



**Mbugua v Kerre & 2 others (Environment and Land Appeal
E004 of 2022) [2023] KEELC 18755 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18755 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

AE DENA, J

JULY 18, 2023

BETWEEN

GEORGE NDICU MBUGUA APPELLANT

AND

REUBEN WABUKE KERRE 1ST RESPONDENT

PAVINDER SINGH SOKHI 2ND RESPONDENT

KWALE LAND REGISTRAR 3RD RESPONDENT

JUDGMENT

Facts From the Pleadings

1. This judgement relates to an appeal against the decision of Honorable Omido. J.M, Senior Principal Magistrate, delivered in Kwale Senior Principal Magistrate’s Court Environment & Land Case NO. 22 of 2014 on 29th June, 2022.
2. The appellant was the plaintiff in the trial court above. By a plaint dated 13/7/2015 the plaintiff sued the defendant Reuben Wabuke Kerre. The plaintiff pleaded that he was a bonafide purchaser for value parcel number KWALE/DIANI BEACH BLOCK/1053 (suit land) from one Noah Rajab Khaoya following due diligence and payment of the consideration of Kshs. 3,000,000/=. That upon complying with all legal requirements the suit property was transferred into the plaintiff’s name. That on taking possession and commencement of construction of a perimeter wall the defendants through his agents trespassed into the suit land and had refused to leave despite efforts by the plaintiff to have him vacate.
3. The plaintiff sought the following reliefs; -
 1. A permanent injunction restraining the defendant by himself, his agents and/or servants from trespassing onto the plaintiff’s parcel of land known as Kwale/diani Beach Block/1053 measuring 0.1996HA



2. A declaration that the plaintiff is the absolute owner of the land known as Kwale/diani Beach Block/1053 measuring 0.1996HA
 3. Costs of the suit and interest
 4. Any other relief this honorable court may deem just and fair to grant.
4. The suit was defended by the 1st and 2nd defendant vide Amended Defence & Counterclaim dated 25/6/2018. The defendants pleaded that they were registered owners of the suit property and had never relinquished their ownership to the said Noah Rajab Khaoya. That any due diligence would have revealed the 1st and 2nd defendants as the proprietors. That any transfer to the plaintiffs if at all could not have been affected without the 1st and 2nd defendants' consent and the perimeter wall was constructed by the 1st and 2nd defendants who had been in full occupation and control of the suit property. They denied the allegations of trespass and stated that no loss had been occasioned to the plaintiffs who had no proprietary interest in the suit property.
5. In the counterclaim the above defendants pleaded that the plaintiffs were trespassers who had fraudulently acquired the title to the suit property. The particulars of fraud and trespass were respectively listed in paragraph 16 and 17 of the Amended Defence & Counterclaim. They prayed for the following reliefs; -
1. A declaration that the 1st and 2nd defendants are the absolute legal owners of the land property KWALE/DIANI BEACH BLOCK/1053.
 2. A declaration that the alleged sale and transfer of KWALE/DIANI BEACH BLOCK/1053 to the plaintiff is unlawful and fraudulent.
 3. An order directing the Registrar Lands Kwale District to cancel the plaintiff's certificate of lease.
 4. A permanent injunction restraining the plaintiff from entering into or any way interfering with the 1st and 2nd defendant lawful use of the land plot number Kwale/diani Beach Block/1053.
 5. General damages and interest thereon.
 6. The plaintiff denied the averments in the Amended Defence & Counterclaim and stated that the counterclaim did not disclose any reasonable cause of action, was incompetent for being filed out of time without leave of the court. It was urged that the same be struck out.
 7. The 3rd defendant Kwale Land Registrar who was enjoined latter in the proceedings together with the 2nd defendant, entered appearance but did not file any pleadings. However, the registrar was summoned as a witness to produce the original register.

Judgment Of The Trial Court

8. The trial court upon hearing the parties rendered judgement on 29th June 2022 dismissing the plaintiffs suit with costs to the 1st and 2nd defendants and entered judgement for the 1st and 2nd defendants against the plaintiff in respect of the counterclaim as follows; -
1. A declaration is hereby issued that the 1st and 2nd defendants are the absolute lawful and/or legal proprietors of the suit property Kwale/diani Beach Block/1053 to the exclusion of the plaintiffs.



