



**Blue Tea Limited v Than Platinum Limited & another (Environment & Land  
Case 94 of 2019) [2023] KEELC 18930 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18930 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 94 OF 2019**

**MAO ODENY, J  
JULY 18, 2023**

**BETWEEN**

**BLUE TEA LIMITED ..... PLAINTIFF**

**AND**

**THAN PLATINUM LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, KILIFI COUNTY GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 31<sup>st</sup> October 2019 the Plaintiff herein sued the Defendants seeking the following orders;
  - a. A declaration that plaintiff is the lawfully registered proprietor of the parcel of land known as Kilifi/MadetenI/505.
  - b. A declaration that the transfer and registration of the suit land Kilifi/MadetenI/505 to the 1<sup>st</sup> defendant was unlawful, null and void and did not divest the plaintiff of its lawful interest therein.
  - c. An order that the 1<sup>st</sup> defendant does surrender within 14 days from the date of judgment, the title deed issued to it on 19.06.2019 in respect of Kilifi/MadetenI/505 to lands registrar Kilifi County for purposes of cancellation and reinstatement of the plaintiff as the registered owner.
  - d. An order that the 2<sup>nd</sup> defendant does rectify the register for land parcel number Kilifi?madeteni?505 by cancelling all entries therein in relation to the transfer to the 1<sup>st</sup> defendant and reinstating to the plaintiff as the registered owner of land parcel number Kilifi/MadetenI/505.



- e. An order of permanent injunction be issued against the defendant, their servants, agents, employees, tenants and or any other person (s) acting on their behalf or claiming through them prohibiting them from transferring, leasing, fencing, surveying, selling, developing, trespassing or adversely dealing in any way with the plaintiff's land known as Kilifi/Madeteni/505, except as instructed by the plaintiff.
  - f. Costs of the suit.
2. The 1<sup>st</sup> Defendant filed a statement of defence and counter-claim dated 10<sup>th</sup> August 2021 seeking the following orders;
  - a. That a declaration be made that the 1<sup>st</sup> defendant is the bonafide owner and lawfully registered proprietor of the land known as Kilifi Madeteni/505
  - b. A declaration that the plaintiff's purported title of land Kilifi Madeteni/05 is illegal null and void and does not confer any proprietary interest upon the plaintiff or any other person.
  - c. An order directing the 2<sup>nd</sup> defendant to rectify and nullify the plaintiff's registration in respect to the entire parcel of land known as Kilifi Madeteni/505.
  - d. An order for vacant possession against the plaintiff by themselves their employees, agents and/or servants.
3. The 2<sup>nd</sup> Defendant files a defence and denied the claim and asked the court to dismiss the plaintiff's case with costs.

### **Plaintiff's Case**

4. PW1 Dominic Gilbert George a Director of the Plaintiff. Company adopted his Witness Statement dated 31<sup>st</sup> October 2019 as his evidence in-chief and produced the documents on his list of documents dated 31<sup>st</sup> October 2019 and the documents on his further list of documents dated 7<sup>th</sup> April 2022 as exhibits 1-18.
5. PW1 further stated that the Plaintiff purchased the suit land from the previous registered owners, that they did due diligence before purchasing and were issued with a title deed on 20<sup>th</sup> March 2006.
6. It was PW1's case that the Plaintiff then took possession, constructed a house on the parcel of land and that there is a caretaker on the parcel of land to date.
7. PW1 stated that the caretaker called him in the month of June 2019 that there were strangers visiting the suit land claiming the land belonged to them. That this prompted him to visit Kilifi Lands Office to find out what was happening and the Land Registrar confirmed that there were attempts to transfer the suit land and advised him to register a caution, which he never registered as he was told that the file was missing.
8. PW1 further stated that on 16<sup>th</sup> September 2019 the caretaker called him again and told him that there were people who had gone to the suit plot to fence with concrete blocks. That PW1 reported to Watamu Police Station and that is when the intruders showed him a copy of the title in the 1<sup>st</sup> defendant's name.



