven that the 2nd Defendant's former secretary was charged and convicted with the offense of conspiracy to defraud in CMCC 804 of 2017 and that in the circumstances, it has been demonstrated that the 1st Defendant's title is defeasible and the Plaintiffs are entitled to the orders sought.

Analysis and Determination

33. Vide the present suit, the Plaintiffs seek inter-alia a declaration that the 1st Plaintiff is the lawful proprietor of the suit property and asks that the Chief Land Registrar be directed to cancel the title deed issued in favour of the 1st Defendant and issue a title in the 1st Plaintiff's name. They also seek permanent injunctive orders restraining the Defendants' interference with the suit property.
34. It is the 1st Plaintiff's case that it purchased the suit property from the 2nd Defendant sometime in 1994; that in the process of selling the property to the 2nd Plaintiff, it visited the lands office to obtain its title and thereafter effect a transfer and that it learnt that a title had been issued in the name of the 1st Defendant. It contends that the said title is fraudulent and liable to be impeached.
35. The Plaintiffs adduced into evidence the 1st Plaintiff's certificate of registration dated the 12th January, 2015; receipts for payments in respect of the suit property; 2nd Defendant's list of plot owners dated the 29th May, 2001; minutes of the 1st Plaintiff's special general meeting held on the 12th December, 2014; sale agreement between the Plaintiffs dated 29th December, 2014; rates clearance certificate; complaint letter and response dated 10th and 11th May, 2016; photos of the suit property and judgment in CMCC 804 of 2017-R vs Ibrahim Hussein Maingi.
36. The 1st Defendant on its part asserts that it is the legitimate proprietor of the suit property having purchased the same from one Judy Muthoni who purchased it from the 2nd Defendant; that he duly conducted a search at the 2nd Defendant's offices and it was confirmed that Judy Muthoni was the proprietor of the suit property, and that he did not defraud any party and is in fact the victim being a bonafide purchaser for value.
37. He seeks by way of counterclaim to be declared the legitimate proprietor of the suit property as well as permanent injunctive orders restraining the Plaintiffs from interfering with his ownership and possession of the suit property.
38. He adduced into evidence the sale agreement between himself and Judy Muthoni dated 11th September, 2013; RTGS dated 12th September, 2013; certificate of lease in his names, lease dated the 24th July, 2015; letter of sub-division scheme approval from NLC dated the 10th October, 2013; letter from Chief Land Registrar; land rent payment request; receipt no 3369469 for Kshs 4,215 and sale agreement dated 20th May, 2009 between the 1st Plaintiff and Judy Muthoni.



39. The 2nd Defendant supports the 1st Plaintiff's claim to the suit property. It maintains that the purported sale of the property to the 1st Defendant by one Judy Muthoni was a fraudulent scheme which was actuated by its former secretary, one Ibrahim Hussein Maingi. It claims that Mr. Maingi has been duly prosecuted for his role in the aforesaid fraud, and that by virtue of the fraud, the 1st Defendant did not acquire any title to the suit property.
40. The 2nd Defendant adduced into evidence its by-laws; minutes of 17th July, 2013 and 2nd November, 2013; correspondence by Mr. Maingi to the Commissioner of Lands dated 2nd September, 2013, 12th September, 2013 and 14th October, 2013 in respect of the suit property; correspondence from the 2nd Defendant to the commission dated the 2nd and 7th November, 2013, and summons and suspension letter to Mr. Maingi dated the 7th and 19th November, 2013 respectively.
41. The 2nd Defendant further adduced the caveat emptor notice in the star newspaper dated the 23rd December, 2013, pleadings and judgement in ELC 1534 of 2013; DCI letters dated the 12th November, 2016 and 15th April, 2020; charge sheet in criminal case 804 of 2017; 1st Plaintiff's complaint letter dated 10th May, 2016 and minutes of the executive committee meeting of the same date.
42. In view of the foregoing narration, and having considered the pleadings, testimonies and evidence, the issues that arise for determination are:
- i. Whether the 1st Defendants' title to L.R Block 122/237 was fraudulently acquired? And if not?
 - ii. Whether the 1st Defendant is a bonafide purchaser for value?
 - iii. What are the appropriate orders to issue?
43. The dispute herein centers on the legitimacy of the title registered in the name of the 1st Defendant and subsequently the ownership of the suit property. There are conflicting positions in this respect, and the parties are obligated to establish their respective claims. This finds roots in the cardinal evidentiary principle of law that he who alleges must prove.
44. This principle is succinctly captured in Sections 107, 109 and 112 of the [Evidence Act](#). Section 107 provides as follows:
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
45. And Sections 109 and 112 of the same Act states:
- "109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- "112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."



46. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR held:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

.....The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

47. The court will be so guided.

48. The evidence herein shows that the title to the suit property is in the name of the 1st Defendant having been registered on the 28th August, 2015. Subsequently, the law applicable to the title is the *Land Registration Act*, 2012. The provisions of Section 24(a) and 25(1) of the *Land Registration Act*, 2012 outlines the rights and interests of a registered proprietor as follows:

49. Section 24(a) provides:

“Subject to this Act—

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

50. Whereas Section 25 (1) states:

1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever....”