2. A declaration is hereby issued that the purported sale and/or transfer of the suit property Plot No.Kwale/diani Beach Block/1053 by Noah Rajab Khaoya to the plaintiff was null and void, unlawful and fraudulent.
3. An order is hereby issued directing the Land Registrar Kwale to cancel the plaintiff's Certificate of Lease issued on 21st November, 2014 to the plaintiff.
4. A permanent injunction is issued restraining the plaintiff from trespassing into or any other way interfering with the 1st and 2nd defendant's occupation and/or use of the suit property KWALE/DIANI BEACH BLOCK/1053.
5. The claim for General damages against the plaintiff fails as it is clear from the evidence presented that the lapse of procedure in registration of the interests on the suit property resulting in the instant suit were perpetuated mainly on the part of the office of the Land Registrar, Kwale.
6. The plaintiff shall bear the costs of the counterclaim.

The Appeal

9. The plaintiff aggrieved by the above decision has proffered this appeal and by Memorandum of Appeal dated 7th July 2022 sets out the following grounds of appeal; -
 1. The Trial Magistrate erred in law and fact when he reached the finding that the purported sale and transfer of the suit property by Noah Rajab Khaoya to the Appellant was fraudulent, null and void yet the law is very clear that allegations of fraud must be strictly proved to the required standard, a different standard which is higher than beyond a balance of probabilities, which burden the 1st and 2nd Respondents failed to discharge.
 2. The Trial Magistrate further failed to appreciate the principle of law which requires that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts like he did.
 3. The Trial Magistrate erred in law and fact by ignoring and failing to take caution of the glaring discrepancies in the title held by the 1st Respondent which did not correspond with the records held in the property register of the 3rd Respondent. From the white card produced by the 3rd Respondent Entry No.3 on the white card for the suit property indicated that the transfer of the suit property to the 1st Respondent was registered on 3rd May, 2011 and a certificate of lease issued to him on the very same day. However, the certificate of lease in the name of the 1st Respondent was issued on the 28th April, 2011 way before the transfer of the suit property had been registered on the white card or land register.
 4. It then follows that this particular title was impugnable based on this discrepancy which goes to the core and heart of the title held by the 1st Respondent.
 5. The Trial Magistrate should also have exercised caution in arriving at his decision noting that the testimony adduced by Dick Safari, the Land Registrar Kwale lacked probity of value as he unequivocally admitted that he was unable to ascertain who was the bona fide owner of the suit property. The Land Registrar's evidence was also full of contradictions as it did not go to demonstrate that the transfer of the suit property to the 1st Respondent was lawful, regular and procedural and undertaken in exercise of the 3rd Respondent's statutory mandate, yet the Trial Magistrate went ahead to rely upon his evidence.



6. The Trial Magistrate erred in fact and in law by overlooking and disregarding critical issues which should have been addressed and determined before a decision could be reached on whether the Appellant was a bona fide purchaser for value as otherwise the learned Magistrate disregarded the Appellant's evidence wherein the Appellant had successfully relied upon the bona fide doctrine and managed to prove that he holds title to the suit property, purchased the same in good faith and for valuable consideration, had no knowledge or notice of any fraud, and that from the official search results issued by the 3rd Respondent, Noah Rajab Khaoya being the person who sold to the Appellant the suit property had apparent good title.
7. The Trial Magistrate further misdirected himself in failing to find that there was no evidence on record to demonstrate that there was a fraudulent transfer of the suit property in favour of the Appellant.
8. The Trial Magistrate further failed to appreciate that it is trite law that everyone who purchases a property in a bona fide manner and for value from a registered proprietor and enters his deed of transfer or mortgage on the property register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.
9. The Trial Magistrate generally misapprehended the facts pertinent to this matter and the applicable law when he reached a finding that Noah Rajab Khaoya did not acquire title lawfully for the suit property and thus could not pass a good title to the Appellant.
10. The Trial Magistrate erred in law by relying on his own surmises, conjectures, presuppositions and theories in so casually and adversely dismissing the Appellant's equitable rights of ownership over the suit property.
11. That had the trial court not committed the aforementioned alleged breaches it would not have so casually upheld the 1st and 2nd Respondents counterclaim since it did not render the land answer within the realm of the law, regulations and procedures, but rather drove the Appellant away from the judgment seat when the facts of the matter called out for the obvious righting of a wrong committed against the Appellant.
12. That in all the circumstances of the case, the decision of the Trial Magistrate did not serve the interests of justice as he ended up unilaterally tilting the scales of justice in favour of the 1st and 2nd Respondents.
13. The Trial Magistrate generally misapprehended the facts pertinent to this matter and the applicable law.
14. The Trial Magistrate further failed to appreciate and weigh evenly the various issues of fact and law so as to do justice and equity to the parties before him.
15. The Trial Magistrate also failed to consider and take into account the extensive material placed before him, touching on pertinent and substantial points of fact and law so as to arrive at a just and fair decision.
16. The decision in its entirety is bad and unjust and cannot be supported either on the facts or the law pertinent to the various issues before the Superior Court.
17. The decision offends all notions of justice, equity, fairness and rationality and as such ought to be set aside.



