



Mohamed v Board of Management Pentrose Community School & another (Environment & Land Case 26 of 2019) [2023] KEELC 19133 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 26 OF 2019
NA MATHEKA, J
JULY 26, 2023**

BETWEEN

SAADA HAMID MOHAMED PLAINTIFF

AND

**THE BOARD OF MANAGEMENT PENTROSE COMMUNITY
SCHOOL 1ST DEFENDANT**

WAVECON ENTERPRISES LIMITED 2ND DEFENDANT

JUDGMENT

- At all material times to this suit the plaintiff was the registered owner of that property known as parcel No MN/1/11375 situated in Nyali measuring 0.054 ha or thereabouts. The plaintiff avers that she has physical possession of the property and has fenced it, the property is free from any third party claims, does not fall on public or private road and no third party lays claim to the title. The plaintiff avers that the 1st defendant is in the process of constructing classrooms and toilets within their plot which is behind the plaintiff's plot No MN/1/11375. The plaintiff avers that the construction works are being undertaken by the 2nd defendant. The plaintiff states that she was informed that part of her perimeter walled had been pulled down by the defendants to create a path which the 2nd defendant uses to convey construction materials to the 1st defendant's site. The plaintiff further states that the 2nd defendant's trucks now traverse her property on a daily basis while in the process of conveying building materials to the site and also while removing waste materials from the construction site. The plaintiff avers that the defendants' actions of pulling down the wall and creating a path on a private property amount to trespass and conversion. The actions are illegal. The plaintiff states that she has reported the matter to Nyali Police Station where she was issued with OB. No 77124101119. The plaintiff has further issued demands both oral and written to the defendants but their illegal activities have been continuing nonetheless. The plaintiff avers that the acts of the defendants' amount to trespass on private property



and constitute wanton breach of the rights of the plaintiff to property as guaranteed under Article 40 of the Constitution. The plaintiff prays for judgment against the defendants for;

1. A permanent injunction restraining the defendants by themselves their servants/agents from encroaching upon/trespassing onto/ passing through or occupying the suit property and/or in any other manner interfering with the indefeasible rights of ownership of the plaintiff over the suit property No MN/1/11375.
 2. An award of general damages for trespass and conversion of private property.
 3. An award of special damages in the ascertained value as per the valuation report dated 4th February 2019 for re-building of the perimeter wall.
 4. Costs of this suit.
2. DW1, the Chairman of the Board of Management of Pentrose Community School and incharge of the school resources testified that the school is located at a Shauri Yako which is public land. The same was registered in 2016 with over 1000 pupils and employees who are around 20 in number. The same was one of the non-formal schools under the Municipal Council of Mombasa but now is a public school and has been receiving government funding for some time now. That from the time the school was formed to date, the school has been using an access road linking it to the main road and allowing the pupils to attend school with ease. Around 2016 they were ambushed by an individual who started fencing the said access road, claiming that it was their Land Registration No 11375 and started fencing off the entrance to the school. That the action of the said person raised an uproar and the whole village demonstrated against the alleged owner who then stopped the development on the said parcel of land. The school wrote a letter to the Ministry of Land seeking for assistance from the lands office, however, the same was never responded to by the them. After a while the Plaintiff in the matter started coming to the said access road claiming that she had bought the said land from the previous owners. She quickly raised the wall blocking the access to the school. That the village was irate with the actions of the Plaintiff and they demonstrated on the parcel of land leading to the bringing down of the alleged wall. The Defendants have never in any way damaged any property belonging to the Plaintiff. That granting the Plaintiff the orders sought will lead to interfering with the rights of the pupils of access to free and fair education, which are rights guaranteed by the Constitution. That it is clear that the parcel of land in question is public land acting as an access road to Pentrose Community School, thus the court should protect public land and the right of pupils to a secured learning environment.
3. This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:
- “Subject to this Act, 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.”
3. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
4. This court in considering this matter referred to the case of Elijah Makeri Nyangw’ra v Stephen Mungai Njuguna & Another [2013] eKLR where the court held that the title in the hands of an



innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. 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 through a corrupt scheme.”

