



**Mwende v Kalume & another (Environment & Land Case 208 of 2019)  
[2023] KEELC 20106 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20106 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 208 OF 2019  
NA MATHEKA, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**CHRISTINE MWENDE ..... PLAINTIFF**

**AND**

**DANIEL MBOGO KALUME ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KILIFI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff claims ownership of an eighth of an acre of plot wherein she purchased the same from Jones Muchiti Chitahi on the 22<sup>nd</sup> September 2014. That at the time of the purchase of an eighth of an Acre in the year 2014, the 1<sup>st</sup> Defendant was fully aware since he had apportioned Musa Idd Kanzovu (deceased) a parcel of Land that housed the church called Miracle Revival Fellowship Pentacostal Church. That on the said Plot, the Plaintiff constructed the School Jambo Jipya School which caters for nursery, primary school and Secondary School that contains approximately 200 students and it is a day school. That in May 2019, the 1<sup>st</sup> Defendant approached Plaintiff and told her that she should withdraw herself from the pending representative suit being ELC No. 299 of 2013 Masha Birya Dena & Others vs Francis Kalume & 8 Others and instead pay him the consideration and her proceeds to process the title deed.
2. That they were unable to agree and this prompted the 1<sup>st</sup> Defendant to instigate the 2<sup>nd</sup> Defendant who served the Plaintiff with an enforcement notice to bring down the building construction on her plot which action the Plaintiff says is illegal, null and void since she has complied with all the Courts Government condition to ran the Jambo Jipya School. The Plaintiffs claim against the Defendant is an injunction and a declaration that their intended action is illegal, null and void. That the suit pending is a representative suit being ELC No. 299 of 2013 parties which cause of action is different and the 2<sup>nd</sup> defendant is not party within that suit. The Plaintiff prays for judgment to be entered against the Defendants for;



1. Declaration that the actions of the 2<sup>nd</sup> Defendant are unlawful.
  2. Permanent injunction restraining the 1<sup>st</sup> Defendant from interfering with the proprietary rights of the Plaintiff on Plot No. MN/II/942.
  3. Cost of this suit and interest
3. The 1<sup>st</sup> Defendant maintains that the Plaintiff is a tenant of the 1<sup>st</sup> Defendant on plot number 9476/111/MN whereon the plaintiff operates a school in the name and style of Jambo Jipya Secondary School. The 1<sup>st</sup> Defendant is a total stranger to the plaintiff's allegations of having purchased an eighth (1/8) of an acre from Jones Muchiti Chitahi. That the 1<sup>st</sup> Defendant, through his mother, had leased plot number 9479/III/MN to one Musa Iddi Kanzovi (now deceased) as a ground tenant paying some nominal rent to the 1<sup>st</sup> Defendant's mother. The 1<sup>st</sup> Defendant maintains that the Plaintiff rented already existing structures which she only modified to the suit her business of a school and has of late commenced illegal extension of the perimeter without the 1<sup>st</sup> Defendant's consent and/or approval. The 1<sup>st</sup> Defendant states that the Plaintiff, in total breach of the terms and conditions of the existing tenancy agreement between the Plaintiff and the Defendant, stopped paying rent and is in arrears of rent from July 2017 and has commenced illegal and unapproved constructions and extension of the walls on the suit premises which not only endanger the safety of the students attending the Plaintiff's school but are aimed at alienating the 1<sup>st</sup> Defendant's leased premises.
4. The 1<sup>st</sup> Defendant avers that the Plaintiff has commenced illegal constructions on the 1<sup>st</sup> Defendant's plot number 9476/111/MN without the consent of the 1<sup>st</sup> defendant and also without the requisite approvals of the Physical Planning Department of the 2<sup>nd</sup> Defendant in total breach of the terms of the existing tenancy agreement between the Plaintiff and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant further avers that the Plaintiff in total breach of the said tenancy has without any lawful justification stopped paying rent for the 1<sup>st</sup> Defendant and is now in arrears of rent since July 2017 to date. The 1<sup>st</sup> Defendant prays that the Plaintiff clears all the outstanding arrears of rent and hands over vacant possession of the suit premises to the 1<sup>st</sup> Defendant.
5. This court has considered the evidence and the submissions therein. The 2<sup>nd</sup> Defendant did not participate in this matter. PWI the Plaintiff testified that she purchased eighth of an acre of plot from Jones Muchiti Chitahi on the 22<sup>nd</sup> September 2014. That at the time of the purchase of an eighth of an Acre in the year 2014, the 1<sup>st</sup> Defendant Daniel Mbogoh Kitsaumbi was fully aware since he had apportioned Musa Iddi Kanzovu (deceased) a parcel of Land that housed the church called Miracle Revival Fellowship Pentacostal Church. That on the said Plot, the Plaintiff constructed the School Jambo Jipya School. She produced a sale agreement for 1/8 acre plot divided from plot No. MN/11?4427 original No. 3847/7 Mainland North between Jones Muchiti w/o Musa Iddi Kanzovi and herself. The 1<sup>st</sup> Defendant maintains that the Plaintiff is a tenant of the 1<sup>st</sup> Defendant on plot number 9476/111/MN whereon the plaintiff operates a school in the name and style of Jambo Jipya Secondary School. That the 1<sup>st</sup> Defendant, through his mother, had leased plot number 9479/III/MN to one Musa Iddi Kanzovi (now deceased) as a ground tenant paying some nominal rent to the 1<sup>st</sup> Defendant's mother. The 1<sup>st</sup> Defendant produced the certificate of title and the tenancy agreement as his evidence.