9. On cross examination, PW1 stated that the Plaintiff owned two parcels of land namely Kilifi/Madeteni/505 and Kilifi/Madeteni/539 and that the two plots are adjacent to each other but each has a separate title deed and the caretaker lives on plot 505. He said he did not annex any proof of payment for the plot and the land rates.
10. PW1 also said he had not annexed a receipt for stamp duty payment and that the dates on the green card could not be ascertained. Further that his efforts to lodge a caution were unsuccessful and that he did not call the parties who sold the land to him. He also said that he was not aware that the discharge of charge was done in 2019.
11. On re examination, PW1 said that he paid for the purchase of the land through his advocate Mr. K Osmond advocate who has since died hence he did not have a copy of the cheque to prove the payment of the purchase price and stamp duty. He further stated that he obtained a green card from the Kilifi Lands office and the reason for a ground report in 2014 was due to an embargo on dealing with the parcel of land at the time the report was written.
12. PW2 adopted his witness statement dated 31<sup>st</sup> October 2019 as his evidence in chief and stated that he was employed by PW1 in the year 2007 to be a caretaker of plots Kilifi/Madeteni/505 and Kilifi/Madeteni/539.
13. That the two plots are adjacent to each other, that he cleared the bushes, fenced the plots and that the employer built two houses for himself and one for him where he still resides.
14. On cross-examination, PW2 stated that he was the one who put up the fences in both plots but did not have any proof of the same.

#### **1st Defendant's Case**

15. DW1 Amon Muturi Kiarie adopted his Witness Statement dated 29<sup>th</sup> September 2021 as his evidence and produced as PEX 1- 14 in the list of documents dated 10<sup>th</sup> October 2021 and 29<sup>th</sup> March 2022 respectively.
16. On cross-examination, DW1 stated that he met the owner of the land in April 2019 and entered into an agreement the same month. That the sale agreement he produced in court is dated 21<sup>st</sup> May 2019 and that he went with his lawyer to the parcel of land and saw a vacant parcel of land that had no house.
17. It was DW1's case that he bought the parcel of land for Kshs. 20 million which he paid vide RTGS to his advocate Mr. Gicharu in May 2019. He further stated that the agreement in court indicated a price of kshs. 31.8 million which was before they did the valuation and after paying the money he left everything to his lawyer. He confirmed that the Land Control Board Consent was issued on 10<sup>th</sup> May 2019.
18. DW1 stated that he did due diligence and was not aware that there was a ground report by the land Registrar and which of the two IDs of Yusuf Ngumbao that was used to effect the transfer.
19. On re-examination, DW1 stated that he had agreed with the vendors a price of Kshs. 31.8 million and after valuation, they agreed on a lower price of Kshs. 20 million as per the valuation report but they did not vary the agreement to reflect the changes.
20. DW1 stated that the ID number for Yusuf Ngumbao that was used was 67260069 and there were two ID cards for the said person but the details were the same. He said he was not aware of the vendors' marital status and it was his lawyer who did due diligence. He finally stated that he did a search, got a green card and that the plaintiff's name was not in the green card.



## 2nd Defendant's Case

21. DW2 Boaz Oketch Juma a Land Registrar Kilifi County produced the documents filed by the 2<sup>nd</sup> defendant dated 14<sup>th</sup> January 2021 as exhibits 1-32. He said the property is registered to the 1<sup>st</sup> defendant and that according to the documentation the transfer was done procedurally and legally.
22. DW2 testified that in Settlement schemes the allocation begins from the adjudication and settlement where the beneficiaries are identified. The beneficiaries are given the land on a loan basis and upon payment of the loan; there is a transfer and discharge of charge. DW2 stated that a ground report is done by the Adjudication and Settlement Officer and not the Land Registrar.
23. On cross-examination, DW2 stated that he came to the Kilifi Land Registry in September 2019 after the transaction in relation to the suit land had been done and that it was his colleague Stella Gatwiri who handled the transaction. He stated that Madeteni scheme had many issues and there was an embargo but he could not tell the period of the embargo.
24. DW2 stated that Land Registrars have powers to reject a transfer if there are anomalies like lack of a KRA PIN, ID card, and signature or stamp duty. He stated that the suit land is registered in the name of Than Platinum Limited and had been issued with a title deed on 19 June 2019 and that from the documentation the transfer was done procedurally and legally.

