



Visch & Vischi (Suing as the legal representatives of the Estate of Fernando Visch) & another v Mulewa & 6 others (Environment & Land Case 210 of 2017) [2023] KEELC 21956 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21956 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 210 OF 2017
MAO ODENY, J
NOVEMBER 30, 2023**

BETWEEN

**AMINA LAURA FERNANDO VISCHI & MARIA GIADA VISCHI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF FERNANDO VISCH) 1ST PLAINTIFF
RENZO QUACIARI 2ND PLAINTIFF**

AND

**ALBERT MUKARE MULEWA 1ST DEFENDANT
FRANCIS KAREMA MULEWA 2ND DEFENDANT
BENJAMIN MUKARE MULEWA 3RD DEFENDANT
PAUL CHAI MULEWA 4TH DEFENDANT
THE LAND REGISTRAR, KILIFI 5TH DEFENDANT
MUMBU HOLDINGS LIMITED 6TH DEFENDANT
DREAM GUEST HOUSE 7TH DEFENDANT**

JUDGMENT

1. By the Plaint dated 25th January 2006, the Plaintiffs herein sued the Defendants seeking the following orders;
 - a. As against the first, second, third and fourth defendants for:
 - i. Specific performance of the said agreements for sale.



- ii. Order that the first, second, third and fourth defendants take all necessary steps to obtain the consent to transfer the properties to the plaintiffs from the appropriate land control board.
 - iii. All necessary and consequential orders.
 - iv. Damages for breach of contract in lieu of or in addition to specific performance;
 - v. Further or other relief which this court may deem just to grant.
 - vi. Interest
 - vii. Costs and incidentals to the suit
- b. As against the 5th defendant for;
- i. An order that the fifth defendant be restrained from registering any further transactions or entry against the title of the properties pending the hearing and determination of this suit.
 - ii. A declaration that the fifth defendant wrongly registered the restriction in favour of the new buyers ahead of the restriction in favour of the Plaintiffs against the titles of the second property.
 - iii. An order that the restriction placed against the title of second property as entry No. 6 be expunged and be placed after the restriction in favour of the plaintiffs.
 - iv. Costs and incidentals of the suit.
 - v. Suitably extend the time to file an application to the appropriate land control board for consent to transfer the properties to the plaintiffs.
2. The 6th and 7th Defendants applied to court to be joined as Defendants and the same was allowed in March 2006. The 6th Defendant filed a statement of defence and counterclaim on 26th February 2018 seeking the following orders;

As Against The Plaintiff

- a. That the Plaintiff's suit be dismissed with costs to the 6th Defendant.
- b. A declaration that the purported sale of the subject parcel of land known as Kilifi/Chembe Kibambamshe/406 between the Plaintiffs and the 1st to 4th Defendants be declared void ab initio, illegal and untenable.
- c. A declaration that the Plaintiffs have no proprietary interest and/or right over the suit premises.
- d. A declaration that the Plaintiffs are not entitled to the relief claimed in the Plaint.
- e. A declaration be and is hereby issued that the 6th Defendant is and has always been the bona fide proprietor of parcel of land known as Kilifi/Chembe Kibambamshe/406 (the suit property).
- f. A declaration be and is hereby issued that the purported removal of the 6th Defendant's name from the land register and all the purported entries



thereafter including but not limited to that of the 7th Defendant's name being entered as the proprietor of the property are illegal, null and void.

As Against The 5th And 7th Defendants

- g. An order be and is hereby issued directing the Kilifi Land Registrar to rectify the land register in respect of the suit property by cancelling the 7th Defendant's name and substituting thereof the 6th Defendant's name as proprietor of the land.
 - h. A mandatory injunction be and is hereby issued compelling the 1st to 4th defendants, servants, employees to vacate and deliver vacant possession thereof to the 6th Defendant
 - i. A permanent injunction be and is hereby issued restraining the 7th Defendant by itself, servants and or agents from trespassing onto or in any other way interfering with the suit property.
 - j. In the alternative, the 5th and 7th Defendants be ordered to compensate the 6th Defendant equivalent to the current value of the property.
 - k. The 6th Defendant to be paid general damages, pecuniary damages punitive and exemplary damages quantum to be determined by the court and be interest at the bank rate of interest of 14% of the said sum of damages from the date of filing the suit to the date when all monies shall be paid in full to the plaintiffs.
 - l. The Plaintiff, 5th and 7th defendants to pay cost of the counterclaim suit and interest on damages jointly and severally.
 - m. Any other relief, which the Honourable court may find, justified in the circumstances.
3. The 7th Defendant filed a defence to the 6th Defendant's Counterclaim on 29th June 2018 and set out the breaches and illegalities allegedly committed by the 6th Defendant and sought that the Plaintiff's suit and the 6th Defendant's counterclaim be dismissed with costs.
 4. The Plaintiffs filed a Notice of discontinuance of the suit against the 1st to 5th Defendants, which was allowed on 24th October, 2018 and the suit was marked as withdrawn. Counsel for the 6th Defendant informed the court that the 6th Defendant will be proceeding with the counterclaim against the 7th Defendant.
 5. On 14th June 2022 the 1st 2nd and 3rd Defendants made an application to be allowed to testify as witnesses for the 7th Defendant which was allowed. The matter therefore proceeded between the 6th and 7th defendants.

