



**Miroro v Nyarumi & 5 others (Environment & Land Case 23 of 2019)
[2023] KEELC 21533 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 23 OF 2019**

**M SILA, J
NOVEMBER 15, 2023**

BETWEEN

MELLEN KEMUNTO MIRORO PLAINTIFF

AND

SAMUEL MANGUTI NYARUMI 1ST DEFENDANT

THE DIRECTOR OF SURVEY 2ND DEFENDANT

THE LAND REGISTRAR KISII COUNTY 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

THE NATIONAL LAND COMMISSION 5TH DEFENDANT

THE HON. ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

(Both plaintiff and 1st defendant having title to the disputed land; plaintiff asserting that her title is a good title as she purchased the land from the previous proprietor who was alleged to have been the first allottee of the land; the 1st defendant on the other hand contending that it was him who was allotted the land; the vendor of the plaintiff's title giving evidence to support the assertion that it was him who was allotted the land; however, no evidence of payment of the amounts noted in the allotment letter; Lease purportedly issued to the vendor also showing a date of registration that comes prior to the execution of the Lease; signature of the vendor also not attested; in those circumstances, no valid leasehold title issued to the vendor; on the other hand, 1st defendant demonstrating that he paid the monies in the allotment letter by exhibiting the banker's cheque and receipt; court persuaded that 1st defendant has the better title; whether plaintiff may be protected as she was a purchaser; since vendor had no valid title, he had no title to pass; nemo dat principle also applicable to sales of land; whether doctrine of innocent purchaser for value without notice may



apply; court of opinion that the doctrine cannot apply to land that has an invalid title; it matters not that the purchaser is an innocent purchaser for value without notice; title of the plaintiff cancelled and that of the 1st defendant upheld)

A.Introduction And Pleadings

1. This suit was commenced through a plaint filed on 27 June 2019. In the plaint, the plaintiff pleaded that the suit property, which is Kisii Municipality/Block I/836, was allocated to one Tom Nyagami Gai, who was later issued with a Certificate of Lease by the Commissioner of Lands upon making requisite incidental payments, and thus became the lawful owner of the suit property. The plaintiff pleaded further that she later on entered into a land sale agreement with the said Tom Nyagami Gai who transferred the suit property to her through a legal process that culminated into her being issued with a Certificate of Lease. She averred that notwithstanding the foregoing, the 1st defendant, Samuel Manguti Nyaruti, had in collusion with the 2nd, 3rd and 4th defendants (respectively, the Director of Survey, the Land Registrar Kisii, and the Chief Land Registrar) who are officers of the 5th defendant (the National Land Commission) fraudulently generated in his favor a new lease instrument in respect of the suit property, which lease instrument was issued long after the sale, transfer and registration of the suit property in the name of the plaintiff. She thus contended that the Green card, title instrument and Certificate of Lease issued in favor of the 1st defendant in respect of the suit property amounted to an infringement of her property rights and was fraudulent unlawful and illegal. She decried that as a result of the fraudulent actions of the 2nd, 3rd, 4th and 5th defendants in collusion, with the 1st defendant, she as the legitimate owner of the suit property, by virtue of being a bonafide purchaser for value, has been denied the benefits of the suit property and consequently she has suffered loss. She pleaded that she discovered the fraud in August 2018 when the 1st defendant laid claim to the land contending that it belongs to him.
2. In this suit, the plaintiff seeks the following orders :-
 - (i). A declaration that the transaction and/or entry entered and/or endorsed in the register of LR Kisii Municipality/Block1/836(hereinafter referred to as ‘the suit property’) on the 5th day of April, 2017, contrary to and in violation of the rights of the plaintiff, were fraudulent unlawful, illegal and void.
 - (ii). An order for cancellation and/or nullification of the name of the 1st Defendant as the registered proprietor of the suit property together with all title instruments, inter-alia the Green Card and the Certificate of Lease bearing the name of the 1st defendant.
 - (iii). An order of rectification of the register in respect of the suit property, and in particular restoration of the name of the plaintiff as the bona fide and legitimate owner thereof.
 - (iv). Permanent injunction restraining the 1st defendant either by himself, servant and/or anyone claiming under him from trespassing onto, encroaching upon, building, fencing selling, charging, leasing, sub-dividing, alienating, interfering with and/or in any manner dealing with the suit property and any portion(s) thereof.
 - (v). General damages for fraudulent and unlawful interference with the plaintiff’s peaceful and/or peaceable occupation of the suit property.
 - (vi). Aggravated/exemplary, damages for fraud.
 - (vii). Costs of the suit.



