



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Agengo v Abbot (Environment and Land Appeal E007 of 2022)  
[2023] KEELC 21095 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21095 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E007 OF 2022  
SO OKONG'O, J  
OCTOBER 26, 2023**

**BETWEEN**

**BEATRICE AKINYI AGENGO ..... APPELLANT**

**AND**

**BILL MARTIN OKEYO ABBOT ..... RESPONDENT**

*(Being an Appeal from the judgment and decree of Hon. P. Gesora CM delivered on 4th February 2022 in Kisumu Chief Magistrate's Court ELC No. 12 of 2019)*

**JUDGMENT**

**Brief Facts**

1. The Respondent sued the Appellant in the Chief Magistrate's Court at Kisumu seeking the following reliefs;
  - a. An order for the eviction of the Appellant from land parcel No. Kisumu/Nyalenda "B"/2368 and delivery to the Respondent of vacant possession thereof.
  - b. An order for demolition of any and all structures erected illegally on land parcel No. Kisumu/Nyalenda B'/2368.
  - c. A declaration that the Appellant's occupation/possession of land parcel No. Kisumu/Nyalenda B/2368 was fraudulent/illegal. d. General damages for trespass.
  - e. An order that the Appellant pays to the Respondent a sum of Kshs. 30,000/- per month as mesne profits from the date of filing the suit until the date of delivery of possession of the portion of the suit property occupied by the Appellant.
  - f. Any other order the court may deem fit and just to grant in the circumstance.
  - g. Costs and interest of this suit.



2. The Respondent averred that at all material times relevant to the suit, the Respondent was the registered owner of all that parcel of land known as Kisumu/Nyalenda 'B'/2368 measuring approximately 0.045 Ha. (hereinafter referred to as “the suit property”) having purchased the same on 28<sup>th</sup> September 2018 from one, Lucy Juma Agengo who was a co-wife to the Appellant. The Respondent averred that the suit property together with the developments thereon were part of Lucy Juma Agengo’s inheritance from her late husband. The Respondent averred that the Appellant inherited a different parcel of land from their said deceased husband. The Respondent averred that even after he purchased the suit property, the Appellant continued to trespass, use, and try to put up structures thereon without the Respondent’s permission and the necessary government approvals. The Respondent averred that as a result of the Appellant’s actions aforesaid, the Respondent had been deprived/robbed of his constitutional right to own property thereby causing him loss and damage.
3. The Appellant filed a defence and a counterclaim against; the Respondent, Lucy Juma Agengo and the Land Registrar Kisumu. In her defence, the Appellant denied the Respondent’s claim in its entirety. In her counterclaim, the Appellant averred that on 10<sup>th</sup> February 2012, the suit property was registered in her name and the name of Lucy Juma Agengo as joint proprietors thereof. The Appellant averred that sometime on 6<sup>th</sup> September 2018, she learnt upon visiting the Land Registry that the suit property had been transferred to Lucy Juma Agengo on 21<sup>st</sup> March 2018 and subsequently to the Respondent on 29<sup>th</sup> August 2018. The Appellant averred that the transfer and registration of the suit property in the name of Lucy Juma Agengo was fraudulent, irregular, illegal, and unlawful. The Appellant sought judgment against the Respondent, Lucy Juma Agengo and the Land Registrar jointly and severally for;
  - a. A declaration that the Appellant was lawfully registered as a joint proprietor of the suit property together with Lucy Juma Agengo.
  - b. A declaration that Lucy Juma Agengo and the Land Registrar lacked statutory power to transfer the suit property to Lucy Juma Agengo and subsequently to the Respondent.
  - c. A declaration that the transfer of the suit property to Lucy Juma Agengo and the Respondent was irregular, illegal, and unlawful for the lack of authority and consent of the Appellant who was a joint proprietor thereof.
  - d. An order to issue expunging and cancelling all the entries numbers 3, 4, 5,6 and 7 in the register of the suit property.
  - e. Costs and interests.
4. The Respondent and Lucy Juma Agengo filed a reply and a defence to the counter-claim denying all the allegations contained therein. The Respondent’s suit and the Appellant’s counter-claim were heard by the lower court. In a judgment delivered on 4<sup>th</sup> February 2022, the lower court entered judgment in favour of the Respondent and issued orders for the eviction of the Appellant from the suit property and the delivery of vacant possession to the Respondent. The court also made a declaration that the Appellant’s occupation of the suit property was fraudulent and illegal. The Appellant’s counter-claim was dismissed with costs. The lower court found that no fraud or illegality was committed in the transfer of the suit property to Lucy Juma Agengo and that the Respondent who had acquired the property lawfully was entitled to possession of the same.
5. The Appellant was aggrieved with the said judgment and preferred this appeal. In her Memorandum of Appeal dated 17<sup>th</sup> February 2022, the Appellant challenged the lower court’s judgment on the following grounds;