6th Defendant's Case

6. PW1, John Kariuki adopted his Witness Statement dated 14th March 2018 as part of his evidence and produced a list of documents dated 14th March, 2018 as PEX No. 1 to 8. He also produced his supplementary list of documents dated 14th March, 2018 as PEX No. 9 to 11.
7. PW1 stated that he is one of the directors of the 6th Defendant and had filed a counterclaim seeking the cancellation of the of the 7th Defendant's title and rectification of the register.



8. It was PW1's evidence that the 6th Defendant purchased Plot No. 406 from Samuel John Mulewa, Paul Mulewa & Benjamin Chai Mulewa (3rd and 4th Defendants for a consideration of Ksh 1,000,000/- in 1993 who duly executed a transfer in his favor on 12th May 1993 and a Land Control Board consent granted on 22nd September 1994 and a titled issued.
9. PW1 further testified that on 30th May 2007, the 5th Defendant proceeded to cancel the 6th Defendant's title and substituted it with the 7th Defendant's (Dream Guest) name in entry number 11 & 12 of the land records without his acquiesce, knowledge or execution of any court order.
10. It was PW1's evidence that after the 6th Defendant's title was cancelled, he approached the National Land Commission who advised him to seek the court's intervention.
11. On cross-examination by Mr. Kilonzo, PW1 confirmed that he was a director of the 6th Defendant, Mumbu Holdings Limited and had filed a case before the National Land Commission and that Mwangi Njenga & Company Advocates had filed case No. 76 of 2006 against the Defendants which was withdrawn.
12. PW1 also told the court that he was aware of JR Misc. Application of 2012 but he could not remember the outcome. Further that he was not aware of the ruling that was made by Justice Ouko in the year 2006 on the issue of ownership of the suit property.
13. On further cross-examination by Mr. Kilonzo, PW1 told the court that he had bought the suit property from Samuel Malewa and his two brothers who signed for him a transfer in his presence but admitted that they did not have a sale agreement. PW1 also confirmed that the Land Registrar did not sign the transfer and further that the presentation book number was never indicated.
14. It was PW1's testimony on cross examination that he got a Land Control Board consent dated 22nd September, 1994 and the acreage was indicated as 2.4 Hectares and was issued with a title deed but entry No. 4 on the register was not signed by the Land Registrar. It was his evidence that he came to know ten years later that the Defendants had purchased the suit property from the same people who had sold it to him and he was aware that the 7th Defendant had a title deed which he was seeking to be cancelled.
15. Upon further cross examination by Mr. Mouko he stated that he bought the land in 1995 and was issued with the title deed in the same year but the transfer form was signed in 1993. He further stated that he paid for stamp duty but he had neither the payment receipts nor a copy of the original title with the three names. He also stated that he did not know why there was no endorsement on the green card and at the time he bought the land one of the sellers was deceased.
16. PW2 Morris Kupalia Advocate adopted his Witness Statement dated 6th July, 2018 as part of his evidence and stated that he dealt with the transaction on behalf of the 6th Defendant whereby the vendors were paid their money and that he sought and obtained the Land Control Board consent for the transfer.
17. On cross-examination by Mr. Kilonzo, he told the court that there was no sale agreement as it was a direct transfer as the parties had agreed and only signed the transfer on 12th May 1995 after getting the consent in 1994. Further that the transfer did not indicate the acreage of the suit property.
18. PW3 Blanze Matemua a Valuer stated that he had been instructed by the 6th Defendant's Advocates Chepkwony & Co. Advocates and prepared a valuation Report dated 28th June 2018 which gave the land value as Kshs. 95million.



19. On cross-examination by Mr. Kilonzo, he reiterated that the Valuation Report was for the suit property without the developments thereon and that he was not able to access the property but used the comparable approach to value the property. He did not state the comparable properties he used in the report.
20. PW4 Henry Kazungu Lughanje Advocate adopted his Witness Statement dated 6th July 2018 as part of his evidence and testified that in 1993, he was approached by the 6th Defendant to do a transaction over the suit property. That the purchaser was the 6th Defendant while the vendor was Samuel John Malewa (deceased) and his two sons Benjamin Mukare Mulewa and Paul Chari Mulewa.
21. It was PW4's evidence that he was only acting for the purchaser whom they went with to the Standard Bank where both the purchaser and the vendor had bank accounts and the monies were transferred to the vendor's accounts.
22. PW4 testified that he was the one who went to Kilifi to register the title and was given the said title in May 1995. He stated that he checked and confirmed that the title had been signed and sealed before giving it to his client but some years later, his client went to him complaining that there was something wrong with the title as the green card had not been signed by the Land Registrar.
23. Upon cross-examination by Mr. Kilonzo, he informed the court that he was the one who prepared the land sale agreement and sent it to the advocates for the vendors. That the title deed stated that the suit property was 2.6 hectares while the Land Board consent indicated that it was 2.4 Hectares.
24. He pointed out to the court that he was neither aware of the person who cancelled entry No. 4 on the green card nor that there were proceedings that took place on 30th January 2006 in Kilifi Land Registry. It was PW4's evidence that he had been directed to produce the original records, which he no longer had, and further that he did not know of the orders that had been issued on 27th January 2006.
25. Upon further cross examination by Mr. Mouko PW4 stated that Samuel John Mulewa was deceased at the time of the transaction and that he did not carry out a search after registration.