(viii). Such further and/or other relief as the honorable court may deem fit and expedient so to grant.

3. In response, the 1st defendant filed a statement of defence and counterclaim against the plaintiff. He asserted that he is the one who holds the genuine Certificate of Lease in respect of the suit property. He pleaded that the mentioned Tom Nyagami Gai had no legal interest in the land and could not dispose the suit property to anybody as he generated fake documents that could not generate a valid title. He pleaded that he was allotted the suit property by the Commissioner of Lands vide an allotment letter dated 12 March, 1997 which he duly paid for within the stipulated period and he subsequently became registered as proprietor of the suit property. He pleaded that survey was undertaken and completed and beacons were placed on 12 November 2008 and he was issued with a beacon certificate. He averred that for some unknown reasons the Lands Office file went missing. Subsequently he reported to the Divisional Criminal Investigations Department (CID) and investigations were undertaken which culminated in a report dated 21 October 2011 addressed to the Commissioner of Lands. He avers that it was discovered that one Tom Nyagami had through fraud transferred the suit property into his name. He contended further that it was the duty of the Plaintiff to undertake due diligence before purportedly purchasing the suit land. He added that by the plaintiff not joining the said Tom Nyagami in the suit, the plaintiff was by all means condoning the deficiency and/or the illegality of Tom Nyagami's alleged title. In the counterclaim, the defendant seeks the following orders:-

- (a). A declaration that the allotment letter issued to him on 12 March 1997, the Lease dated 24 May, 2016, and the Certificate of Lease issued on 5 November, 2017, are the only valid documents in respect of the suit property.
- (b). An order of permanent injunction restraining the plaintiff from either by herself, her agents and/or anybody claiming through or under her, from entering into any dealings over the suit property or trespassing into it.
- (c). Costs of the suit.
- (d). Any other relief this Honourable Court may deem fit and just to grant.

4. The plaintiff filed a reply to the 1st defendant's defence and counterclaim, where she more or less joined issue with him.

5. The 2nd, 3rd, 4th and 6th defendant (6th defendant being the Attorney General) entered appearance through the State Law Office but did not file any defence. The 5th defendant (National Land Commission) did not enter appearance nor participate in the suit.

B. The Evidence of The Parties.

i The plaintiff's case

6. The plaintiff testified as PW1. She is a business woman who is engaged in the business of selling clothes. She relied on a pre-recorded witness statement and also orally testified in court. Her evidence was that she purchased the suit property from the previous proprietor, one Tom Nyagami Gai, upon carrying out a search and confirming that the same belonged to him. They wrote a sale agreement dated 5 September 2008 which shows that she purchased the suit property for Kshs. 330,000/=. The property was then transferred to her and she proceeded to develop it in the year 2015. She made a storey building which has tenants who pay her rent. However in 2017 issues emerged wherein she was told that the suit property did not belong to her which is what led her to file this suit. She produced as exhibits various



documents relating to the title of Tom Nyagami Gai, the sale agreement and documents indicating that she now holds title to the suit property in her name.