10. The appellant urges that this Appeal be allowed and that the whole Judgment of the trial court be set aside and the Appellant be declared the legal and bona fide owner of the suit property Title Number Kwale/Diani Beach Block 1053. That the costs of this Appeal and those incurred in the Trial Court be awarded to the Appellant.

Hearing Of The Appeal

11. The appeal was heard by way of written submissions which parties filed and exchanged.

Appellants Submissions

12. The appellant identified the following issues for determination; -
- i. Whether the Appellant was a bona fide purchaser for value in respect to the suit property.
 - ii. Whether the 1st and 2nd respondents managed to prove their allegations that the suit property was fraudulently transferred to the appellant.
 - iii. Whether the 1st respondent acquired the suit property for valuable consideration and in a lawful regular and procedural manner.
 - iv. Whether the Certificate of Lease issued to the 1st respondent on the 28th April 2011 is assailable and could therefore not pass a good title to the 1st and 2nd respondent.
13. On whether the appellant was a bona fide purchaser for value in respect to the suit property, citing the case of David Peterson Kiengo vs Kariuki Thuo, Machakos HCCC No. 180 of 2011, it was submitted that having undertaken a genuine search and obtained official search results there was no need for the appellant to go to the trouble and expense of digging behind the register of the suit property to investigate the genesis and history of the suit property in order to satisfy himself of the validity of the title held by the previous registered proprietor.
14. Several court decisions on the torrens system and sanctity of title and the plight of innocent third parties were highlighted. It was submitted that the Appellant has a prima facie absolute claim to the suit property having paid money for a title good at law; was innocent whatever may be the guilt of others and notwithstanding if there be, any concealed defect, arising from the conduct of those who had held the property long before he acquired it of which he had no notice. Citing Article 40 of *the Constitution* the court was urged to protect the appellant's proprietary rights from any form of threat or infringement. See Peterson Kirengo & 2 Others vs Kariuki Thuo (2012) eKLR, Eunice Grace Njambi Kamau & Anor ELC Case NO.976 of 2012 and Rutongot Farm Ltd vs Kenya Forest Service & 3 others (2018) eKLR.
15. As regards whether the 1st and 2nd respondents proved the suit property was fraudulently transferred to the appellant it was submitted that no evidence of fact was led to prove that the transfer of the suit property from the previous registered proprietor's name to the appellant was done fraudulently either through the forgery of the Land Registrar's signature or otherwise. That the DCI did not come up with any findings to support the allegations of fraud. That neither did the 1st and 2nd respondents bring any evidence to show that the appellant's acquisition of the suit property was unlawful, irregular and unprocedural. It was consequently contended the threshold for proof of fraud and which was beyond that of a balance of probabilities as underscored in Central Bank of Kenya Limited vs Trust Bank Limited & 4 Others (1996) eKLR was not met by the plaintiffs. Other cases referred to were Vijav Morajaria vs Nansingh Madhusingh Darbar & Anor (2000) eKLR, Umilla w/o Mahendra Shah vs Barclays Bank International Limited & Anor (1979) KLR,



16. Discussing the provisions of Sections 107, 108,109,112 of the *Evidence Act* and the Court of Appeal findings in *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Anor* [2005] 1 EA 334 it was emphasized that in every legal proceeding, the parties are required to adhere to rules on evidentiary standards and burdens of proof.
17. On the third issue for determination, pointing to lack of proof of payment of the purchase price and stamp duty by the 1st respondent it was contended that the 1st Respondent did not adhere to due process in his purported acquisition of the suit property as he failed to comply with both substantive as well as procedural matters. His acquisition of the suit property could not be said to have been lawful, regular and procedural.
18. Counsel reiterated the third ground of appeal herein and placed reliance was on *Athi Highway Developers Limited vs West End Butchery & 6 Others* (2015) eKLR and *Zephania Ngaira Angwere vs Rodgers Senaji Mulemi & Anor* (2021) eKLR where the Court of Appeal held that the transfer of title by a Vendor possessing a fake or fraudulent title cannot pass a good title and urged for the cancellation of the certificate of lease.
19. The court was invited to allow this appeal by setting aside the entire judgment of the trial Magistrate and substituting its own judgment in favour of the appellant.