7TH Defendant's Case

26. DW1 Philemon Mwakilulu Mwavala adopted his Witness Statement dated 27th January 2023 as part of his evidence and testified on behalf of the 7th Defendant. He also produced the documents in the 7th Defendants list of documents dated 28th June 2018 as DEX No. 1 to 21 and stated that at the time of the purchase he was a director of the 7th Defendant.
27. DW1 testified that in May 2006, the 7th Defendant was approached by Benjamin Mulewa, David Mulewa and Paul Mulewa who wanted to sell the suit property, gave him a copy of the title deed and a recent search which indicated that the suit property was registered in their names.
28. It was his evidence that they entered into a sale agreement and made payments but were informed that there was a caveat at the Kilifi Land Registry and so they had to wait for it to be removed. DW1 further stated that there were hearings at the Kilifi Land Registry which led to the removal of the caveat and that the court gave them an order for registration.
29. DW1 produced a search dated 14th May, 2005 which indicated that the title was free from any encumbrance but they later came to realize that the 6th Defendant had a title deed but the green card had neither been signed nor endorsed by the Land Registrar.



30. It was his evidence that he was not aware when the entry that showed the registration of the 6th Defendant was cancelled and that the Mulewa's showed them the original titles. That the Mulewa's had not told them that they had sold the suit property to other persons.
31. DW1 also testified that there was a case by Fernando Vischi that was determined in their favour upon which the titles were issued and further that another case filed in Malindi by Fernando Vischi was also struck off. It was his case that they followed due process and the title deed was issued.
32. Mr. Mwavala stated that they have built a hotel on the suit property that is worth over Kshs. 1 billion with 96 rooms that has been operational since 2008 and that there was no one in possession when they took possession of the land.
33. On cross-examination by Mr. Mouko he stated that meetings took place at the Land Registrar's office where the 6th Defendant was asked to produce the original title and documents but he did not.
34. On cross-examination by Ms. Chepkwony, he told the court that the dates on the title and the green card are not similar as the title was dated 11th January 1980 while the entry on the green card was 2nd December 1986. That the green card was opened on 26th December 1986.
35. DW1 also stated that he ceased being a director of the 7th Defendant in the year 2017 and that the Sale Agreement dated 20th September 2005 was signed by the administrators. Further that they had a confirmed grant though not in their list of documents.
36. It was DW1's further evidence that the entry dated 17th May 2005 indicated that the restriction had been removed and the search did not show an entry in favour Mumbu Holdings Limited.
37. On re-examination, he stated that the green card that was produced was edition No. 2 but that he had not brought a copy of edition No. 1 green card to court. That edition No. 2 was opened on 22nd December 1996 and was not aware of what happened to the other editions as there were embargos on the properties registered as Kilifi Chembe/Kibabamshe.
38. He also stated that when they did a search, the suit property was registered in the names of Samuel Mulewa, Benjamin Mulewa and Paul Chai Mulewa. That by the time they did a search the Mulewa's title was yet to be cancelled which was cancelled upon transfer.
39. He told the court that the entry in favour of the 6th Defendant had been cancelled by the time they were doing the transaction and that the title would not have been issued if there was no grant of letters of administration.
40. DW2 David Mulewa adopted his statement dated 16th May 2018 and stated that the 1st Defendant was his brother and that the 4th Defendant was deceased. He produced his list of documents as DEX No. 22 to 39. He stated that he had filed the said statement before the case against the 1st to 5th Defendants was withdrawn.
41. It was DW2's evidence that the title deed to land parcel No. Chembe/Kibabamshe/406 was issued in 1980 and was registered in the name of his late father and the 3rd and 4th Defendants. That between the years 1983-1984 there was an embargo on Chembe/Kibabamshe and so they were issued with a title deed on 1987. DW2 also stated that his father died in 1996 and that his estate was administered and sold the suit property to the 7th Defendant upon agreeing with his brothers. That when they conducted a search, the Land Registrar told them that there was an entry in the green card in favour of the 6th defendant which had been cancelled.