7. PW2 was Tom Nyagami Gai. He works with the County Government of Kisii. He testified that he applied to be allotted the suit property in 1997 and was issued with an allotment letter. He had the original with him which he produced as an exhibit. He testified further that the allotment letter had conditions for payment, which he complied with, and he was issued with a Lease instrument in December 2004. He had the original of this Lease instrument which he produced as an exhibit. He took possession of the land and planted trees and made some temporary mabati structures in the year 2004. He testified that he used to pay rates and produced the receipts to that effect. He followed up on amendment of the Registry Index Map, which was done. In the year 2008, he decided to sell the land to the plaintiff. He applied for, and obtained, consent to transfer, from the Municipal Council of Kisii, which he referred to, before transferring the land to the plaintiff. The plaintiff took possession and built a storey building thereon. He testified that the plaintiff is still in possession and she is the rate payer of the property. He more or less asserted that he obtained good title to the suit property which he transferred to the plaintiff.
8. Cross-examined, he testified that he did apply to be allotted land though he did not have the said letter. He did not obtain a letter of offer from the Municipal Council. He testified that the Municipal Council would meet before allocating land. He did not have the minutes which allotted the land to him. He affirmed that his allotment letter was for land that had already been surveyed and specified the parcel 'Block I/836'. He stated that the land had been surveyed on 12 March 1997. There was no plan number in the allotment letter and no PDP attached to it. He averred that he wrote a letter of acceptance though he did not have a copy of it. He testified that he left the letter in the office of the Commissioner of Lands and did not make a copy for himself. He acknowledged that he was to make payment for the allotment within 30 days. He claimed that he made the payment, but he did not have the payment receipt. He stated that he paid by cash, and not by cheque, and that he made the payment in April 1997 in Ardhi House, Nairobi. He claimed that they did not give him a receipt but informed him that they would forward the receipt with the Lease instrument. He acknowledged that there was to be survey fees of Kshs. 2,450/= to be paid but he did not pay this. He affirmed that he got title reading 0.0405 Ha though the allotment letter showed 0.0465 Ha. The commencement date of the Lease in the allotment letter was 1 July 1995 but the lease showed commencement date to be 1 March 1997. He acknowledged the difference. Cross-examined on his lease instrument, he conceded that it has no seal of the Commissioner of Lands. He testified that it was signed on 8 June 2005 by the Commissioner of Lands though it shows that it was registered on 6 December 2004. His position was that he was given the document as it is. He could see that his lease instrument bore no stamp indicating the date of registration. His signature in the Lease instrument was not attested. He stated that the same was registered by one Owuor, Land Registrar. He testified that he was shown the plot by a surveyor called Nyakango. He thought that he was given the beacon certificate but he did not have a copy of it. He had a letter relating to amendment of the Registry Index Map dated 16 August 2007. That letter shows that survey was done for the plots numbers Kisii Block I/836 – 841 (new grants) with all the plots measuring 0.0421 Ha save for the Plot No. 841, measuring 0.0495 Ha. The survey plan was F/R No. 271/39. He affirmed that he sold the land to the plaintiff on 5 September 2008 for Kshs. 333,000/= and stated that he was paid in cash. The transfer instrument however showed Kshs. 33,000/=. The signature of the plaintiff in the transfer instrument was put to him and he conceded that it looks different from her signature in the verifying affidavit. The register (White Card) bearing his name was put to him. He affirmed that it was opened on 6 December 2004 when his lease was registered; it shows the land as measuring 0.0465 Ha. He acknowledged not being able to explain the discrepancies in the size of the land.



9. With the above evidence, the plaintiff closed her case.

ii Defence Case

10. DW1 was Samuel Manguti Nyarumi the 1st defendant. He worked as a Provincial Transport Officer with the Kenya Police before retiring in 2016. His evidence as adduced in court and in his witness statement was as follows: That on 12 March 1997, he was allotted an unsurveyed residential Plot No. 10 in Kisii Municipality, measuring 0.0465 Ha, for a term of 99 years with effect from 1 July 1995. He stated that on 4 April, 1997 he paid the monies in the allotment letter being a sum of Kshs. 10,810/= by way of a banker's cheque which cheque was accompanied by a letter of acceptance. He was duly issued with an official receipt. He had the allotment letter, a copy of the banker's cheque, the acceptance letter, and receipt acknowledging this payment. On 12th October, 2008 he was duly shown beacons of the suit property and a Beacon Certificate was issued to him signed by the District Surveyor. On 25 March, 2011, he made a follow up in Nairobi regarding his title as he had gotten wind that some persons had embarked on a move to develop the suit property and he filled a 'Customer Inquiry Form.' He also reported to the CID, Kisii who wrote a letter to the Commissioner of Lands on 13 April 2011. They went to the site, in company of the District Surveyor and the police, and they found it being prepared for development. The workers at site called the alleged owner and Tom Nyagami Gai emerged and identified himself. At the CID offices the following day, the plaintiff came and identified herself as the owner. The CID completed their investigations and wrote a report dated 21 October 2011 to the Commissioner of Lands pointing out anomalies on the title of Tom Nyagami. On 6 September 2016, his lease was forwarded to the Kisii Lands office for registration. He executed the Lease instrument and it was duly registered on 4 April 2017 upon which he was issued with a Certificate of Lease on 5 April 2017.
11. Cross-examined, he reiterated that he got an allotment letter for an unsurveyed plot upon application, though he did not have the application letter. He was not aware if there was any advertisement for allocation of plots. He was not sure whether the County Council of Kisii had held a meeting to allot him the plot. He did not have minutes of the allocation. He wrote the letter of acceptance on 3 April 1997. He had the original of this letter of acceptance, explaining that he picked it up from the Lands office in 2014, when he was following up on his lease. It has a stamp bearing the words 'Cancelled'. He did not ask why it bore this stamp. Part of the monies in the allotment letter, which he paid for, included survey fees. The allotment letter does not show the County Council allotting the land. The size indicated therein was 0.0465 Ha as an unsurveyed plot with a term of 99 years from 1 July 1995. The allotment letter had an attached PDP though he could not see a stamp from the Physical Planning Department on it. He stated that survey was done on 12 November 2008. Up to this time, the land was unsurveyed and he was yet to take possession. It was during survey in 2008 that he first went to the land. Thus, he had not been to the land from 1997 when the land was allotted till 2008. He found some people digging foundation trenches and he reported to the CID. It was in 2008, that the suit land was allocated the Plot No. 836. The Lease instrument was thereafter processed. He could see that it is dated 24 May 2016. He signed it on 5 April 2017. It bears the registration date of 4 April 2017. The term of the lease is 99 years from 1 March 1997 though he could see that his allotment letter has a term of 1 July 1995. He could not explain the discrepancy. The lease shows the land to be 0.0421 Ha, though the allotment letter shows 0.0465 Ha. He affirmed that he never took possession of the land. After the survey in 2008, he next went to the land in 2013, five years later. At this time, he still hadn't gotten a lease. He stated that he used to follow up with the Lands office Nairobi, and they would tell him to go and see what is on the ground. In 2013, he saw a house being built on the plot, but never applied to stop construction. In 2014 he found a developed building on the land but did not know who had developed it. He did not inquire who built it and did not go to the County offices to complain. At this