1. That the Learned Magistrate erred in law and fact in not finding that the title relied on by the Respondent was procured by fraud against the provisions of section 26 (a) and (b) and 80 of the *Land Registration Act* No. 3 of 2012.
2. That the Learned Magistrate erred in law and fact by failing to appreciate that disposition of interest in land under a joint tenancy must only be done with the consent of all the joint tenants otherwise its voidable.
3. That the Learned Magistrate erred in law and fact by failing to appreciate the defect in the Respondent's title despite the overwhelming evidence adduced by the Appellant.
4. That the Learned Magistrate erred in law and fact in failing to appreciate the pleadings, testimony of the witnesses and the submission by parties which clearly pointed out the applicable law in the circumstances.
5. The Learned Magistrate erred in law and fact by failing to appreciate the evidence presented and considering extraneous factors thereby arriving at manifestly wrong and unfair finding.
6. The Appellant prayed that the Appeal be allowed, the judgment and decree of the lower court be set aside and in its place, the Plaintiff's counterclaim be allowed with costs. The Appellant also prayed for the costs of the appeal.
7. The appeal was argued by way of written submissions.

#### **The Appellant's submissions**

8. The Appellant filed her submissions on 2<sup>nd</sup> June 2023. The Appellant submitted that the Appellant and Lucy Juma Agengo who were co-wives became jointly registered as the proprietors of the suit property pursuant to the orders that were made in Kisumu High Court Succession Cause No. 227 of 2007. The Appellant submitted that land parcel No. Kisumu/Nyalenda 'B'/1961(hereinafter referred to as "Plot No. 1961") was to be distributed between the Appellant and Lucy Juma Agengo in equal shares. The Appellant submitted Plot No. 1961 was subdivided into three portions namely; Kisumu/Nyalenda "B"/2229, 2230 and 2231. The Appellant submitted that she did not sign the mutation form for the subdivision of Plot No. 1961 and as such she did not consent to the subdivision of the said property. The Appellant submitted that the suit property was a subdivision of land parcel Kisumu/Nyalenda "B"/2230 and the same was registered in the joint names of the Appellant and Lucy Juma Agengo. The Appellant submitted that her name was removed from the register of the suit property without her knowledge and the property transferred to the sole name of Lucy Juma Agengo. The Appellant submitted that this exercise was undertaken on the basis of the summons that was issued by the Land Registrar under Section 14(b) of the *Land Registration Act* 2012 which required the Appellant to appear before the Land Registrar to be examined by Lucy Juma Agengo.
9. The Appellant submitted that Section 14(b) of the *Land Registration Act* 2012 does not give the Land Registrar power to delete the name of a proprietor from the register of land. The Appellant submitted that her name was removed from the land register in an illegal and fraudulent manner. The Appellant submitted that the titles that were obtained by Lucy Juma Agengo and the Respondent in respect of the suit property were impeachable in the circumstances under the provisions of Section 26 (1) (a) and (b) of the *Land Registration Act* 2012. The Appellant cited *Elijah Makeri Nyangwara v. Stephen Mungai Njuguna & Another* [2013] eKLR in support of this submission. The Appellant submitted that having proved that fraudulent entries were made in the land register in favour of Lucy Juma Agengo contrary to the provision of Section 91(4) of the *Land Registration Act*, 2012, she was entitled to have the illegal