42. DW2 further told the court that the Land Registrar asked them to look for the 6th Defendant and when it was summoned, its directors did not go. He stated that the suit land measured 2.6 Hectares and that the 7th Defendant has built a hotel thereon.
43. Upon cross-examination by Mr. Kilonzo he denied that his father and two brothers ever sold the suit property to the 6th Defendant because at that time their father was ailing. He further denied that the signatures on the 6th Defendant's transfer belonged to his father and brothers. That in the year 1995 his father was admitted at Aga Khan Hospital therefore the title in the name of the 6th Defendant could not have been issued. He urged the court to dismiss the 6th Defendant's case as they regularly sold the suit land to the 7th Defendant.
44. Upon cross examination by Ms. Chepkwony, DW2 stated that the letters of administration were issued on 1st September 2005 and they sold the suit property on 20th September 2005. That the confirmed grant was not registered on the green card and that he had filed a restriction on 21st September 2005.
45. DW2 further testified that they went to the Land Control Board for consent and the transfer was signed by Mulewa, David Mulewa and Benjamin Mulewa as the administrators of the estate of his late father. That the search done on 14th May 2005 did not indicate or show there was a restriction and that he did not produced any document to show that his father was at Aga Khan Hospital.
46. Upon re-examination he stated that the transfer dated 3rd October 2005 had been signed by the sellers and the 7th Defendant and that they did not sell the property to any other person.
47. DW3 Benjamin Mulewa adopted his Witness Statement dated 10th May 2018 as part of his evidence and stated that they sold the suit property to the 7th Defendant and not the 6th Defendant.
48. On cross examination by Ms. Chepkowny, he stated that in the year 1995 there was no restriction on the property and that they did not obtain a confirmed grant of letters of administration. Upon re-examination, he stated that they were joint owners and any of them could appear before the Land Control Board.
49. DW4 Rufus Kalama also adopted his Witness Statement dated 10th May 2018 as part of his evidence and testified that in the year 2005 he was in charge of the Kilifi Land Registry. That he worked in the said office between 2004 and 2007 and was aware of land parcel No. Chembe/Kibabamshe/496.
50. DW4 further stated that he could not establish who made the entries on the green card in 1995, as he was not working at the said registry. That the entries are made by data entry clerks and verified by the Land Registrar before issuance of titles. It was his evidence that several advocates wrote to him with regard to the suit property and so he wrote to the 6th Defendant summoning it to explain as there were no supporting documents in the parcel file.
51. It was his evidence that the parcel file contains all the documents with regard to every transaction. DW4 told the court that he wrote a letter dated 22nd September 2005 indicating that there was no restriction on the suit property and later all the parties were summoned and the 6th Defendant sent a representative who did not have the supporting documents and so the entries remained invalid.
52. Upon cross examination by Ms. Chepkwony, he stated that his letter dated 22nd September 2005 was with regard to land parcel No. 387 and 406 which had problems and that his Assistant Elizabeth Thoya had the power to issue titles. That he later came to learn that a title deed had been issued. DW4 also stated that if the title issued to the 6th Defendant was cancelled, then it was cancelled by the person who had issued it. That the Land Registrar can cancel a title if the entries are not signed.



53. He also told the court he was not aware of the lifting of the embargo and that a Land Control Board consent presented to the Land Registrar after six months was still valid.
54. Upon further cross-examination by Mr. Kilonzo, he stated that as per the search done on 11th May 2005, there were no encumbrances on the suit property and that it showed that the land was registered in the name of Samuel Mulewa, Albert Mulewa and Francis Mulewa.
55. DW4 informed the court that any unsigned entry is invalid and does not confer any interest and reiterated that when a document is rejected, the entry would not be signed. That the 7th Defendant was registered as the owner on 30th May 2007 after the transfer dated 30th May 2007 was signed by Elizabeth Thuya.
56. Upon re-examination, he stated that the Mulewa family had not complained about the transfer of the property to the 7th Defendant and that the embargo was in place to rectify some mistakes that had been made.

6th Defendant's Submissions

57. Counsel for the 6th Defendant reiterated the evidence of the parties and submitted that the 6th Defendant was issued with a certificate of title, which title was protected under Section 28 of the Registered Land Act (now repealed).
58. Counsel relied on Republic v County Council of Olkejuado & 3 others Ex parte John Karumo Macharia & 4 Others and submitted that the 5th Defendant does not have any statutory power to revoke or cancel a title as the said power is vested with the court under Section 143 of the Registered Land Act (now repealed). The 5th defendant's actions were therefore *ultra vires*.
59. Counsel also submitted that the 6th Defendant was not heard before its title was cancelled and that no grant of letters of administration were produced by the parties to indicate that the 1st and 2nd Defendants had the capacity to sell the suit property.
60. Ms Chepkwony submitted that the actions of the 4th and 5th Defendants were null and void and relied on Sections 45 & 55 of the Law of Succession Act and the case of Wambui Otieno v John Ougo (1987-88) KAR; 1049 at page 1059.
61. Counsel also relied on the case of Attorney General v Ryan [1980] eKLR and submitted that the actions of the 5th Defendant contravened Article 47(1) and 50 of the Constitution.
62. It was counsel's submission that there was no grant of letter of administration therefore the sale and transfer was null and void and relied on the cases of Kariuki v Gatura [1981] KLR 247, Estate of Cyrus Kingori Ngothi alias Kingori Ngothi (Deceased) and Monicah Adhiambo v Maurice Odera Koko [2016]eKLR, and Estate of Jamin Inyanda Kadambi [Deceased]2021 eKLR
63. Counsel therefore urged the court to find that the title held by the 7th Defendant was acquired illegally, irregularly and through a corrupt scheme and the court should therefore invoke Section 80 (1) of the Land Registration Act.