time he still had not got a lease since he got it in 2017. He did not tell the Lands office that the plot is already developed. When he received and signed the lease, he already knew that the plot had been developed. He did not proceed to evict the person in possession. It was in 2011 that he made a report that someone was developing the land and it is upon his complaint that a letter was written by the DCI. Tom Nyagami Gai emerged with a title, thus, in 2011, he was aware that somebody else was claiming to have title to the land. He did not file a case against the person. What he did was record a statement with the DCI in 2011 and he left it at that. He was cross-examined on when he discovered the fraud. He stated that he discovered the fraud in 2008. It was in 2011 that he discovered that the land had been sold to the plaintiff. He now changed to say that it was in 2011 that he discovered the fraud and reported to the CID. He did not use the land after getting title in 2016. He went to the County offices to find who the rate payer was and he found it was Tom Nyagami Gai.

12. With the above evidence, the 1st defendant closed his case. The State Law office did not call any witness.
13. I invited counsel to file submissions, which they did, and I have taken note of the submissions filed.

C. Submissions of Counsel

i Plaintiff's Submissions

14. Mr. Mulisa, learned counsel for the plaintiff, inter alia submitted that the suit property was legally and procedurally allotted to one Tom Nyagami Gai who eventually sold it to the plaintiff herein. Counsel argued that Mr. Nyagami, who was allotted the land on 12th March, 1997 by the Kisii Municipal Council upon making a payment of Kshs. 10,810 as requisite fee as was conditioned in the allotment letter, was issued with a lease and a lease certificate for the property by the 3rd defendant. Counsel contended that Mr. Tom Nyagami by virtue of being registered as the proprietor became vested with rights over the suit property in exclusion of everybody including the defendants. Counsel contended too that the title of Mr. Tom Nyagami was protected by sections 24, 25 and 26 of the Land Registration Act. He submitted that Mr. Nyagami rightfully sold and transferred the suit property to the plaintiff through a valid sale agreement upon obtaining the consent of the Municipal Council of Kisii. He argued further that in as much as 1st defendant had in his counter claim dated 30th September, 2019 claimed that he apportioned fraud on the part of Mr. Tom Nyagami and the plaintiff, he did not provide proof to his fraudulent claim to the required standard and he referred to the standard of fraud as outlined by the Court of Appeal in the case of Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR. Counsel submitted further that in as much as the 1st defendant had claimed that he was lawfully and procedurally allotted the suit land on 12 March, 1997, and that he had complied with all conditions on the allotment letter, he did not take possession and occupation, and pointed out that he first visited the suit property in 2008 and that he found Tom Nyagami was already in occupation of the same. Counsel also reiterated the 1st defendant's evidence that he did not complain to the Lands office. He pointed out that the 1st defendant does not pay rates for the property. He also submitted that the 1st defendant did not avail any minutes from the Municipal Council on the alienation of the property. He pointed out that the allotment letter showed the stamp 'Cancelled.' Counsel submitted that upon alienation of the property to Tom Nyagami the same could not be alienated again to the 1st defendant unless the first allocation was cancelled. He referred to the case of Paul Victone Otieno vs George Asuke & 2 Others [2022] eKLR which supports the position that once land is allotted, the same cannot be allotted a second time. In conclusion, he submitted that the plaintiff had proved his case against the defendants and thus was entitled to the prayers sought in his complaints as against them.