1st & 2nd Respondents Submissions

20. The 1st and 2nd respondents were filed on 14/3/2023 by the firm of Gitonga Mureithi & Co. Advocates. Upon a detailed review of the facts and evidence it was submitted that considering the suit property was registered in two names, the person who alleged he sold the land to the appellant denied any knowledge of this fact or that the land was transferred to him by these two owners jointly and the Registrar of Lands confirmation that for a transfer to be effective, it would have had to involve both parties and that it was not legally and factually possible for the land to be transferred to any person without the two registered persons signing a transfer jointly this therefore confirmed the alleged transfer to the appellant was fraudulent.
21. The respondents identified four (4) issues for determination; -
 - a. Whether the 1st and 2nd respondents are the registered owners of the suit property.
 - b. Whether the alleged sale and transfer of the suit property to the Appellant is unlawful and fraudulent.
 - c. Whether the 1st and 2nd respondents were entitled to an order directing the Land Registrar to cancel the Appellant's Certificate of Lease.
 - d. Whether the 1st and 2nd respondents are entitled to a Permanent Injunction restraining the Appellant from entering or in any way interfering with their lawful use of the suit property.
22. Referring to the definition of bona fide purchaser in *Lawrence Mukiri v. Attorney General & 4 Others* [2013] eKLR it was submitted that the appellant was not a bona fide purchaser as he was part of the fraud. That the appellant had no legal basis for reporting the loss of a certificate that was in the 1st and 2nd respondents' names if he had bought it from a legitimate owner. That thereafter obtained another one in his name which in addition was a criminal offence with penal consequences. It was urged that the resultant title can be impeached on those grounds and the register should be rectified to revert the land back to the 1st and 2nd respondents. That the appellant made no attempt to explain the transition



from the two original registered owners to the person who purportedly sold the land to him or his false report that his original Certificate was lost.

23. It was submitted that a title could be impeached under the provisions of section 26 of the [Land Registration Act](#) as well as the court pursuant to Section 80 of the [Land Registration Act](#) is conferred with powers to order for rectification of a 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. The court was also referred to Falcon Global Logistics Co. Limited v Management Committee of Eldama Ravine Boarding Primary School [2018] eKLR.
24. It was submitted that the land registry represented by the Land Registrar, is the guarantor of the records and register. His testimony cannot be impeached by the questions asked in cross-examination. That the appellant was not able to impugn the testimony.
25. Further in rebuttal to the appellant's submissions, the respondents referred to various instances where the appellant it was alleged to have misrepresented the facts, the law and the record. It was submitted that there must be a holistic reading of the evidence on record. That the Land Registrar testified that even though the appellant was able to misrepresent that the title was missing and was issued with a new one the process was flawed. This was also only possible after the documents at the land's office were stolen but luckily, the computerized records still held that the owners of the land were the 1st and 2nd respondents as owners which the appellant could not dispute.
26. Referring to the maxim *nemo dat quod non habet* (that you cannot pass title that you do not have) it was urged it did not aid the appellant who admits that he bought a property from someone who had no title to pass only that he did not know. It was pointed further that a person only acquires good title as a bonafide purchaser and the authority of *Daudi Kiptugen —vs- Commissioner of Lands & 4 Others* (2015) eKLR also relied upon by the plaintiff did not help him since the plaintiff was unable to trace his journey back to the two joint owners of the property.
27. The 1st and 2nd Respondents submit that they proved their counterclaim to the required standard and successfully defended the Appellant's claim in the lower court. There is no legal or factual underpinning upon which a court, properly evaluating the evidence as above as required of a first appeal, could reach any other decision. The court was urged to dismiss the appeal.

Issues For Determination

28. Having analyzed the parties' pleadings, evidence, the submissions in the trial court as well as the judgement, the memorandum of appeal and the filed submissions in support of the appeal and in opposition thereto this court is of the view that the issues that arise for determination are; -
 1. Whether the Plaintiff was a bona fide purchaser and lawful registered owner of the suit property.
 2. Whether the 1st and 2nd defendant managed to prove that the plaintiff was involved in the fraudulent acquisition of the suit property.
 3. Whether the plaintiff is entitled to the reliefs sought.
 4. Whether the 1st and 2nd defendants acquired valid interests over the suit land and if they were the lawful registered owners of the suit land.
 5. Which between the plaintiffs' and the 1st and 2nd defendant's titles/leases should be upheld?
 6. Whether the 1st and 2nd defendants were entitled to the prayers sought.



