



REPUBLIC OF KENYA



KENYA LAW
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**Lune v Okwero & another (Environment & Land Case 116 of 2017)
[2025] KEELC 3414 (KLR) (23 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 116 OF 2017**

FM NJOROGE, J

APRIL 23, 2025

BETWEEN

HASSAN MELE LUNE PLAINTIFF

AND

ACHIENG JOHANA OKWERO 1ST DEFENDANT

WANDERA JOHANA 2ND DEFENDANT

JUDGMENT

1. This suit was instituted by the plaintiff by way of a plaint dated 15/7/2014 and which was amended on 23/10/2017. The plaintiff seeks the following reliefs against the defendants: -
 - a. Permanent injunction restraining the Defendants by themselves their servants or agents and any person claiming through them from trespassing onto the suit property being all that parcel of land situated at Kibarani in Kilifi and known as Title No. Kilifi/Kibarani/122 and from selling, charging or alienating the suit property to any person and from dealing with the said suit property in any manner whatsoever;
 - b. Vacant possession of the suit property being all that parcel of land situated at Kibarani in Kilifi known as title no. Kilifi/Kibarani/122 and the demolition of all the defendants' houses or structured erected thereon and their eviction from the said suit property;
 - c. Costs of this suit and interest thereon at court rates;
 - d. Any other relief that this honourable court may deem just to grant.
2. The Plaintiff claimed that he is the registered proprietor of all that parcel of land described as Kilifi/Kibarani/122 measuring approximately 1.1 Ha, situated within Kilifi township (hereinafter also referred to as "the suit property"), having purchased the same from one Charo Ngala Mwavuo and Kadzo Charo Ngala sometime on 14/8/2012; that on diverse dates between the year 2012 and 2014,



the 1st Defendant wrongfully entered the suit property and put up permanent and semi-permanent structures, blatantly disregarding the Plaintiff's interest therein. The Plaintiff averred that the 2nd Defendant, who is the 1st Defendant's son, also entered the suit property sometime in the year 2017 and commenced construction of a house thereon without the Plaintiff's consent.

Defence to The Plaintiff's Claim.

3. The Defendants filed a statement of defence dated 23/11/2017. They pleaded that the present suit is a duplication of Mombasa ELC 196 of 2014. The Defendants claimed that the Plaintiff fraudulently purchased the suit property despite being aware that the same had been purchased by the Defendants' patriarch, Johana Okwero Kudo (deceased), in 1996. The Defendants outlined the particulars of fraud as conniving with the vendor to sell the suit property for the second time, misleading the land control board into issuing a consent, being mischievous and cunning, misrepresentation of facts and status of the land to the land control board and Land Registrar and ignoring the deceased's family's occupation of the suit land. The Defendants averred that they have fully developed the suit property and that the deceased was even buried thereon. They urged the court to dismiss the suit.

Evidence.

Plaintiff's Evidence.

4. The Plaintiff's case was anchored on the testimony of two witnesses. The Plaintiff testified as PW1. He adopted his written statement dated 5/3/2018 and produced the documents in the list of documents dated 15/7/2014 as PEXH 1-4. He testified that he bought the suit property for a consideration of Kshs. 300,000/- and got a title deed on 27/12/2012. He stated that when the deceased died, they went to the area chief to stop the Defendants from interring the deceased on the suit property, but they forcefully did it.
5. The Plaintiff added on cross-examination that as at the time of burial, there was no house on the suit property, and that as the time he purchased the suit property, there was no grave on the suit property. The Plaintiff further testified that he attended the land control board for the consent, together with the vendor, his wife and family.
6. Mapenzi Charo Ngala (PW2) told the court that her late father, Charo Ngala, had a land parcel which he sold to the Plaintiff and that she witnessed the sale agreement. She adopted her written statement dated 13/2/2023 as her evidence-in-chief. On cross-examination by Mr. Mouko, counsel for the Defendants, she told the court that she did not know the plot number of the suit property, but she stated that it is 2 acres. She added that she signed the agreement in Kilifi, at the Plaintiff's office, and was accompanied by her husband and the Plaintiff alone. She could not identify the 1st Defendant in court, but she knew that there is one palm tree and some mango trees and a grave on the suit property. The witness confirmed that she only lived on the suit property briefly when she was young then moved to a different area known as Kiembeni. She did not know about the deceased's family or how they came to be on the suit property. She recalled her late father telling them that some people and invaded the suit property. She was aged 10 years then. PW2 added that she accompanied her parents to the board meeting in Kilifi.

Defendant's Evidence.