## Plaintiff's Submissions

25. Counsel for the Plaintiff identified two issues for determination, namely who is the owner of the suit property between the Plaintiff and the 1<sup>st</sup> Defendant and what orders should issue.
26. Counsel reiterated the evidence of the parties that we have enumerated above on what they said; there would be no need to repeat apart from relating to the point that needs emphasis.
27. Counsel submitted that there is consensus by both parties that before any of them bought the parcel of land; it previously belonged to Yusuf Ngumbao Khamis and David Mweri Mangi. The issue is how each acquired the land.
28. Mr. Nyongesa submitted that the Plaintiff's case was supported by the sale agreement, Consent from the Land Control Board, Valuation for stamp duty, the transfer forms and pictures of the house he built on the land and his caretaker's.
29. Counsel further submitted that the Plaintiff's evidence in regard to the acquisition of the land was not challenged in any way on cross examination and that he explained that the lawyer who acted for him in the sale, Mr. Osmond remained with copies of the documents for payment of stamp duty, the cheque for the purchase price and that the advocate passed on. That plaintiff purchased the suit land in 2006, it is expected that some of the documents like receipts cannot still be available more than 10 years later.
30. Counsel relied on the case of Benja Properties Limited -versus- Syedna Mohammed Burhannudin Sahed & 4 others (2015) eKLR, and submitted that DW2 did not produce the parcel file to confirm the entries in the green card and even though ground reports do not emanate from the Land Registrar, he did not disown the report.
31. Counsel stated that the plaintiff had proved fraud as the defendants did not challenge or rebut the claim for fraud and that the DW1's evidence was contradictory and did not produce the documents for payment of RTGS and instalments. Counsel relied on the cases of Gachuma Gacheru V Maina Kabuchwa[2016] eKLR and Zachary Omondi Odongo v Bernard Stephen Omollo & 2 others [2022] eKLR and submitted that the 1<sup>st</sup> defendant colluded with the 2<sup>nd</sup> defendant.



32. Counsel relied on the case of John Mburu Kiarie v William Kimani Njuguna & 3 others [2019] eKLR and submitted that the application for LCB was neither dated nor signed and therefore irregular. Counsel further relied on the cases of Gitwany Investment Limited – Vs - Taj Mall Limited and 3 others (2006) eKLR and James Mwangi Kamau v Weson Investment Ltd [2021] eKLR and urged the court to grant the orders as prayed in the plaint and dismiss the 1<sup>st</sup> defendant’s counterclaim.

### **1st Defendant’s Submissions**

33. Counsel identified three issues for determination as follows:

- a. Whether the 1st Defendant followed the lawful procedure to acquire its title?
- b. Whether the 1st Defendant is a bonafide purchaser for value without notice.
- c. On the face of two competing titles, which title prevails?

34. On the first issue counsel submitted that the 1<sup>st</sup> Defendant has proved they acquired the suit property legally, conducted proper due diligence to ascertain who owns the property before purchase as per the documentary evidence produced as exhibits namely:

- a. Copy of Certificate of Official Search dated 15<sup>th</sup> May 2019
- b. The Sale Agreement between the original allottee to the 1<sup>st</sup> Defendant dated 21<sup>st</sup> May 2019 indicate the parcel being sold was land parcel Kilifi/Madeteni/
- c. Copy of Rates Clearance Certificate from Kilifi County Government dated 27<sup>th</sup> May 2019.
- d. Copy of Miscellaneous payments receipts of Kshs. 400,000 for Rates, Penalties and Clearance to Kilifi County Government dated 27<sup>th</sup> May 2019
- e. Copy of Application for Consent of Land Control Board and Letter of Consent dated 10<sup>th</sup> May 2019
- f. Copy of Valuation of Stamp Duty Requisition from the Ministry of Lands dated 29<sup>th</sup> May 2019 and a Stamp duty payment receipt from Kenya Revenue Authority.
- g. Application for Registration of Transfer and receipt payment dated 19<sup>th</sup> June 2019.
- h. Copy of Registered Transfer of Interest of Land dated 19<sup>th</sup> June 2019-
- i. Copy of Green Card from Registrar of Lands dated 15<sup>th</sup> May 2019.