7. Who should bear the costs of the suit and the counterclaim.

Discussions And Determination

29. The above issues have been identified by this court bearing in mind that this is a first appeal and therefore this court is expected to reconsider the evidence, evaluate it itself and draw its own conclusion. However even as I embark on this I will be cautious to bear in mind that this court did not have the benefit of seeing or hearing the witnesses. See *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123. I will therefore proceed to discuss the issues above seriatim at the same time speak to the grounds of appeal and where necessary I will combine some to avoid unnecessary repetition.
30. PW1 was the plaintiff George Ndicu Mbugua. He testified that he undertook a search, entered into a sale agreement in the year 2014 with Noah Rajab who was then the owner of the suit land and had a title deed. That he paid a 10% deposit of the purchase price and upon paying the purchase price in full a transfer was done. He informed the trial court that he was issued with a title, took possession in 2014 and placed building materials in the suit land. That he also paid rates. That in 2015 he was alerted that someone had entered the property and upon arriving thereat it was Reuben Kerre the 1st defendant. His evidence was that they both reported to the police but that he also discovered the 1st defendant also had a title deed for the suit land given to him by David Mango the initial owner of the suit land. That Noah Rajab the vendor was David Mango's nephew. Further that the 1st defendant had allegedly purchased the suit land in the year 2010 from David Mango who died in 2011.
31. At the outset from the above the court was faced with two titles for the suit land. This was confirmed by DW1 Mr. Dick James Safari Land Registrar who was summoned to produce the original register for Kwale/diani Block 1053 When He Stated There Existed Currently Two Green Cards, One Reconstructed And The Other Retrieved From The System. The Certificate Of Lease For Kwale/diani Beach Block No. 1053 Issued On 21st November, 2014 In Favour Of George Ndicu Mbugua And Certificate Of Lease For Kwale/diani Beach Block No. 1053 in favor of Reuben Wabuke Kerre and Pavites Singh Sokhi Amar issued on 28th May 2012 were also produced as part of the exhibits in this case.
32. It is trite that legally there cannot exist two separate titles on the same land, only one title or certificate could issue. Section 32 of the Registered *Land Act* (repealed) and which applies by dint of section 107 of the *Land Registration Act* provides as follows; -
32. (1) The Registrar shall, if requested by a proprietor of land or a lease where no title deed or certificate of lease has been issued, issue to him a title deed or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease:
- Provided that - (i) only one title deed or certificate shall be issued in respect of each parcel of land or lease;
33. Additionally, the 1st and 2nd respondents questioned the plaintiffs for the following; -
- Fraudulently acquiring a Certificate of Lease of the suit land.
 - Fraudulently reporting the loss of the 1st and 2nd Defendants' Certificate of Lease so as to obtain another one.
 - Tendering forged documents to the lands office for registration.
 - Colluding with Noah Rajab Khaoya an imposter to effect fraudulent transfer.



- e. Purporting to transfer the parcel of land with one who had no proprietary interest to the suit land.
- f. Transferring land without conducting requisitions of title.
34. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR, stated that where the registered proprietor's title root is under challenge, it is not enough to dangle the instrument of title as proof of ownership. This then called for the interrogation by this court of the plaintiff's title. The plaintiff having been put on notice on the above not only had to prove that he was a bonafide purchaser for value as pleaded but that his title was the valid title in view of the existence of a rival title coupled with the provisions of section 32 above.
35. Justice Sila Munyao in *Daudi Kiptugen Vs. Commissioner of Lands & 4 Others* (2015) eKLR and which was also referred to by both parties persuasively further elaborated the above; -
- 'In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. 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 the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or 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 is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.'
36. The plaintiff produced among others, the following documents to demonstrate how he lawfully acquired his title and which were admitted as exhibits; -
1. Certificate of Lease for Kwale/diani Block 1053 Issued On 14th April, 2011 In Favour Of Noah Rajab Khaoya.
 2. Certificate Of Official Search Dated 5th November, 2014.
 3. Sale Agreement Dated 29th October, 2014 Executed By Noah Rajab Khaoya (vendor) And George Ndicu Khaoya (purchaser).
 4. Copy Of Cheque No. 000325 Dated 29th October, 2014 For Ksh. 300,000/- Issued By Freeline General Agencies In Favour Of Noah Rajab Khaoya.
 5. Copy Of Cheque No. 000279 Dated 4th December, 2014 For Ksh. 290,000/- Issued By George Ndicu Mbugua In Favour Of Noah Rajab Khaoya.
 6. Copy of money transfers dated 4th December, 2014 for Ksh. 2,000/- by Freeline Agencies To Noah Rajab Khaoya.
 7. Cash Deposit Slip Dated 26th November, 2014 For Ksh. 2,000,000/- By Freeline Agencies To Noah Rajab Khaoya.
 8. Acknowledgment Of Final Payment Of Ksh. 2,700,000/- Signed By Noah Rajab Khaoya Dated 4th December, 2014.