7. The Defendant's case was premised on the testimonies of 6 witnesses. The 1st Defendant testified as DW1. She adopted her written statement dated 8/11/2022 as part of her evidence-in-chief, and produced the documents in the list of documents dated 8/11/2022 as DEXH 1-7. She asserted that the



suit property was purchased by her late husband and that she has been living thereon. She told the court on cross-examination by Mr. Shujaa, that she was present when the agreement was drawn between her husband and the said Charo, and that she witnessed Charo receive the purchase price and attest the agreement. She testified that her son, Wafula, drafted the agreement at the suit property but she was not aware what the consideration amount was. She added that part of the purchase price was a cow which they gave later on. The 1st Defendant explained on re-examination that the vendor complained that the purchase price was not enough hence the cow.

8. Albert Wafula Okwere (DW2) equally adopted his written statement filed on 10/11/2022 as his evidence-in-chief. He testified that his mother, the 1st Defendant herein, was summoned to the Chief's office over the suit property; that Mr Charo had filed a complaint that he had given the suit property as 'rehani'; that it was decided that the suit property belonged to DW2's late father. On cross-examination, the witness testified that he was in Nairobi when the suit property was purchased and he did not witness the agreement. He stated that the consideration was Kshs. 40,000/- and that Charo did not have a title deed when his father purchased the suit property. He added that the agreement was dated 5/9/1996.
9. Kadenge Katana Mwavuo (DW3) told the court that he is the elder brother of Charo Ngala. He stated that his late brother sold the land many years ago and that the deceased, Okwero, was buried on the suit property without any objection. The witness added on cross-examination that his late brother Charo told him that he had sold the suit property to Okwero.
10. Kitsao Kadenge Masha (DW4) stated that he is a resident at Kibarani and that the Defendants are his neighbors; that they have been his neighbors, residing on the suit property for long having purchased the same from Charo Ngala. He added that the deceased, Okwero, was buried on the suit property and that the vendor's family attended the burial with no objection. The witness also adopted his written statement as his evidence-in-chief. The court observed that DW4 looked older than 70 years and frail. On cross-examination, DW4 testified that the suit property was very bushy and that Charo never lived thereon.
11. Wilson Fundi Kashuru (DW5) testified that he was the area Chief until 1996. He told the court that he heard a dispute over the suit property and gave his decision. He explained on cross-examination that the late Charo brought a claim to him stating that he had given the suit property as 'rehani', refuting the claim that he had sold it.
12. Rama Katana Sulu (DW6) adopted his written statement filed in court on 10/11/2022 as his evidence-in-chief. He knew both parties in this suit. He testified on cross-examination by Mr. Shujaa, that although he did not sign the agreement between the late Okwere and the vendor, he witnessed its making and that the consideration was Kshs. 40,000/-.
13. At the end of their viva voce evidence parties filed their respective submissions.

Submissions.

Plaintiff's Submissions.

14. In the submissions dated 12/12/2024, counsel for the Plaintiff listed two issues for determination: - who between the Plaintiff and the late Johana Okwero had a valid agreement for sale, and whether the Plaintiff is entitled to vacant possession of the suit property and an order for permanent injunction.
15. Counsel submitted that the agreement for sale said to have been made on 16/11/1996 could not have been executed by the late Charo for reasons that it is indicated on that agreement that he signed



by writing his name yet there was no evidence that the late Charo could read and write. He added that the transfer form exhibited as DExh-7 indicates that the late Charo affixed his thumb print on 5/9/1996, two months before the agreement for sale was done, which to counsel is not ordinary in land transactions. Counsel added that other than DW1 there was no other witness called before this court that witnessed the late Charo signing the 1996 sale agreement. To counsel, the documents relied upon by the Defendants were most probably written recently but backdated to 11/11/1996 to suit their case.

16. Counsel argued that the Plaintiff's agreement with Charo is a valid one and that he is entitled to the prayers sought, being the registered proprietor of the suit property. He added that Section 26 (1) of the [Land Registration Act](#) provides that a certificate of title issued by the Registrar is conclusive proof of ownership and in that case, the Plaintiff is the indefeasible owner of the suit property herein. To him, the Plaintiff's title can only be challenged on the grounds of fraud, misrepresentation to which the Plaintiff is proved to be a party, or that the title was acquired illegally, unprocedurally or through a corrupt scheme. Counsel argued that the Defendant's title has not impeached the Plaintiff's title in the said manner. He sought reliance on Sections 24 and 25 of the [Land Registration Act](#) and urged the court enter judgment in the Plaintiff's favour.

Defendants' Submissions.