- entries in the register cancelled pursuant to Section 80 of the [Land Registration Act](#) 2012. In support of this submission, the Appellant cited *Esther Ndegi Njiru & Another v. Leonard Gatei* [2014] eKLR.
10. The Appellant submitted that since the suit property was registered in the joint names of the Appellant and Lucy Juma Agengo, any disposition of an interest therein required the consent of both registered proprietors who had also to execute the instrument of transfer or any other instrument of disposition.
  11. The Appellant submitted that Section 91 (4)(c) of the [Land Registration Act](#) 2012 provides that, "each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer their interest to any other person shall be void." The Appellant submitted that she was entitled to the prayers in her counterclaim. The Appellant submitted that the Land Registrar did not defend the counterclaim. The Appellant submitted that the illegal transfers should be nullified or cancelled and the land reverted to the name of the Appellant and her co-wife, Lucy Juma Agengo. The Appellant urged the court to allow the appeal with costs.

### **The Respondent's submissions**

12. The Respondent submitted that the burden of proof is on he who alleges. In support of this submission, the Respondent cited Section 107(1) of the [Evidence Act](#) (Chapter 80 Laws of Kenya), which 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."
13. The Respondent submitted that the validity or otherwise of a title must be established on the basis of the evidence before the court. The Respondent submitted that the Respondent proved that he purchased the suit property lawfully after which the same was transferred and registered in his name. The Respondent submitted that the Respondent purchased the suit property from the registered owner thereof and paid the purchase price. The Respondent submitted that he produced evidence at the trial showing that he conducted a search before purchasing the property which showed that the same was registered in the name of Lucy Juma Agengo. The Respondent submitted that during the purchase of the suit property, the Respondent was not aware of any defect in the title that was held by Lucy Juma Agengo. The Respondent submitted that he was an innocent purchaser of the suit property for value without notice of any defect in its title. In support of this submission, the Respondent referred to the definition of a bona fide purchaser for value in Black's Law Dictionary 9<sup>th</sup> Edition, *Katende v. Haridar & Company Ltd.* [2008] 2 E A 173 and *Hannington Njuki v. Willam Nyanzi*, High Court Civil Suit No.434 of 1996.
14. The Respondent submitted that the Appellant did not establish grounds for impeachment of a title of a bona fide purchaser without notice set out in Section 26(1) (a) and (b) of the [Land Registration Act](#) 2012. The Respondent submitted further that he acquired the suit property procedurally. The Respondent submitted that his title could only be impeached if it was established that he acquired the suit property through fraud or misrepresentation or that he was a party to the fraud through which the property was acquired. The Respondent submitted that the Appellant failed to prove that the Respondent acquired the suit property illegally through fraud or corrupt scheme. The Respondent cited the decision of *Munyao Sila J. in Alice Chemutai Too v. Nickson Kipkurui Korir & 2 others* [2015] eKLR where the judge stated that:

"It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party: or where it is procured illegally, unprocedurally, or through a corrupt



scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation.”

15. The Respondent urged the court to dismiss the appeal dismissed with costs.

### **Analysis and Determination**

16. I have considered the pleadings, the proceedings and judgment of the lower court, the Memorandum of Appeal, and the submissions filed by the parties. I will consider the Appellant’s grounds of appeal together. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269 and *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 on the duty of the first appellate court. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.
17. It was not disputed that the Appellant and Lucy Juma Agengo were registered as joint proprietors of Plot No. 1961. It is also not disputed that Plot No. 1961 was subdivided to give rise to among others, Kisumu/Nyalenda ‘B’/2230 which was subsequently subdivided to give rise to the suit property. It was also common ground that the Appellant and Lucy Juma Agengo were registered as joint proprietors of the suit property on 10<sup>th</sup> March 2012 and that on 21<sup>st</sup> March 2018, the suit property was transferred to the sole name of Lucy Juma Agengo. It is not disputed that the Appellant did not participate in the transfer of the suit property to the sole name of Lucy Juma Agengo. In the lower court, both the Respondent and Lucy Juma Agengo contended that the said transfer was effected by the Land Registrar in the exercise of his statutory powers after the Appellant refused to execute a transfer of the property in favour of Lucy Juma Agengo. The issues that the lower court was called upon to determine were; whether the purported transfer of the suit property by the Land Registrar to Lucy Juma Agengo was lawful, whether Lucy Juma Agengo acquired a valid title to the property through that process, and whether the Respondent acquired a valid title from Lucy Juma Agengo on 29<sup>th</sup> August 2018. The lower court was of the view that upon the refusal of the Appellant to transfer the suit property to Lucy Juma Agengo, the Land Registrar had statutory power to transfer the suit property to Lucy Juma Agengo. The lower court did not disclose the source of that power. The lower court was of the view that Lucy Juma Agengo acquired a valid title in respect of the suit property which she lawfully transferred to the Respondent. The lower court found that there was no fraud or illegality that was involved in the transfer of the suit property to Lucy Juma Agengo and subsequently to the Respondent. It was on the basis of the foregoing findings that the lower court entered judgment for the Respondent against the Appellant and dismissed the Appellant’s counterclaim. What I have been called upon to determine is whether the lower court was right in its findings and holdings in light of the evidence that was before it.
18. Section 26 of the *Land Registration Act* 2012 provides as follows:
  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.
- (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.
19. Elijah Makeri Nyangwara v. Stephen Mungai Njuguna & Another(supra), the court stated follows:

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

20. Section 80 of the *Land Registration Act* provides that:

“ 80.

- (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.”

21. Section 14(a) and (b) of the *Land Registration Act* 2012 provides as follows:

“ 14. General powers of Land Registrars

The Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act—

- (a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;
- (b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or



charge in question, and that person shall appear and give the information or explanation;

- (c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;
- (d) cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration; and
- (e) order that the costs, charges and expenses as prescribed under this Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of this Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit.”

22. The suit property is alleged to have been transferred to Lucy Juma Agengo by the Land Registrar following the summons that the Land Registrar had issued to the Appellant under Section 14 of the [Land Registration Act](#) 2012. It is clear from the provisions of Section 14 of the [Land Registration Act](#) 2012 that I have reproduced above that it does not give the Land Registrar power to transfer land from joint proprietors to one of the joint proprietors in the event that one of the joint proprietors refuses to transfer the land to the other. The Land Registrar does not also have the power under that section to delete or cancel the name of a proprietor lawfully entered in the register of land from the register. The Land Registrar also has no power to force one joint proprietor of land to transfer his/her interest in the land to another joint proprietor. It was claimed that the Land Registrar conducted a hearing and made a decision to transfer the suit property to the sole name of Lucy Juma Agengo. The proceedings of the Land Registrar and his purported decision were not placed before the lower court. This court has also not had sight of the same.

23. Section 91 (4) of the [Land Registration Act](#) 2012 provides that:

- “ 4. If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—
- a) dispositions may be made only by all the joint tenants;
  - b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or
  - c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.”

24. It is my finding that since the Appellant did not transfer her share in the suit property to Lucy Juma Agengo, the purported transfer of the property to the sole name of Lucy Juma Agengo by the Land Registrar was illegal null and void, and was ineffectual to convey the Appellant’s interest in the suit property to Lucy Juma Agengo. Since Lucy Juma Agengo did not have a valid title in the suit property, could she pass a valid title to the Respondent in respect thereof? The answer is no.



25. In *Macfoy v. United Africa Co. Ltd.* (1961) 3 All E.R. 1169, Lord Denning stated as follows at page 1172 concerning an act that is a nullity:

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

26. In *Wambui v. Mwangi & 3 others*, Civil Appeal 465 of 2019, [2021] KECA 144 (KLR) the Court of Appeal stated as follows:

“70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3rd respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80(sic) of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.

72. In light of all the above, we reiterate that the Judge’s reasoning as to why appellant’s title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable.”

27. The purported absolute title that Lucy Juma Agengo acquired in the suit property was a nullity. Nullity can only beget nullity. Lucy Juma Agengo had no valid absolute title in the suit property. She could therefore not pass a valid title to the Respondent. She could not give what she did not have. The titles that were held by Lucy Juma Agengo and the Respondent were all vitiated by the illegal manner in which Lucy Juma Agengo acquired absolute title to the property.