6. Section 24 (a) of the [Land Registration Act](#) stipulates as follows:

"subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto....."
7. In the case of [Willy Kipsongok Morogo vs Albert K. Morogo](#) (2017) eKLR the Court held as follows;

"the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under Sections 24, 25 and 26 of the [Land Registration Act](#)."
8. While in the case of [Joseph N.K. Arap Ng'ok vs Moiwo Ole Keiwua & 4 Others](#) (1997) eKLR, where the Court of Appeal held that;

"Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder."
9. Further, in Civil Appeal No. 246 of 2013 [Arthi Highway Developers Limited vs West End Butchery Limited and Others](#), the Court of Appeal expressly stated thus:

"Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the [Land Registration Act](#) set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."
10. Be that as it may, Section 26 of the [Land Registration Act](#), No.3 of 2012 provides that;
  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."
11. In the case of [Elijah Makeri Nyangw'ra -vs- Stephen Mungai Njuguna & Another](#) (2013) eKLR 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."



12. Hon. Justice Munyao Sila 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.

For the first limb, it appears to me that the title of the 1<sup>st</sup> defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1<sup>st</sup> defendant was a party to the fraud or misrepresentation. Indeed, to me the 1<sup>st</sup> defendant was an innocent purchaser for value. He was probably conned of his money by the 2<sup>nd</sup> Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2<sup>nd</sup> Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2<sup>nd</sup> defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).

Is the title impeachable by virtue of section 26(1) (b)? First, 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 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 of 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 the titles by subsequent transactions”.

13. From the pleadings and annexures, it is clear that the suit property belongs to the 1<sup>st</sup> Defendant and the Plaintiff was a tenant. Although the Plaintiff alleges to have bought an eighth of an Acre in the year 2014 from Jones Muchiti Chitahi w/o Musa Idd Kanzovu (as beneficial owner) on the 22<sup>nd</sup> September 2014, there is no evidence that these were the owners or had any capacity to sell the plot to her as they were not the registered proprietor. The Plaintiff has failed to demonstrate to court that she had any valid reason to believe that the said Jones Muchiti Chitahi w/o Musa Idd Kanzovu (as beneficial owner) had authority to sell the suit land. The said Jones Muchiti Chitahi was not a party capable to entering into an agreement of sale of land within the meaning accorded to in Section 3 (6) of the Law of Contract Act. Sections 3(3) and 3(6) of the Law of Contract Act, states that;

Section 3(3);

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

- (a) the contract upon which the suit is founded—
  - (i) is in writing;
  - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;



Section 3(6);

“party” includes any agent, auctioneer or advocate duly authorized in writing to act in the absence of the party who has given such authority.

14. Section 109 of the *Evidence Act* Cap 80 is clear that;

“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.”

15. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in *Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi* (2013) eKLR as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that “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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

16. It is the view of this court that it can only make a determination on the ownership of the suit property based on the title documents and the supporting documents thereto. In the instance suit the burden to prove the alleged sale lies with the Plaintiff who has failed to adduced evidence in support of those allegations. In associating myself with the cited decisions, the legal provisions cited above as well as the evidence before me, I find that 1<sup>st</sup> Defendant is the lawful registered owner of the suit property namely plot number 9476/111/MN hence entitled to protection of the law in accordance with the provisions of Section 24, 25 and 26 of the *Land Registration Act*. I find that the Plaintiff has failed to establish her claim on a balance of probabilities and I dismiss it with costs.

17. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**N.A. MATHEKA**

**JUDGE**