7th Defendant's Submissions

64. Counsel for the 7th Defendant gave a background of the suit, a summary of the evidence and identified the following issues for determination;



- a. Who between the 6th defendant and the 7th defendant has a valid title to plot No. Chembe/Kibabamshe/406.
 - b. Whether the 6th defendant has a valid suit and claim against the title held by the 7th defendant.
 - c. Whether the 6th defendant has led evidence sufficient to be granted the reliefs sought in the counterclaim against the 7th defendant's title to plot No. Chembe/Kibabamshe/406
 - d. Who should bear the costs of the suit between the 6th and 7th Defendants.
65. On the first issue, counsel relied on the cases of *Hubuu Seif Mohamed v Sultana Fadhil & others* [2017] eKLR, *Munyu Maina vs Hiram Gathiba Maina* CA No. 234 of 2009, *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others* [2016] eKLR and submitted that the 7th Defendant had a better and valid title as it demonstrated how it acquired the suit property.
 66. Counsel for the 7th Defendant submitted that the evidence of the 6th Defendant on the acquisition of the suit property did not show all the processes and procedures that led to the purchase of the suit property. He submitted that from the evidence of PW1, PW2 and PW4, there was no valid sale of the suit property.
 67. With regard to the second issue, counsel submitted that the 7th defendant was a bona fide purchaser for value without notice and relied on the cases the cases of *Richard Kimani vs Saleh Mohamed Mwakuriwas & 5 others* [2022]eKLR, *Harrison Kiamubi Wanjiru & another vs District land Registrar & 3 Others* [2022]eKLR and further stated that the 7th Defendant conducted due diligence before purchasing the suit property and met the criteria to be considered as a bona fide purchaser for value.
 68. On the third issue, counsel reiterated that the 7th Defendant was the owner of the suit property as it purchased it from the registered owners. Counsel also submitted that DW2- Dr. David Malewa and DW4- Rufus Karema Kalama testified that entry No. 4 that indicated that the suit property was registered in the name of the 6th Defendant was not signed and was later cancelled.
 69. Mr. Kilonzo relied on the cases of *Samuel Odhiambo Oludhe & 2 Others vs Jubilee Jumbo Hardware Ltd & another* [2018] and *Richard Kimani vs Swaleh Mohamed Mwakuriwa & 5 Others* [2022]eKLR in support of his arguments.
 70. On the fourth issue, counsel submitted that the 6th Defendant was not entitled to the orders sought in his counterclaim and reiterated that the alleged manner of acquisition of the title to the suit property was improper, unprocedural and illegal. Counsel relied Section 37 of the *Registered Land Act* (repealed) which is replicated in Section 35 of the *Land Registration Act*.
 71. Mr. Kilonzo submitted that it is noteworthy that the 6th Defendant in this matter did not plead and raise any counter-claim against the 1st to the 4th Defendants who purportedly sold the suit property to the 7th Defendant and further that the 6th Defendant chose to proceed with its case against the 7th Defendant only and not the 1st to the 5th Defendants who were active players in the issuance of the title to the 7th Defendant.
 72. Counsel for the 7th defendant relied on *Arthi Highway Developers vs West End Butchery Ltd & 60 Others* [2012]eKLR and submitted that even though the 6th Defendant had set out the particulars of fraud in its counterclaim, the same were not proved and urged the court to dismiss the 6th Defendant's counterclaim with costs to the 7th Defendant.



1st 2nd and 3rd Defendants' submissions

73. Counsel for the 1st, 2nd and 3rd Defendants also reiterated the evidence by the parties, relied on Section 107(1) of the Evidence Act and submitted that that even though the 6th Defendant alleged that it purchased the suit property from the 1st 2nd and 3rd Defendants, , the requisite documents that include a sale agreement were not produced.
74. Mr. Mouko relied on Section 3(3) of the Law of Contract Act, Section 70 of the Evidence Act, the case of Aggrey Khajira Indeche vs Jonah Andaje Muchilimani [2018]eKLR and sought that their counterclaim be allowed.
75. This court notes that even though the 1st, 2nd and 3rd Defendants seek that their counterclaim be allowed, they did not prosecute it during the hearing as the matter proceeded between the 6th and 7th Defendants.