9. Certificate Of Lease For Kwale/diani Beach Block No. 1053 Issued On 21st November, 2014 In Favour Of George Ndicu Mbugua
10. Certificate of Official search dated 12th June, 2015.
37. My review of the above prima facie revealed a transaction that appeared above board until the allegations herein by the 1st and 2nd defendant emerged as well as their certificate of lease. Did the plaintiff then obtain a good title out of the above transaction considering the emerging issues? The history of the suit land became material at this point. Under the Registered Land Act (now repealed) it is the information in the register that is proof of registration where there is a lease it is known as white card and where it is freehold/absolute proprietorship it is a green card. I will not focus much on this distinction.
38. DW1 evidence was that he retrieved a copy of a green card that showed the lease was first issued on 4/9/2000 to David Mugo Khaoya and Irena Moons Josephine, a certificate of lease was issued on the same day as joint owners. On 3/5/2011 a transfer was effected to Reuben Wabuke Kerre and certificate of lease issued. On 28/5/12 a transfer was effected to Reuben Wabuke Khaoya and Paviter Sokhi Singh Amar. That the sale agreement dated 29th October, 2014 showed Noah Rajab Khaoya (vendor) and George Ndicu as purchaser.
39. It was then important to interrogate the vendors title and if the vendor passed a good title to the plaintiff. Noah Rajab Khaoya testified on behalf of the plaintiff as PW2. He told the trial court that the suit land belonged to David Mango who was his uncle. The said David Mango transferred the same to him as a trustee of his properties as he was ailing and he PW2 sold the land to the plaintiff with the permission of the family who received the proceeds thereof.
40. I drew several observations from the above. PW2 did not produce to the court the transfer to him as trustee by David Mango. It is not in dispute that the said David Mango died in March 2011. While it was confirmed by DW1 that the land was jointly owned no evidence was availed to show the death of the other joint owner Irena Josephine Moons and which ought to have been before the death of Mango for the suit land to have become Mango's property exclusively for him to have effected the alleged transfer to Noah Rajab. It is trite that where property is in the names of joint owners, upon the death of one of them, the surviving owner automatically becomes the owner upon presenting the evidence of death of the joint tenant i.e death certificate to the registrar. Section 60 of the Land Registration Act No. 3 of 2012 provides that;

60. Transmission on death of joint proprietor.

If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.
41. No such evidence was adduced. PW2 upon cross examination stated he did not know Irena Moons Josephine. Interestingly PW3 contradicts PW2 when she stated in her evidence in chief that PW2 resided with Mango and Moons and that he PW2 knew Moons. Neither was there an entry deleting the name of the said Irena Moons Josephine in the green card as required under section 60 above. It is clear to me the same could not have been entered based on PW3 confirmation during cross examination that when Mango was ailing Josephine Moons was in Kenya and would even visit him in hospital. This gap in the process and which to me was very material was never explained. DW1 summed it up in his evidence in chief by stating that; -



‘the only thing captured in the green card is the transfer dated 21/11/14 (to Goerge Ndicu) but there is nothing to show how the property was transferred to Noah. Noah does not appear in the history.....There is no transfer from David Mango and Josephine Moons to Rajab or to Ndichu.’

Clearly based on the foregoing the Certificate of Lease for KWALE/DIANI BLOCK 1053 issued on 14th April, 2011 in favour of Noah Rajab Khaoya was invalid and therefore could not have passed a valid interest to the plaintiff.