28. The Respondent had contended that he was an innocent purchaser of the suit property without notice of the defect that may have existed in the title that was held by Lucy Juma Agengo. In *Mwangi James Njehia v. Janetta Wanjiku Mwangi & another* [2021] eKLR, the Court of Appeal stated as follows:

“37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -



“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

38. For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

38. We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

39. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased” properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.

29. The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard earned property, because a party has “purchased” the property on the basis of an “apparent title” at the land registry which had been transplanted in place of the genuine title, only for the genuine one to reemerge after the transaction? In our view, no legitimate owner of property should be divested of their property unlawfully, under the guise that the “purchaser” was duped to buy land which he/she could have believed to be genuinely owned by the person holding himself out as the vendor.”

30. From the pleadings in the lower court, it is obvious that there was a dispute between the Appellant and Lucy Juma Agengo over the ownership of the suit property at the time the suit property was sold to the Respondent by Lucy Juma Agengo. Clause 4 of the agreement of sale between the Respondent and Lucy Juma Agengo dated 28<sup>th</sup> September 2018 leaves no doubt that the Respondent was aware of the Appellant’s interest in the suit property. The Respondent was aware that the Appellant had semi-permanent structures and 2 containers on the property. It was not for the Respondent and Lucy Juma Agengo to declare the said structures and containers illegal. The same represented an interest



that was disclosed to the Respondent. The Respondent cannot therefore claim that he had no notice of the Appellant's claim over the suit property. In *Godfrey Githinji Kamiri v Attorney General & 4 others* [2019] eKLR the court cited *Chemey Investment Ltd. v A.G & 2 Others* [2018] eKLR where the Court of Appeal stated as follows:

31. We have noted that the Ekima Junior Academy never took possession of the suit property. It therefore means that when the appellant purported to purchase the same, the suit property was in the same condition it was when it was initially allocated, namely in use for public purposes. We ask ourselves, which innocent purchaser, without notice, would accept to purchase a property that is being used for public purposes, just next to the provincial headquarters and the law courts, without any form of inquiry". As this court stated in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* (Supra), only a foolhardy, and we may add, a careless or fraudulent investor would purchase land such as the suit property "with the alacrity of a potato dealer in Wakulima Market". And further in *Flemish Investments Ltd vs Town council of Mariakani*. CA No. 30 of 2015, in an appeal where the appellant who had fraudulently obtained registration of public property in his name but claimed to be an innocent purchaser for value without notice, this court stated:-
32. A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, person, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that plot no. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells".
33. I am also of the view that an enhanced due diligence would have brought to the attention of the Respondent the fact that Lucy Juma Agengo did not have a valid title. A perusal of the register would have brought to the attention of the Respondent the fact that the Appellant was previously a joint owner of the property with Lucy Juma Agengo. The Respondent would have thereafter made inquiries as to the circumstances under which Lucy Juma Agengo became the absolute owner of the property. It is my finding therefore that the Respondent was not an innocent purchaser of the suit property for value. I wish to add that even if he was, the doctrine of an innocent purchaser for value could not enable him to acquire a valid interest in the suit property from Lucy Juma Agengo whose title was a nullity. His equitable interest in the property could also not defeat the Appellant's legal interest that was first in time.

## Conclusion

34. It is my finding that the Respondent's suit in the lower court had no merit and should have been dismissed. On the other hand, I have found that the Appellant proved her claim in the lower court against the Respondent, Lucy Juma Agengo, and the Land Registrar and as such, her counterclaim should have been allowed as prayed. I therefore allow the appeal and make the following orders:
  - a. The judgment of the lower court delivered on 4<sup>th</sup> February 2022 is set aside.
  - b. The Respondent's suit in the lower court is dismissed.
  - c. The Appellant's counterclaim in the lower court is allowed in terms of prayers (a), (b), (c) and (d) of the counterclaim 6<sup>th</sup> February 2019.
  - d. The Respondent shall bear the costs of the appeal, and the main suit and the counterclaim in the lower court.

**DELIVERED AND DATED AT KISUMU ON THIS 26<sup>TH</sup> DAY OF OCTOBER 2023**



**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Mabalau h/b M.Omondi for the Appellant

N/A for the Respondent

The Respondent present in person

Ms. J. Omondi-Court Assistant