Analysis And Determination

76. This is a very old matter, which has been in different court corridors, namely Nairobi, Mombasa and Malindi since 2006 seeking for various reliefs. The issues for determination are as follows:
 - a. Whether the 6th Defendant acquired the suit property procedurally and lawfully from the 1st to 4th defendants.
 - b. Whether the cancellation of the 6th Defendant's title for land parcel No. Chembe/ Kibabamshe/406 was procedural.
 - c. Whether the 7th Defendant's title was acquired procedurally.
 - d. Who pays the costs of the suit?
77. As earlier stated, this case has a protracted history and has seen better days in court with many cases and applications in respect of the suit land. This case was filed by the Plaintiffs on 25th January 2006 in Mombasa as HCC No. 12 of 2006, was later transferred to Malindi High Court and given case No HCC No 69 of 2006 and finally transferred to Malindi Environment and Land Court as ELC Case No. 210 of 2017.
78. The Applicant filed an application for a temporary injunction against the Defendants which was granted on 27th January 2006 but the same was later discharged upon an application by the 7th Defendant on 21st November 2006. In the said ruling Justice Ouko (as he then was) stated that “ both properties are registered in the names of the 1st to 4th Defendants and Samuel John Mulewa , the deceased , as proprietors in common in equal undivided shares”
79. The Plaintiffs also filed Malindi Misc Application No. 27 of 2012 formerly Nairobi Misc. Application No 1220 of 2009) against the 6th and 7th Defendants for cancellation of title but the same was dismissed for non-disclosure that this case was pending before the court. It should also be noted that the 6th Defendant filed case No. 78 of 2006 which it voluntarily withdrew with costs to the defendants.
80. Similarly, the Plaintiffs on 22nd October 2018 filed a Notice of Discontinuance of the suit against the 1st to 5th Defendants which was endorsed by the court on 24th October 2018. The suit therefore proceeded between the 6th and 7th Defendants.
81. Having laid that background, it was the 6th Defendant's case that it purchased the suit property from Samuel John Mulewa, Paul Mulewa and Benjamin Chai Mulewa in the year 1993 at a consideration of



- KShs 1,000,000/=. It was also the 6th Defendant's case that the vendors executed a transfer in its favour on 12th May 1993 and was issued with a consent on 22nd September 1994 and was later issued with a title deed.
82. The 6th Defendant further stated that in the year 2007, it was surprised to learn the suit property was now registered in the name of the 7th Defendant therefore filed a counterclaim against the 7th Defendant for cancellation of the said registration.
83. The 7th Defendant's case on the other hand was that it purchased the suit property from Benjamin Mulewa, David Mulewa and Paul Mulewa after conducting due diligence. That its directors entered into the land sale agreement dated 20th September 2005, executed the transfer and got the Land Control Board consent and was later issued with a title deed to the suit property.
84. On the first issue as to whether the 6th Defendant acquired the suit property procedurally or at all, it is on record that the 6th Defendant and its witnesses being Mr Kupalia and Mr. Lughanje advocates who handled the transaction stated that there was no sale agreement to the transaction as it was a direct transfer as per the words of Mr. Kupalia. The 6th Defendant stated that he paid the money and the vendors signed the transfer.
85. PW2 and PW4 the two advocates who handled the transaction gave contradictory evidence as to whether there was a sale agreement or not. Mr. Kupalia told the court that there was no sale agreement while Mr. Lughanje stated that there was a sale agreement that was never produced in court. The other contradiction is how the money was paid to the vendors. The 6th Defendant stated that he gave a cheque to the advocate who paid cash to the vendors. PW4 told the court that they went to Standard Bank where the vendors each had an account, money was transferred to them, and he witnessed the same. Evidence full of contradictions puts such testimony to credibility test as was held in the case of *Coast Water Services Board v Juma Abdalla Vitu & 4 others* [2018] eKLR.
86. It should be noted that this assertion was not backed by documentary evidence like, a copy of the cheque, cheque number, the transaction details of the transfer to the vendors 'accounts, sale agreement, banking details of the vendors and the purchaser, acknowledgment of the monies received by the vendors. It is unusual for any party to a transaction to part with either small or colossal sum of money for purchase of anything moreso land without getting a payment receipt or acknowledgment even if you are buying from your own mother. The anomalies in this transaction begun with a lack of entering into a written agreement. The 6th Defendant and its witnesses stated that the parties had agreed and that is why they got a transfer form signed but the same was never registered.
87. The 1st to 4th Defendants also denied having entered into a sale agreement with the 6th Defendant and further denied that they received any money from the 6th Defendant. There was no evidence of payment or receipt. It is telling that the 6th Defendant produced copies of a company resolution, affidavit by Henry Lughanje, copy of transfer of land, letter of consent, copy of title deed, bundle of copies of green card entries no. 1 to 13 submissions to the Chairman National land Commission, statement by John Kariuki, and statement of Mr. Kupalia, but never produced the initial documents like a Sale Agreement, acknowledgment of payment of the purchase price, receipts if any for payment of stamp duty.
88. The question is, what were the terms of the agreement if at all it was there, and if so was the purchase price paid in full or by instalments and to whom. The 6th Defendant failed to answer these questions which is the root of the title and the process he used to get the title that he held.