35. On whether the first Defendant followed the lawful procedure to acquire title, Counsel relied on the case of Daudi Kiptugen vs Commissioner of Lands & 4 Others [2015] eKLR where the court held that the acquisition of title cannot be construed only in the result as the process of acquisition is material.

36. Counsel further relied on the case of Teresia Wangari Mbugua Vs Jane Njeri Nduati & Anor (2020) eKLR where the Court held that when the root of title is under challenge, it is not sufficient for the holder of the title to dangle the impugned title as proof of ownership.

37. Counsel cited on Section 26 of the *Land Registration Act* on indefeasibility of title and relied on the cases of Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR



38. Counsel submitted that the 1<sup>st</sup> Defendant is a purchaser for value without notice and relied on the case of Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997 and Gitwany Investment Ltd vs. Tajmal Ltd & 3 Others (2006) eKLR and urged the court to dismiss the Plaintiff's case and allow the 1<sup>st</sup> defendant's counterclaim with costs.

## **2nd Defendant's Submissions**

39. Counsel for the 2<sup>nd</sup> Defendant reiterated the evidence by the parties and identified two issues for determination thus: whether the 1<sup>st</sup> Defendant 's title is valid and lawful, whether the 1<sup>st</sup> Defendant's title was fraudulently issued.
40. On the first issue counsel submitted that the 1<sup>st</sup> Defendant acquired the suit property through purchase from the first allottees Yusuf Ngumbao Khamisi and David Mweri Mangi who were allocated the suit property vide a letter of offer dated 9<sup>th</sup> December 2002.
41. It was counsel's submission that the transfer was registered in the name of the 1<sup>st</sup> Defendant on 19<sup>th</sup> December 2019 and that the green card entries shows that it was in favour of the 1<sup>st</sup> Defendant. That in addition the 1<sup>st</sup> Defendant produced a title deed as proof of ownership.
42. Mr. Munga submitted that there was no evidence produced by the plaintiff that the previous owners transferred to them the suit land, that the tile was discharged before the alleged transfer, payment of Stamp Duty, land rates as required by law.
43. Counsel relied on the case of John Gitau Mungai v Stephen Thuku Kabebe & 3 others [2020] eKLR and submitted that the Plaintiff has not proved any fraud against the 2<sup>nd</sup> Defendant and urged the court to dismiss the Plaintiff's case.

## **Analysis And Determination**

44. The issue for determination is that to whom does the suit land belong to and who between the Plaintiff and the Defendant is entitled to orders sought.
45. This is a case where the Plaintiff and the 1<sup>st</sup> Defendant are claiming the same parcel of land KILIFI/MADETENI/505. A brief background to this case according to the Plaintiff is that he purchased the suit property from the previous registered owners, did due diligence before purchase and was issued with a title deed on 20<sup>th</sup> March 2006.
46. It was PW1's case that the plaintiff took possession, constructed a house on the parcel of land and that there is a caretaker on the parcel of land.
47. On the other hand the 1<sup>st</sup> Defendant also stated that they bought the suit land from the registered owners vide an agreement dated 21<sup>st</sup> May 2019 measuring 2.4 Ha. That he paid the purchase price and a title deed was issued on 19<sup>th</sup> June 2019.
48. Similarly the 2<sup>nd</sup> Defendant according to the Land Registrar, Kilifi , the register for KILIFI/MADETENI/505 was first opened and registered to Government of Kenya on 22<sup>nd</sup> December 1986 under Settlement Fund Trustee.
49. That on 29<sup>th</sup> September 2005 the suit land was allocated to Yusuf Ngumbao Khamis and David Mweri and a title deed issued, subsequently transferred to Than Platinum Limited and a title deed issued on 19<sup>th</sup> June 2019.



50. With that background, we can now deal with the two issues for determination. The issue is that, when faced with two titles in respect of the same parcel of land then we must go to the root of each title and how it was obtained.