ii The submissions of the 1st defendant

15. For the 1st defendant, Mr. Ogado, learned counsel, raised a preliminary objection that this Court has no jurisdiction to hear and entertain this suit because the lease instrument that was issued to Tom Nyagami did not meet the requirements of Section 3(3) the *Law of Contract Act* and section 38 of the *Land Act*, 2012. He urged that the signature of Tom Nyagami was not attested as required by law and thus there was no enforceable contract disposing the suit property to Tom Nyagami. He referred to various authorities on the need for attestation. Counsel also submitted that the suit property was not lawfully and procedurally allocated to Tom Nyagami. He pointed out that the allotment letter did not have a Physical Development Plan (PDP) attached to it as was mandatorily required under the repealed Government *Land Act*. He added that in as much in the allotment letter showed the Plot being allotted as No. 836, this could not be, as the said number was assigned later. He underscored that the plaintiff did not tender sufficient evidence to prove that Tom Nyagami had complied with all conditions in the letter of allotment, particularly payment of the monies noted in the said allotment letter. He was of view that the allotment letter to Tom Nyagami was a clone of the letter of allotment issued to the 1st defendant. He therefore urged this court to find that the allocation of the suit property to Tom Nyagami, if at all, was illegal and unprocedural, and thus the said Tom Nyagami could not in turn transfer good title to the plaintiff. He submitted that acquisition of title by Tom Nyagami was fraudulent and that he used his position in office to influence the cloning of the Letter of Allotment and engineered the purported cancellation of the letter of acceptance of the 1st defendant. On the sale to the plaintiff, counsel submitted that the 1st defendant had nothing to sell and referred to the maxim *ex nihilo nihil fit* (nothing comes from nothing) and relied on the decision on *Embakasi Properties Limited & Another v Commissioner of Lands & Another* [2019] eKLR where this principle was expounded. He added that the plaintiff did not meet the strict requirements for one to be regarded as a bonafide purchaser of value without notice as they were exemplified in the decision of the court of Appeal of Uganda in the case of *Katende vs Haridar* [2008] 2 E.A 173. Counsel urged that 1st defendant had proved to the required standard his counterclaim and that his title is protected. He submitted that the 1st defendant had demonstrated the root of his title starting from the letter of allotment to issuance of the lease. He submitted that the import of the letter of acceptance and compliance with the terms of the letter of allotment was to bring to fore a legitimate expectation that the allotment could only be revoked procedurally. He submitted that the alleged cancellation endorsed in the letter of acceptance was thus illegal and unconstitutional. He submitted that the 1st defendant is entitled to the prayers in the counterclaim as he had proved the fraudulent title of the plaintiff. He submitted that the 1st defendant is entitled to the orders of cancellation of the title of the plaintiff and referred to various authorities on fraud and cancellation of a fraudulent title including the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another* [2013] eKLR, *Republic vs Minister of Transport & Communications & 5 Others ex parte Waa Ship Garbage Collector & 15 Others* [2006] eKLR and *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* [2015] eKLR.
16. I have considered these submissions to the fullest before arriving at my disposition.

D. Analysis And Disposition

17. Let me start by addressing the so called ‘preliminary objection’ raised by counsel for the 1st defendant, which I find completely misplaced, if not outrightly frivolous. It claims that this court has no jurisdiction to hear the dispute. That assertion is based on the argument that the lease of the plaintiff was not attested. It is clear that counsel is confusing jurisdiction with legality of a document. Jurisdiction is the power given by law to a court to determine a particular kind of dispute. In exercise of its jurisdiction, the court will assess the legality of any document presented before it. Now, if it is an



argument that the document does not pass the test of legality, the court will pronounce itself as such in exercise of its jurisdiction. One cannot contend that since a document has no legality then this ousts the jurisdiction of court. It is an extremely illogical argument which I do not wish to engage myself further in. The long and short of it is that this court has jurisdiction to hear and determine this dispute given that it is a case for the determination of title to land. There is really no point of saying any more on this argument.