89. In the case of *Munyū Maina –v- Hiram Gathiba Maina* (2013) eKLR, the Court of Appeal expressed itself as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of the title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

90. Similarly in the case of *Esther Ndegi Njiru & Another v. Leonard Gatei* (2014)e KLR Mutungi J held that:

“Whereas the law respects and upholds sanctity of title the law also provides for situations when title shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40(6) of the *Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of the *Constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the title.”

91. Further in the case of *Mohamed v Fadhil & 2 others* (Environment & Land Case 68 of 2016) [2022] KEELC 3278 (KLR) (26 July 2022) this court held that:

“When parties claim to have two titles in respect of the same parcel of land then investigations into the root of such titles must be carried out. A party must prove that the process that culminated into the issuance of such title was legitimate and legal. That all the requisite steps were followed and adhered to before the title was issued.”

92. It was incumbent upon the 6th Defendant to carry out due diligence, carryout a search and be satisfied that the suit land was registered in the names of the purported vendors, get a copy of the title and ensure that all the processes were done procedurally and thereafter carry out a search after registration to confirm that it had been properly registered as an owner. The 6th Defendant never produced any search before or after registration as an owner of the suit land.

93. In the case of *Daudi Kiptugen Vs Commissioner of Lands & 4 Others* [2015] eKLR the Court held that:

“...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 a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a 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.”



94. With many cases of fraud and double allocation, a purchaser has to go beyond the normal due diligence of getting a search from the land registry. Sometimes the fraud starts with the vendors and it has now also reared its ugly head in our land registries where you can never be sure whether the title you are holding or dangling is a genuine one or fake until it is challenged.
95. In the case of ELC Reference No. 1 of 2018 – *In the Matter of Drive In – Primary School & Ruaraka School – Versus – the National Land Commission & 11 others*” the court held:-
 “An official search on any title at the land registry is very important before one can act on it. The search indicates the owner (s) of a particular property and the encumbrances or other relevant entries registered against that land. Once a search is issued by the Lands Office, it should be conclusive evidence of proprietorship in light of the fact that our title registration system is based on the Torrens System of registration. However, a search may not always be a true reflection of the position.On Torrens System of registration. It is necessary for one to take further steps to ascertain the authenticity of the search and ownership of land. If the Applicant had bothered to delve into history of the title. It would have discovered that the title had two mortgage besides the entries in the register.....or any other overriding interest affecting the land they wish to transact on. In light of the foregoing our finding is that a search is not conclusive evidence of ownership. One needs to go further than a mere search”
96. In the case of *Hubert L. Martin & 2 Others –vs- Margaret J. Kamar & 5 Others* (2016)eKLR the court stated as follows:
 “A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such a litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over a similar document and there is therefore no advantage in bringing one’s case solely on the title document that they hold. Each party must show that their title has a good foundation and passed properly to the current title holder”
97. I find that the Plaintiff fell short of proving that it acquired the title to the suit land procedurally as the basics to prove the root of the title were missing and this leads me to the next issue as to whether the 6th Defendant’s title was cancelled procedurally.
98. On the issue whether the 6th Defendant’s title was cancelled procedurally, the evidence on record enumerated above indicate that there were some anomalies in the issuance of the said title. First and foremost having found that the 6th Defendant did not establish the root of its title due to lack of basic requirements and documents leading to the issuance of the title, it follows that the 6th Defendant will also have a bumpy ride in proving the indefeasibility of such a title.
99. As earlier stated and admitted by the 6th Defendant that there was no Sale Agreement between it and the 1st and 4th Defendants, it is also on record that the presentation book at the lands registry had no number, the transfer form was not signed by the Land Registrar, the Land Control Board consent dated 22nd September 1994 indicated that the acreage was 2.4 hectares whereas it the title was for 2.6 hectares. PW2 stated that the transfer form did not indicate the acreage as the 6th Defendant was



- purchasing the whole parcel of land. This is not feasible as the acreage has to be indicated for precision of what a party is purchasing, the purchase price and for stamp duty purposes.
100. DW 4 a Land Registrar told the court that entry No. 4 and 5 in the green card showing Mumbu Holdings Limited as having a title was not signed by the Registrar and had no supporting documents to back up and authenticate the said entries. It was DW4's evidence that the entries in a register are done by data entry clerks and the Registrar has to verify and sign the same before it can have legal effect. Further that if the entries are not signed or endorsed by the Land Registrar, it implies that the documents were rejected.
 101. DW4 also told the court that he realized that there were no supporting documents to back up the registration of the 6th Defendant hence wrote to the 6th Defendant to avail the same but it did not do so. It follows that the parcel file of the suit land did not have supporting documents for the registration of the 6th Defendant
 102. PW4 Mr Lughanje Advocate also told the court that he appeared on behalf of the 6th Defendant at the lands Registry but did not have the supporting documents to authenticate the transfer.
 103. The Land Registrar told the court that an entry which is not validated by the Registrar is invalid hence cannot be considered as giving proprietary rights to the recipient. The purport of the entry that was never signed is that the 6th Defendant's title was a nullity and did not amount to one that would give him any right over the suit property.
 104. It is trite that a title is a product of process and that the transactions on a transfer of a title are filed in the parcel file. The Land Registrar told the court that in this current case the parcel file of Plot No. Chembe/Kibabamshe/406 had no transfer documents from the Mulewa's to the 6th Defendant. He clarified that if an entry is not signed, the title is doubtful until the owner produces documents in support of the entry.
 105. In the case of *Japhet Nyawade Chessah –vs- Daria Nekesa* (2016)eKLR the Court of Appeal held that:

The Land Registrar could not trace any official copies. Indeed the evidence of the Land Registrar was that entry No. 2 transferring the suit land was made in error and was not signed and was immediately cancelled. The import of evidence of the Land Registrar is that Entry No. 2 is not an official entry of transfer of the suit and from the deceased to the appellant and hence the appellant was not by that entry registered as the proprietor of the suit land. The entry having been officially cancelled could not have vested the appellant absolute ownership of land in terms of section 27 (now repealed) of the Registered Land Act. By Section 142 (1) of the Registered Land Act, the Registrar had power to rectify the Register and by Section 37(3) entries or notes made in or any register is conclusive evidence of the matter or transaction it records.”
 106. Since the Registrar did not endorse the entry, the issue fell under Section 79 (2) of the *Land Registration Act*, which gives the Land Registrar the power to rectify or direct the rectification of a register or document. The above case is similar to this case where the entry having not been signed was not an official entry of transfer of the suit land to the 6th Defendant hence it could not give proprietary rights. The Registrar was therefore under an obligation to cancel the entry after calling for the supporting documents, which were never produced at the lands office.
 107. The issue as to whether the 7th Defendant acquired its title procedurally, the 7th Defendant led evidence on how they entered into a sale agreement with the 1st to 4th Defendants. He produced amongst other documents a sale agreement dated 20th September 2005, title deed for the suit land dated 28th July



2007, certificate of official search dated 28/7/07, consent letter dated 26/10/06, clearance certificate dated 27/11/06. Valuation requisition for stamp duty dated 12/10/05, stamp duty assessment and payment form dated 13/10/05, transfer of land form dated 3/10/05, Report dated 23/11/11 to Chief Land Registrar by Land Registrar, certificate of official search date 11/5/05, letter from the Ministry of Lands by the District Land Registrar to Michicuki & Co Advocates dated 2/12/05, letter addressed to Mulewas, and Mumbu Holdings Ltd dated 13/1/06 for removal of caution, letter from the Ministry of lands to District Land Registrar Kilifi dated 10/2/12.

108. The documents produced and the evidence tendered on the process of acquisition of the suit land was in a bid to establish the root of the title in the 7th Defendant's name. This evidence was not controverted by the 6th Defendant or its witnesses who gave contradictory testimonies as to how the 6th Defendant acquired its title. The 1st to 4th Defendants also corroborated the 7th Defendant's case and especially the Land Registrar who stated that the at the time the 7th Defendant was registered as an owner there was no encumbrance and that the 6th Defendant's title had been cancelled.
109. Section 26 (1) of the [Land Registration Act](#) of 2012 provides that:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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.

110. There was no evidence led by the 6th Defendant that the 7th Defendant's title was procured fraudulently, through misrepresentation or unprocedurally. In the case of [Kinyanjui Kamau v George Kamau Njoroge](#) [2015] eKLR, the Court of Appeal held as follows:

‘In this case, fraud cannot be imputed on the part of the respondent by the mere fact that the record in relation to the subject property was missing at the Lands Registry. To succeed in the claim for fraud, the appellant needed to not only plead and particularise it, but also lay a basis by way of evidence, upon which the court would make a finding. In the present appeal, there is no such evidence, and the courts below rightly came to the conclusion that the appellant had not made out a case for the grant of the orders he sought’.

111. The 6th Defendant pleaded the particulars of fraud against the 5th Defendant who is the Land Registrar for illegally cancelling its title. It is on record that the suit against the 5th Defendant was withdrawn and therefore the claim against the 5th Defendant is not sustainable as they are no longer a party to the suit. The 6th Defendant chose to proceed with the counterclaim against the 7th Defendant and therefore the matter was between the 6th and 7th Defendant. The 6th Defendant could have objected to the withdrawal of the suit against the 5th Defendant as it had a claim against it.
112. It follows that alternative prayers against the 5th cannot stand as the 5th Defendant did not have an opportunity to defend itself. There was also no counterclaim against the 1st to 4th Defendants who purportedly sold the land to the 6th Defendant.



113. I have considered the pleadings, the evidence on record, the documents produced, submissions by counsel and the relevant authorities and find that the 6th Defendant's case lacks merit and is therefore dismissed with costs to the 7th Defendant who is the legally registered owner of the suit land.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF NOVEMBER 2023.

M.A. ODENY

JUDGE

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