51. In the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, Munyao J held as follows;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

52. In this case, each party put their best foot forward to show how they acquired the suit land. The Plaintiff faulted the 1<sup>st</sup> Defendant for fraudulently acquiring the suit land as he had earlier purchased the land from the original allottee.

53. In a case where your title is challenged, a party must go an extra mile to prove that the title he or she is holding is the genuine one as opposed to the one the other party holds. Did it follow the laid down procedures of acquisition of title or missed some steps.

54. In land transactions leading to issuance of title is a process that is well documented and must be followed with every step having its documentation and proof of payment of Stamp duty, rates payments LCB consent if it is agricultural land, payment for registration, valuation.

55. The Plaintiff failed to produce proof of payment of stamp duty and cheque for payment of the purchase price as the advocate who represented in the transaction had passed on K Osmond Advocate. Further that since the transaction happened more than 10 years ago the documents and receipts are unavailable.

56. Even though the Plaintiff produced copy of a title deed and a green card, the same was incomplete and from the evidence of the Land Registrar, they only had a green card with the name of the 1<sup>st</sup> Defendant as the registered owner. Where was this parallel registration of plot No Kilifi/Madeteni/505.

57. The Plaintiff further did not explain whether plot No Kilifi/Madeteni 505 is one and the same plot as Kilifi /Madeteni/539 as he had stated that he bought them and had separate titles. Since plot No 539 is not in issue we will leave it as such.

58. The Court of Appeal in the case of *Munyu Maina vs. 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.’

59. As earlier stated above that when your title is challenged then you must go an inch further to prove the authenticity of the said title. The burden of proof remains with the Plaintiff to prove its case. Counsel tried to shift the burden by submitting the since the Plaintiff’s evidence was not challenged, then the Plaintiff had proved his case. This is not the position as even an undefended case can be dismissed if the Plaintiff does not prove its case to the required standard.
60. That also applies to the 1<sup>st</sup> Defendant who filed a counterclaim, and was also under a duty to prove their counterclaim.
61. The Plaintiff alleged fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for colluding to register the 1<sup>st</sup> Defendant as a proprietor, allegations for fraud must be specifically pleaded and proved. The Plaintiff pleaded fraud but did not lead any evidence to show that the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant colluded to defraud the Plaintiff.
62. In the case of *R. G. Patel v. Lalji Makanji* (1957) EA 314 the former Court of Appeal for Eastern Africa stated thus:

“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.”
63. Similarly in the case of *Vijay Morjaria v. Nnasingh Madhusingh Darbar & Anor* [2000] eKLR where it was sated 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 as distinct/y proved, and it is not allowable to leave fraud to be inferred from facts.’
64. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s evidence and the documents produced are the true reflection from the Land Registry including a recent search which indicated that the 1<sup>st</sup> Defendant is the current registered owner of the suit land.
65. The Land Registrar also confirmed from their records that the 1<sup>st</sup> Defendant is the registered owner of the suit land. The Plaintiff missed some steps in the process of acquisition of the suit land that is why his record are not showing in the green card.
66. I find that the Plaintiff having failed to demonstrate how he acquired his title, he therefore cannot enjoy protection accorded by Section 26 of *Land Registration Act*, 2012 on indefeasibility and conclusive nature of title pursuant to Article 40(6) of Constitution.
67. Secondly, the Plaintiff failed to prove any or all of the allegations of fraud pleaded in his plaint to the required standard which means the Plaintiff’s suit fails
68. On the issue whether the Defendant is entitled to an order of cancellation of the Plaintiff’s title, the court is empowered under section 80 (1) of the *Land Registration Act* to order the rectification and cancellation of any title that is proven to have been fraudulently acquired. Section 80(1) provides as follows:



Rectification by order of Court

- (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 who is in possession and had acquired the land, lease or charge for valuable consideration, 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.

46. The upshot is that the Plaintiff's suit is dismissed and the 1<sup>st</sup> Defendant's counter claim is allowed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18<sup>TH</sup> DAY OF JULY 2023.**

**M.A. ODENY**

**JUDGE**

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