18. What is in dispute is whether the proper title to the suit land is that held by the plaintiff or that held by the 1st defendant. It is another sad situation where two people contend to have title to the same land, a position that is completely untenable in law, for one parcel of land can only have one legal title to it. It is extremely unfortunate that courts are inundated by such disputes which can easily be avoided by having a proper land administration and registration system that is free of corruption and underhand dealings. It is my hope that such cases are going to be a thing of the past. That is however the situation that we find ourselves in and this court thus has to make a decision regarding the two titles that have presented themselves in this dispute.
19. It is certainly not sufficient for either party to dangle the Certificate of title, for the other party also has the same instrument. The formula in unlocking such disputes is to get to the root of title as pronounced in the case of *Hubert L. Martin & 2 others v Margaret Kamar & 5 others*, Nakuru ELC No. 98 of 2012 [2016] eKLR.
20. In conformity with the above principle, let me assess the root of the titles of both plaintiff and 1st defendant and determine who has displayed a better title.
21. The plaintiff avers to have purchased the suit land from Tom Nyagami Gai (Tom Nyagami) and she obtained registration of title in her name. She thus traces her title to that of Tom Nyagami. So did Tom Nyagami have a good title to transfer to the plaintiff? Let us make that assessment.
22. Tom Nyagami contends that he applied for the land and obtained an allotment letter in his name. He displayed the allotment letter which is dated 12 March 1997 addressed to him. That allotment letter has special conditions. Among them is that there should be received an acceptance together with a banker's cheque for the amount of Kshs. 10,810/= within thirty days of the 'postmark.' Tom Nyagami did not have a letter of acceptance. His explanation is that he left it with the Commissioner of Lands and he did not make a copy. Fair enough, maybe he did not make a copy. But did he make payment of Kshs. 10,810/= as required? Now this is critical evidence. The conditions state that payment was to be made by way of banker's cheque. Tom Nyagami made no banker's cheque because he said that he paid the money in cash. I don't believe him, as the conditions clearly stipulate that payment was to be made by way of banker's cheque. If he did not pay through banker's cheque, and paid in cash, the least anybody would expect is that he would have the receipt indicating this payment, or some sort of evidence, assuming that the receipt is not available, that this payment was actually made. There is no such evidence. His explanation was that he paid and expected the receipt to be sent together with the Lease. That explanation does not wash. It is common knowledge that when one makes payment he is the one issued with the receipt and such receipt is not retained unless there are some special circumstances, of which none has been offered. I am not persuaded that Tom Nyagami made the payment in that allotment letter. I know that the allotment letter of Tom Nyagami is contested and there is argument that it was cloned out of the allotment letter of the 1st defendant. Even without determining this point, it is apparent, that if ever there was an allotment letter issued to Tom Nyagami, there was no acceptance of the conditions of offer, by making the requisite payments noted in the letter of allotment. Without there being an acceptance of the conditions and payment thereof, it cannot be said that there was an offer for a lease which Tom Nyagami then accepted so that there can be said to be a contract between Tom Nyagami and the Commissioner of Lands whereby the latter promises to



issue a lease to the latter. I am clear in my mind that Tom Nyagami never made any payment to settle the amounts noted in the allotment letter and thus no lease could issue to him. I must hold, and do hereby hold, that the purported lease to Tom Nyagami, if at all issued, was unprocedurally issued as no payment in the allotment letter was ever made. In other words, no lease ought to have issued, at all, to Tom Nyagami, in respect of the suit property.

23. I had said that I need not talk much about the allotment letter to Tom Nyagami, but let me just mention one issue regarding it. That allotment letter purports to offer a lease to Tom Nyagami for land identified as Kisii Municipality/Block 1/836, which is the title of the suit property. Now, it cannot be that there was an offer in 1997 for this title because such land had not been surveyed. There is evidence, from the plaintiff herself, that the land was surveyed for issuance of title sometimes in the year 2007. Whatever the case, the survey plan F/R No. 271/39 was received for registration on 20 May 1997, but the allotment letter is dated 12 March 1997. I wonder how it can indicate the suit land had been surveyed when survey for it had not even been received. But this is besides the point. The main point is that there is no evidence of any acceptance of the allotment letter by Tom Nyagami.
24. Anyway, there is a Lease instrument that was drawn in favour of Tom Nyagami and I have looked at it. It is dated 8 June 2005 and is purportedly signed by Judith Marilyn Okungu, Commissioner of Lands. No problem with that. It is also purportedly signed by Tom Nyagami but his signature is not attested. It is also not indicated the date when Tom Nyagami signed the document for this part of the document is blank. But even worse, and I think this is the most important aspect, the document is purportedly registered on 6 December 2004. The register shows that Tom Nyagami got his Certificate of Lease on the same date, i.e 6 December 2004. Surely, the Lease could not have been registered on 6 December 2004 and a Certificate of Lease could not have issued to Tom Nyagami on the same date, if the Commissioner of Lands executed the lease on 8 June 2005. It certainly could not have been first registered, then a Certificate of Lease issued and taken to the Commissioner of Lands to sign her part, forget for a moment that we do not even know when the said Tom Nyagami executed his part. This cannot be said to be a mistake. If it was, then the plaintiff ought to have cleared the air by producing the letter forwarding the lease for registration, of which by practice the lessee is copied and he thus ought to have the said letter, and avail the registration receipt of the instrument to show exactly when it was received and registered. None was produced. My persuasion therefore is that there was never a letter forwarding this lease from Nairobi for registration and there was never any payment for it. In essence, there was never issued a Lease in favour of Tom Nyagami that was capable of registration. I find that the purported date of registration of 6 December 2004, as the date of registration of the lease, to be a fictitious date merely inserted by a person who was keen to perpetuate a fraud to create the impression that there had been a lease forwarded from Nairobi for registration when this was never the case.
25. In any event, that lease would be invalid for want of attestation as attestation is demanded by S. 3(3) (b) of the *Law of Contract Act* (Cap 23) Laws of Kenya. Although S.38 of the *Land Act*, 2012, was cited, that law does not apply, for it was not there in 2004 or 2005, when the purported lease was registered. But Section 3(3) (b) of the *Law of Contract Act* would apply and attestation is required for land dispositions.
26. The long and short of the foregoing is that I am not persuaded that Tom Nyagami obtained an allotment letter from the Commissioner of Lands, or that he paid for it, and as a result, a genuine lease could not issue to him. Even then, I have already poked holes into what he considers to be his Lease instrument and I have demonstrated that such instrument could not have been registered as claimed by the plaintiff. In essence, Tom Nyagami was never a leaseholder of the suit property and any records indicating that he holds a leasehold title over the suit property are declared to have been fraudulently