42. But what about the existence of another title at the time of the Certificate of lease issued on 21st November, 2014 in favour of the plaintiff George Ndicu Mbugua? The other title was the Certificate of Lease to Reuben Wabuke Kerre and Pavites Singh Sokhi Amar issued on 28th May 2012 and whose predecessor was the Certificate of lease issued to Reuben Wabuke Kerre on 3/5/2011.
43. It was the defence case that they are the lawful registered owners of the suit land. Reuben Wabuke Kerre the 1st defendant gave evidence as DW3. He adopted his witness statement as his evidence (see pg 130-132 of the record of appeal). It was his evidence that he acquired the suit property from David Mango Khaoya and Irena Moons Josephine who were subleasees of Leisure Lodges Limited, vide a sale agreement dated 23/8/2010 for a consideration of Kshs. 1,050,000/=. That he confirmed the ownership of the suit land by the said vendors through a search. That in April 2011 the land was transferred to him upon payment of the assessed stamp duty which was entered in the presentation book. That the transfer was recorded in the green card on 3/5/2011 as entry No. 3 and he was issued with a certificate of lease. His further evidence as recorded in the witness statement was that in the year 2012 he sought the 2nd defendant to invest in the development of the property and changed the registration to a joint ownership to secure the 2nd defendants interest thus the subsequent certificate of Lease to Reuben Wabuke Kerre and Pavites Singh Sokhi Amar issued on 28th May 2012.
44. It was the 1st defendant’s evidence that thereafter in April 2013 he received a letter from Hezron Gekonde Advocates alleging the above title was fraudulent. That in the year 2015 the plaintiff entered the suit land and DW3 reported the matter to the Kwale police station where the plaintiff stated he had bought the land from Noah Rajab Khaoya and Brian Wekesa (PW4) who thereafter failed to produce their ownership documents and were on 15/6/2015 charged with obtaining money by false pretense in criminal case no. 589 of 2015. That the charges were irregularly withdrawn on 13/10/2015 despite clear findings that he was the legitimate owner and that the accused persons fraudulently transferred the property.
45. DW3 produced as exhibits, the following documents listed in List of documents dated 7/5/2019; -
 1. Certificate of Lease issued on 4th September 2002 in favor of Irena Moons Josephine and David Mango Khaoya
 2. Sale Agreement dated 23rd August 2010
 3. Certificate of official search conducted on 17th April 2012
 4. Certificate of Lease issued on 28th May 2012 in favor of the 1st and 2nd defendants
 5. Demand letter dated 16th April 2013
 6. Certified copy of green card
 7. Certified copy of presentation book
46. Indeed, the 1st and 2nd defendant entries above were corroborated as being supported by documentation in the parcel file. DW1 evidence was that the lease was first issued on 4/9/2000 to David



Mugo Khaoya and Irena Moons Josephine, a certificate of lease was issued on the same day as joint owners. On 3/5/2011 a transfer was effected to Reuben Wabuke Kerre and certificate of lease issued. He also confirmed the entries No.3 as stated by DW3. My perusal of the documents did not reveal any gaps neither did DW1 raise any such issues in his testimony with regard to this title. More credibility is given by the fact that both the original joint proprietors signed the sale agreement dated 23rd August 2010. Infact on cross examination DW1 was clear that DEX1 was not a reconstructed white card and was able to explain why he had not certified it. It is to me then very clear that there was already in existence a valid registered proprietor of the suit property by 3/5/2011 and who was not Noah Rajab Khaoya (I have already set out elsewhere why his alleged title dated 14/4/2011 did not stand the test), neither was it the plaintiff but Reuben Wabuke Kerre. This goes to cement further that no valid legal interest passed to the plaintiff herein.

47. A nullity is nullity and nothing valid can come out of it. I agree with the Court of Appeal dictum in Athi Highway Developers Vs. West End Butchery & 6 Others (2015) while adopting the position taken by Lord Denning in Macfoy Vs. United Africa Limited (1961) ALL FR 1169. The court of appeal held that the transfer of title by a vendor possessing a fake/fraudulent title cannot pass good title. It was stated thus; -

‘It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.’

