



Amolo (Suing on behalf of and as the donee of the power of attorney from)Theodore Overbeck v Mohammed; Wanjiru (Interested Party) (Environment & Land Case 92 of 2021) [2023] KEELC 20995 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20995 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 92 OF 2021
NA MATHEKA, J
OCTOBER 25, 2023**

BETWEEN

**EUNICE ACHIENG AMOLO (SUING ON BEHALF OF AND AS
THE DONEE OF THE POWER OF ATTORNEY FROM)THEODORE
OVERBECK PLAINTIFF**

AND

BILAL MOHAMMED DEFENDANT

AND

RUTH WANJIRU INTERESTED PARTY

JUDGMENT

1. The Plaintiff avers that vide an instrument of transfer dated 31/05/1985 and subject to the payment of a consideration of Kshs 20, 000.00 to one Harry Karobia Mbui the Plaintiff and Ruth Wanjiru Gatuhu the Interested Party became the joint. registered proprietors of the leasehold interest as tenants in common with equal shares (undivided) in all that piece of land known as LR No 2189/I/MN, situate in Mtwapa. The Plaintiff avers that subject to the transfer, they were jointly issued with a certificate of lease to the subject property conferring ownership of the leasehold interest of 99 years to him and the Interested Party starting from 1985. Further the Plaintiff continued paying the land rates, land rent and all other necessary outgoings in relation to the subject land. The Plaintiff avers that he has enjoyed peaceful and quiet possession of the suit land until sometime in 2020, when the Defendant trespassed into, demolished a permanent house in the land and started erecting structures thereon without the Plaintiff's authority or permission. As a result of the acts of trespass, the Plaintiff suffered and continues to suffer immense loss and damage.



2. In spite of the Plaintiff issuing several notices through his Agents directing the Defendant to stop the encroachment and construction thereof, the Defendant declined and/or refused to halt the construction, necessitating the instant suit. The Plaintiff avers that he has never transferred, authorized or consented to the transfer the suit land either by sale or otherwise and therefore the Defendant is a stranger to him. The Plaintiff avers that as a result of the acts aforesaid, the Plaintiff has been unable to access the subject property and his right to property ownership as well as quiet enjoyment of the same has been infringed. The Plaintiff prays for judgment against the Defendant for;
 1. A declaration that the Plaintiff and Interested Party are is the lawful registered proprietors of all that land known as LR No 2189/I/MN.
 2. A declaration that the Defendant is a trespasser in the suit land.
 3. An order of eviction against the Defendant.
 4. General damages for trespass and illegal encroachment onto the suit property
 5. A permanent injunction restraining the Defendant, his servants and/or agents or otherwise howsoever from occupying or continued occupation, entering into and/or re-entering into, building any structures, encroaching onto, wasting, damaging, leasing out, transferring and/or dealing in any manner whatsoever, and/or in any other manner interfering with the possession and/or ownership of all that parcel of land known as Title LR No 2189/1/MN.
 6. Costs of the suit.
 7. Interest on (d) and (f) at Court rates.
3. This court has considered the evidence and submissions therein. The Plaintiff avers that vide an instrument of transfer dated 31st May 1985 and subject to the payment of a consideration of Kshs 20, 000.00 to one Harry Karobia Mbui the Plaintiff and Ruth Wanjiru Gatuhu the Interested Party became the joint. registered proprietors of the leasehold interest as tenants in common with equal shares (undivided) in all that piece of land known as LR No 2189/I/MN, situate in Mtwapa. PW1 produced copy of the certificate of title dated 31st May 1985 (PEx2) and the certificate of search dated 20th April 2021 (PEx5). 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.....”
4. In the case of [Willy Kipsongok Morogo v 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](#).”
5. While in the case of [Joseph N.K. Arap Ng'ok v 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.”



6. Further, in Civil Appeal No 246 of 2013 *Arthi Highway Developers Limited v 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.”

7. 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.”

8. In the case of *Elijah Makeri Nyangw'ra v 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.”

9. 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.

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

11. 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”.
12. From the pleadings and annexures, it is clear that the suit property belongs to the Plaintiff and the Interested Party jointly. The Defendant was served by registered post but failed to attend court or file any defence. The Interested Party also did not participate in this matter despite being served. PW1 produced a special power of attorney registered on the 15th April 2021 to act on behalf of the Plaintiff (PEx1). PW1 testified that in 2020 they started construction on the property and they were arrested by the police. She produced photographs showing the way to the suit property (PEx4). Her evidence has not been controverted. I find that Plaintiff and the Interested party are the lawful registered owners of the suit property namely parcel of land known as Title LR No 2189/1/MN hence entitled to protection of the law in accordance with the provisions of Section 24, 25 and 26 of the Land Registration Act. However, the claim of trespass has not been proved and the same will not be awarded. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;
 1. A declaration that the Plaintiff and Interested Party are is the lawful registered proprietors of all that land known as LR No 2189/I/MN
 2. The Defendant is to vacate the suit property land known as LR No 2189/I/MN within the next thirty (30) days from the date of this judgement and in default execution order to issue.
 3. A permanent injunction restraining the Defendant, his servants and/or agents or otherwise howsoever from occupying or continued occupation, entering into and/or re-entering into, building any structures, encroaching onto, wasting, damaging, leasing out, transferring and/or dealing in any manner whatsoever, and/or in any other manner interfering with the possession and/or ownership of all that parcel of land known as Title LR No 2189/1/MN.
 4. Costs of the suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