procured and null and void ab initio. That includes the leasehold register which indicates that Tom Nyagami was registered as a lessee of the suit property.

27. Now if Tom Nyagami never held a leasehold title to the suit property, can the plaintiff allege to have good title to the suit land ? Certainly not. Tom Nyagami held no lease and thus had nothing to transfer. I think it is now firmly settled in jurisprudence, that the common law principle of *nemo dat quod non habet* (no one can give what they do not have), which is mostly used in sale of goods transactions, is also applicable to dispositions over land in Kenya. This indeed was well articulated by the Court of Appeal in the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others*, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 [2015] eKLR. The facts of the case were that the suit land was owned by the 1st respondent, West End Butchery Limited. Through some fraudulent transactions, the land was transferred to the appellant, Arthi Highway Developers Limited. The appellant proceeded to subdivide the land and sold some of the subdivisions to 5th, 6th and 7th respondents (respectively being KMAH, Yamin and Gachoni). The 1st respondent filed suit to reclaim title to her land and judgment was given in her favour. This was affirmed on appeal with the Court of Appeal declaring as follows :

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

28. The above was a classical application of the *nemo dat* rule to a land transaction. If the registered proprietor of the title in question is declared not to have acquired a good title, then he can have no good title to pass downstream. His title is not laundered by the fact that he has transferred it to someone else and the purchaser or transferee receives such title with the same stain of illegality; the title remains null and void ab initio.
29. In our case, I have demonstrated that Tom Nyagami Gai never acquired a good title to the suit property. His registration was procured by way of fraud. Having not obtained a good title to the suit land, he had no good title to pass to the plaintiff, and therefore the plaintiff does not hold a good title to the suit land. Even the doctrine of an innocent purchaser for value without notice cannot help in such an instance. The doctrine of an innocent purchaser for value without notice, in our jurisprudence, cannot apply to one who has purchased a fraudulent title, or a title that is for one reason or another declared to be null and void. Thus, so long as a title is illegal, it is pointless to argue that one is an innocent purchaser for value, and indeed, the court need not consider the innocence, or otherwise, of the purchaser in so far as the question of nullification of title is concerned. A fraudulent title is subject to nullification irrespective of the fact that the purchaser is an innocent purchaser for value without notice. This principle was given a seal of acceptance by the Supreme Court in the case of *Dina Management vs County Government of Mombasa & 5 Others*, Supreme Court of Kenya, Petition No. 8 (E10) of 2021 [2023] KESC 30 (KLR). The facts of that case were that through an allotment letter dated 29 November 1989, the Commissioner of Lands allotted to H.E Daniel Moi, the then President of the Republic of Kenya, the disputed parcel of land, and he became the first registered proprietor of the land. He sold his interest to M/s Bawazir & Co who then sold their interest to the appellant for consideration. The 1st respondent, the County Government of Mombasa, moved into the suit property and demolished the structures therein, on the contention that the land was public land. The appellant sued the County Government *inter alia* claiming to be an innocent purchaser for value. The 1st respondent demonstrated that the land was never properly alienated to the President,



and both the Environment and Land Court and the Court of Appeal agreed, and held that no good title was ever vested in the President and thus no title could have passed to the appellant. On appeal to the Supreme Court, the Supreme Court affirmed the findings of the court of first instance and the first appellate court and stated as follows :-

“ 110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. [1993] Ltd, who in turn could pass to the appellant.