48. Based on the foregoing this court makes a finding that the sale and transfer of Kwale/diani Beach Block/1053 to the plaintiff was unlawful. For the reasons discussed there cannot have been a valid interest or good title and or lawful interest in the suit property passed to the plaintiff by the vendor Noah Rajab Khaoya. Consequently, the plaintiff is thus not the lawful registered owner of the suit property.
49. It has been contended that the plaintiff was a bonafide purchaser and that he also did not have to go behind the title and examine its history having been assured by the Registrar that the Vendor was the registered proprietor following a search. This is the Certificate of Official Search dated 5th November, 2014. Counsel for the plaintiff submitted at length on the doctrine of a bonafide purchaser for value without notice. This court was referred to the dictum in the case of Lawrence Mukiri vs The Attorney General & 4 others (2013) eKLR where the court defined a bona fide purchaser for value as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. That the purchaser must prove he holds a certificate of title, He purchased the property in good faith, He had no knowledge of the fraud, The Vendor had apparent valid title, He purchased without notice of any fraud and that he was not a party to any fraud. Indeed, this was drawn from the Uganda Court of Appeal in Katende v Haridas and Company Ltd. [2008] 2 E.A 173. But jurisprudence has since evolved in our Kenyan courts as will be seen in this judgement.
50. It has been urged by the plaintiff that one who purchases a property in a bona fide manner and for value from a registered proprietor and enters his deed of transfer or mortgage on the property register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title. But let me add that a title can be impeached under section 26 (1) of the [Land Registration Act](#) which provides: -

26 (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.

51. To me there is therefore nothing in section 26(1) that would mandate the court to sanction a valid a title acquired illegally. Infact Justice Munyao in *Alice Chemutai Too Vs Nickson Kipkurui Korir and 2 Others* (2015) eKLR stated and rightly so that the purpose of the provisions of Section 26(1)(b) of the *Land Registration Act* was to protect the real title holders, (in the present case the 1st and 2nd defendants) from subsequent transactions and it did not matter that an innocent person purchased the property.

52. I will further add that the plaintiffs title cannot be protected under article 40 of *the Constitution* of Kenya 2010 as counsel for the plaintiff would have desired the court to do. In SC Petition 8 (E010) of 2021 *Dina Management Limited Vs County Government of Mombasa & 5 Others* the Supreme Court of Kenya recently pronounced thus; -

(111) 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.

53. There were arguments raised that the 1st and 2nd defendant did not prove to the required standard of proof that the plaintiff was involved in the fraudulent acquisition of the suit property. This argument is of course based on section 26(1)(a) above. In *Denis Noel Mukhulo Ochwada and Another vs Elizabeth Murungari Njoroge & Another* Court of Appeal 298 of 2014 Nairobi, the court took the position taken in *R.G Patel vs Laelji Makayi* court of appeal for Eastern Africa where it was stated that;

“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”.

54. The question that I posed is how the plaintiff took part in the reconstruction of the parcel file two years after the title to the 1st and 2nd defendant without following the gazette process and not being the registered proprietor then? Why did he not let the alleged registered proprietor Noah Rajab apply. Why did the previous record conveniently vanish to his benefit? To me this is where he is involved personally and thus pointing to his knowledge and participation. Infact in my view the two certificates of title ipso facto depicted a case of fraud and considering his was second in time. I have no hesitation that the plaintiff participated in the fraud and with full knowledge. I don't think it helps the plaintiff to argue that the registrar's evidence could not be relied upon. Infact DW1 the registrar clearly stated he was not working at the registry then and to me therefore he had no interest in covering up for any of the staff then. All this goes to demonstrate the absence of bonafides on the part of the plaintiff.

55. In any event even assuming this court was wrong on the above issue, I have already set out in my discussions the gaps and illegalities in the acquisition of the plaintiff's title and therefore under the provisions of Section 26(1)(b) the plaintiffs title herein was impeachable for the illegalities pointed in this judgement.



56. Having stated the foregoing, I will address the issue whether the 1st and 2nd defendants acquired valid interests over the suit land and if they were the lawful registered owners of the suit land. This point has already been addressed elsewhere in this judgement and specifically paragraph 42 and without falling to the risk of repetition this court finds that the 1st and 2nd defendants were the lawful owners of the suit land and which is also supported by the findings on illegalities and fraud that impeached the plaintiffs title. It is also on this basis that the counterclaim would succeed.
57. As to which between the plaintiffs' and the 1st and 2nd defendant's leases should be upheld, based on the foregoing discussions it goes without say that the later should be upheld. The plaintiff was also therefore not entitled to the prayers sought.
58. The upshot of my analysis and discussions is that this court finds no basis to overturn the judgement of Honorable Omido. J.M, Senior Principal Magistrate, delivered in Kwale Senior Principal Magistrate's Court Environment & Land Case NO. 22 of 2014 on 29th June, 2022. Consequently, the appeal is dismissed with costs to the 1st and 2nd respondents.
- 59 Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 18TH DAY OF JULY, 2023

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Gikaria for the Plaintiff Appellant

Mr. Gitonga for the Defendant Respondents

Ms Kagui holding brief for Ms Kiti for 3rd Respondent

Mr. D. Dissi Court Assistant.