5. It is a finding of fact the plaintiff is the registered proprietor of Land Parcel No MN/1/11375. PW1, the plaintiff testified that she bought the plot in 2015 and has been in possession since then. In 2018 construction works being undertaken by the 2nd defendant started. The plaintiff states that she was informed that part of her perimeter walled had been pulled down by the defendants to create a path which the 2nd defendant uses to convey construction materials to the 1st defendant’s site. The plaintiff submitted that she was a bonafide purchaser for value and cannot be associated with any wrong doing if any. DW1 testified that the school was registered in 2016 with over 1000 pupils and employees who are around 20 in number. It started as a non-formal school under the Municipal Council of Mombasa but now is a public school and has been receiving government funding. That the school has been using an access road linking it to the main road and allowing the pupils to attend school.

6. In the case of Munyu Maina v Hiram Gathiba Maina, Civil Appeal No239 of 2009, the Appeal Court held that;

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

7. The Court of Appeal in Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR, in determining who a bona fide purchaser for value without notice is cited the case of Katende v Haridar & Company Limited [2008] 2 E.A 173 where the Court of Appeal held as follows;

7. For a purchaser to successfully rely on the bona fide doctrine, ... he must prove that:-

- a. he holds a Certificate of Title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the Vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.”



8. In the case of *Samuel Kamere v Lands Registrar*, Kajiado Civil Appeal Number 28 of 2005 the Court of Appeal held 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...”

9. I have perused the defendants’ further list of documents filed in court on the 18th May 2022 and the Surveyors Report states that the school structures were measured and plotted on the survey plan F/R 127/77 to indicate its physical position and entrance from the above data, F/R 127/77 a subdivision which was done and approved back in the year 1974, provided an official access to the Government Land where the school is built. That later in the year 1999 the access leading to the school was allocated as plot parcel No MN/1/11375 as per the survey plan No F/R No 370/32. This is clearly demonstrated by the maps filed in this case by the defendants. I find that the suit property is the original official access road to the Government Land from way back in 1974 and was not available for allocation. This is a school of over 1000 children and how are they to operate if they are land locked! It was only in 1996 when the plaintiff’s plot was created. The plaintiff’s deed plan which was produced as evidence is dated June 25, 2000. The first registration was on June 1, 1996 to Ali Mwatsahu, second was on September 23, 2002 to Ibrahim Hassan Abubakar and finally it was transferred to the plaintiff on the February 20, 2015. I think it is common sense that the school had to have an access road. Section 28 of the *Land Registration Act* No 3 of 2012 creates and categorizes the right of way as overriding interest. Similarly, Sections 28(c) and (h) of the same Act provides that;

“Unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act.
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (j) any other rights provided under any written law.”

10. I find that the suit parcel is an access road to the 1st defendant’s compound, the plaintiff clearly acquired it fraudulently and in an illegal manner. Be that as it may, and owing to the illegality and/or unprocedural, that informed the transaction in favor of plaintiff cannot therefore be clothed with indefeasibility, either in the manner pleaded by the plaintiff or at all. Section 26(1) of the *Land Registration Act, 2012*, provides that;

26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
11. Where the title in favor of the vendor is proven to have been obtained and/or acquired unprocedurally, illegally or by corrupt practice, the second and subsequent purchaser of the suit property do not acquire any valid title, irrespective of whether they knew of the illegality or otherwise.
12. The provisions of Section 26 1(b) of the *Land Registration Act*, 2012, does not require Plaintiffs to prove that the title holder was privy or party to the illegality, and/or corrupt practice. For clarity, all that the defendants must prove is that the process of the acquisition of the title was replete with impropriety, illegality or corrupt practice. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR, the court held that;
- “... 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.
13. 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.
14. 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
15. The assertion of the defendants that they were innocent purchasers who were not aware of the fraudulent transaction does not hold the water in this case as the purpose of section 26 is to protect real title holders from the unscrupulous persons.”
16. In conclusion, it is my finding and holding that the plaintiff’s title is vitiated and the same is defeasible. I find that the plaintiff has failed to prove her case on a balance of probabilities and I dismiss it with costs to the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