111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser”. (emphasis mine)

30. It is the same scenario here. The plaintiff is a purchaser, but she purchased a tainted title. The doctrine of ‘innocent purchaser for value without notice’ cannot assist her. The title was null and void ab initio and it remains null and void ab initio even while it is in her hands. This position of the law is indeed given affirmation by Section 26 of the *Land Registration Act*, 2012, which provides as follows :-

26. Certificate of title to be held as conclusive evidence of proprietorship

(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.

31. From the above it will be observed that title can be nullified under Section 26 (1) (b) where it has been acquired illegally, unprocedurally or through a corrupt scheme and in such instance, the holder of the title does not need to be a participant in the issues that vitiates the title. This principle was affirmed in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna*, Eldoret ELC No. 609B of 2012 (2013) eKLR, cited by Mr. Ogado. In our case, I am not in doubt, and I have narrated quite extensively,



that the title of Tom Nyagami was a fraudulent title, and being so, it follows that the title of the plaintiff is an illegal title or was procured unprocedurally. It is liable to cancellation.

32. I have no option but to proceed to order the cancellation of the title of the plaintiff which I proceed to hereby do.
33. The plaintiff of course claimed that the 1st defendant does not have a good title to the suit land, but she has no ground to make that argument, as she has no good title herself, upon which to challenge the 1st defendant's. Nevertheless, within the confines of this suit, at the minimum, the 1st defendant certainly has a better title than the plaintiff's. I have seen that he was issued with a letter of allotment on 12 March 1997. It required him to make payment by way of banker's cheque within 30 days. I have seen a copy of the banker's cheque that the 1st defendant prepared which is dated 19 March 1997, which is well within the 30 days. The 1st defendant forwarded this banker's cheque together with his letter of acceptance. It was acknowledged, and he was issued with a receipt, which is dated 4 April 1997. At this point in time, there was an offer and acceptance thus the 1st defendant needed to be issued with a Lease. I do not know why he was not issued with a lease immediately but it could be that other persons were also eyeing the same parcel of land. I wouldn't put too much premium in the endorsement 'Cancelled' that is in his letter of allotment. Unless demonstrated otherwise, I think it was the machinations of persons in the Lands Registry to try and issue a fraudulent parallel title to someone else. I say so because the Government itself appears to have ignored that endorsement by eventually allowing the survey of that land and issuing a Lease which was registered on 4 April 2017. I am aware that the signature of the 1st defendant in that Lease instrument is dated 5 April 2017 which would be an irregularity, but in the circumstances of this case, I hesitate to declare the 1st defendant's lease as null and void merely because of that irregularity.
34. For the foregoing reasons, I do hold, that as between the plaintiff and the 1st defendant, it is the 1st defendant who has good title to the suit land. Having declared as such, it follows that it is the 1st defendant who is entitled to rights over the land including the right of possession to it. It is immaterial that the plaintiff has developed the land. The fact that she has developed it does not bar the 1st defendant from his rights to possess the land. Indeed, I fault the plaintiff for proceeding to develop the land when she was aware that it had issues. The land was subject to CID investigations in the year 2011. I am sure that the plaintiff was aware of this. She however still proceeded to develop the land in the year 2013. She can have nobody but herself to blame. It is only an unwise person who proceeds to develop land that has a dispute and such person cannot fault anybody else if the risk backfires. Having no title to the suit land I hereby issue an order to the plaintiff directing her to give immediate vacant possession of the suit land to the 1st defendant. I also issue an order of permanent injunction restraining the plaintiff and/or her servants/agents and/or anyone claiming under her purported title or under her instructions, from entering, being upon, utilizing or entering into any disposition over the suit land.
35. For the foregoing reasons, the plaintiff's suit is dismissed and the counterclaim of the 1st defendant succeeds. The last issue is costs. The 1st defendant shall have the costs of both suit and counterclaim against the plaintiff. I make no orders as to costs for or against the 2nd to 6th defendants in the main suit.
36. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 15 DAY OF NOVEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII



In the presence of:

Mr. Mulisa for the plaintiff

Mr. Ogado for the 1st defendant

N/A for the AG for 2nd, 4th, 5th & 6th defendants

N/A for NLC – 4th defendant

Court Assistant – Lawrence Chomba