51. Section 26(1), while affirming the principles of indefeasibility of title, also sets out the circumstances under which a party’s title is amenable to challenge. The section states:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



52. It can be seen from the above provisions that whereas title is protected, the protection can be removed and title impeached, if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme. This was discussed by the court in *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR thus:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-

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

53. The Plaintiffs contend that the 1st Defendant’s title to the suit property was procured by fraud. The Black’s Law Dictionary defines fraud thus:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”

54. It is trite law that fraud must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in *Demutilla Nanyama Pururmu vs Salim Mohamed Salim* [2021] eKLR relying on an earlier exposition in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR where it posited:

“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.”

55. As regards the standard of proof, the Court of Appeal in *Demutila Nanyama Pururmu vs Salim Mohamed Salim* (supra) looked at its earlier decision in *Kinyanjui Kamau vs George Kamau* [2015] eKLR wherein it had held as follows:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (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 that 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 cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

56. The Plaintiffs asserts that the transfer of the suit property to the 1st Defendant was actuated by fraud at the instance of the Defendants. The particulars of this fraud have been pleaded and include, the 1st Defendant purporting to own the suit property knowing it was owned by the 1st Plaintiff, presenting forged documents to the land office, obtaining a clearance from the 2nd Defendant without the Plaintiffs’ knowledge and illegally obtaining a title.

57. This is disputed by the 1st Defendant who maintains that he legitimately purchased the suit property and contends that none of the allegations of fraud attributed to him have been proven. The 2nd Defendant admits to the allegations of fraud only that the same was committed by a former employee who has since been convicted.

58. The Court has keenly considered the evidence in this regard. The parties concede that the 2nd Defendant was the initial proprietor of the suit property. It is also conceded that the suit property was thereafter transferred to the 1st Plaintiff. It is the 1st Defendant’s case in this respect that he purchased the suit property from one Judy Muthoni and Judy Muthoni in turn had purchased it from the 1st Plaintiff.

59. The 1st Plaintiff has however denied ever transacting with Judy Muthoni and the 1st Defendant did not call Judy to rebut the 1st Plaintiff’s assertions in this regard. Further still, evidence from the 2nd Defendant shows that its former secretary, one Ibrahim Maingi was investigated, prosecuted and convicted of the crime of conspiracy to defraud the 1st Plaintiff of the suit property by causing it to be registered in the 1st Defendants’ name.

60. Critically, however, there has been no mention of, nor evidence that the 1st Defendant was a party to this illegal scheme. Ultimately, while the Court does not find evidence to implicate the 1st Defendant in any fraudulent scheme directly, it is evident that the title to the property was acquired illegally, un-procedurally, or through a corrupt scheme.

61. It is key to note however, that the import and tenor of the doctrine of bonafide purchaser for value and in particular the decision in *Katende vs Haridar & Company Ltd* (2008) 2 E.A 173, has since been reviewed as explained by the Court of Appeal in *Mwangi James Njehia vs Janet Wanjiku Mwangi & Another* [2021] eKLR, where the court stated:

“...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*.”

62. This received further support from the apex Court in *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) which pronounced itself as follows:

“110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to *Bawazir & Co. (1993) Ltd*, who in turn could pass to the appellant.

111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser...”



63. The new position as set out in *Mwangi James Njenga(supra)* and *Dina Management(supra)* is that before one can benefit from the doctrine for bona fide purchase for value, it must be established that the vendor had a valid title, as opposed to apparent valid title. In the circumstances, having established that Judy Muthoni did not have any title, this plea must fail.
64. The Plaintiffs seeks several reliefs including a declaration that the 1st Plaintiff is the legitimate owner of the suit property; an order directing the cancellation of the title to the property in the 1st Defendant's name and permanent injunctive orders restraining any interference with the suit property.
65. Having found that the 1st Defendant's title was irregularly acquired, it follows that the same ought to be cancelled as guided by Section 80 of the *Land Registration Act* which provides as follows:
1. Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 2. The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
66. This was also the holding by the Court of Appeal in *Wambui vs Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (Judgment) where the court stated as follows:
- “... no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme... section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme...”
67. As the established proprietor of the suit property, the 1st Plaintiff is entitled to all the rights appurtenant thereto which include the rights to quiet possession thereof. It follows therefore that the Plaintiffs have established a case for permanent injunctive orders.
68. In the end, the Court finds that the Plaintiffs have established their case on a balance of probabilities and proceeds to make the following final orders:
- i. The 1st Defendant's counterclaim be and is hereby dismissed.
 - ii. The 1st Plaintiff be and is hereby declared to be the lawful owner of Title No Nairobi/Block/122/237.
 - iii. An order does hereby issue directing the Chief Land Registrar to forthwith cancel the Title issued to the 1st Defendant and issue a title for parcel number Nairobi/Block/122/237 in the name of the 1st Plaintiff.
 - iv. A permanent injunction does hereby issue restraining the Defendants, their agents or servants from entering, interfering, constructing, transferring or charging or in any other way dealing with Title No Nairobi/Block 122/237.



v. The Defendants shall bear the costs of the suit jointly and severally.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF JANUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mrs Sharo Njoki for Mr. Gatumate for Plaintiff

Mr. Ireri for 1st Defendant

Mr. Kiprono for 2nd Defendant

Court Assistant: Tracy