17. It was the Defendants' argument that the Plaintiff is bound to strictly prove his allegations as is required under Sections 107, 108 and 109 of the [Evidence Act](#). Counsel enumerated 4 issues for determination – whether the Defendants invaded the property in the year 2012 as alleged and accordingly trespassed into the suit property; whether the Plaintiff is a lawful purchaser without notice; whether the deceased, Okwero, purchased the suit property from the late Charo Ngala long before the Plaintiff purportedly bought the same; and what orders should the court make.
18. Counsel submitted that the Plaintiff has failed to prove that the Defendants invaded the suit property in 2012, and that on the contrary, there was ample evidence that the Defendants moved into the suit property in the year 1996 when Johana Okwero purchased it. Counsel added that the Plaintiff cannot claim to be an innocent purchaser since the Plaintiff was present when a dispute over the suit property was presented before the area chief. Counsel added that there was proof that the late Okwero died on 13/4/2011 and buried on the suit property, it could not therefore be possible that the Defendants entered the suit property in 2012. Counsel further submitted that the allegation that the Defendants' documents were forged was not substantiated with any evidence and that the claim that the late Johanna had only leased the suit property was not proven. According to counsel, the Plaintiff had failed to prove his case, and he urged the court to dismiss it with costs.

Analysis And Determination.

19. The rights of a registered owner of property are set out under Sections 24, 25 and 26 of the [Land Registration Act](#) 2012, which provide as follows; -
 - “24. Subject to this Act
 - (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
20. Section 25(1) further provides that for such a registered owner, his/her rights are indefeasible and are held free from all other interests and claims, and that the rights can only be defeated in the manner provided under the Act.



21. Ownership of such title is however not absolute as the said certificate of title can be impeached under certain circumstances as contemplated in Section 26 (1) of the same Act which provides: -

“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.”

22. The Plaintiff contended that he acquired the suit property through a sale agreement dated 14/8/2012 between himself and Charo Ngala Mwavuo and Kadzo Charo Ngala. He maintained that upon payment of the consideration and obtaining the consent of the land control board, he was registered and a title issued to him on 27/12/2012. The Defendants equally averred that their late patriarch, one Johanna Okwere, purchased the suit property from the same Charo Ngala back in 1996 vide a handwritten sale agreement dated 16/11/1996; that immediately, they entered the suit property and took possession thereof and developed the same. The Defendants challenged the Plaintiff's title on grounds that the same was fraudulently acquired.

23. It is trite that when a person's title is called into question, the said proprietor has to show the root of his ownership. He has to demonstrate the process of acquisition of the suit title. In the case of *Munyu Maina v Hiram Gatbiha Maina, Civil Appeal No.239 of 2009*, the Court of Appeal held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

24. I think that in the present case it is not sufficient for the plaintiff to merely rely on the title he has and claim that the land was legally registered in his name. The mere presence of the claim and evidence that the Johanna family was resident on the suit land by the time of his alleged purchase connotes that his claim has the doctrine of innocent purchaser for value without notice as its roots.

25. The Plaintiff led evidence that he acquired the suit property following an agreement dated 14/8/2012. A copy of the sale agreement was produced as P. Exh 1. The agreement was executed by both the vendor and the Plaintiff, and witnessed by some four witnesses. There was however no proof of the transfer documents registered at the land's registry or a copy of the consent by the land control board exhibited to support the transfer to the Plaintiff. It is not even clear when the Plaintiff attended the land control board for the consent.

26. Both parties also exhibited a copy of a letter dated 20/5/2014 written by the then area Chief, who testified as DW5. According to that letter, the said Charo Ngala had filed a complaint against the 1st Defendant herein, claiming that he had not sold the suit property to her late husband, Johanna. That he (Charo) had pawned the suit property to Johanna for a certain amount which he was ready to return,



the sum of Kshs. 43,000/-. The chief found in favour of the 1st Defendant herein. That finding, coming from a local administrator deemed to know the salient affairs of his area of jurisdiction, is a crucial indicator in this case.

27. It raises considerable concern that the late Charo Ngala, the vendor, only took issue with the Defendant's occupation of the suit property after the death of Johanna Okwero. It appears to me that the vendor felt he had sold the suit property to Johanna for a little amount and wanted more. With Johanna deceased, it is my view that the vendor felt it would be an opportune time to sell the suit property to another party in order to obtain more money. This explains why he waited until Johanna's demise to raise complaints about the suit property. By then Johanna's remains had been interred on the suit premises. Moreover, if he had indeed pawned or leased the suit property to Johanna as claimed by the Plaintiff, the very pertinent question arises as to why then he did allow Johanna develop the suit property by building a house, and even allow his remains to be buried thereon in 2011, long before the Plaintiff purchased the suit property.
28. From the evidence adduced, the plaintiff must have known clearly that the land had been sold to Johanna. If, which is the case, he purchased the land while it was already developed with dwelling houses and with Johanna's grave on it, and his survivors in occupation, then it must have, or ought to have occurred to him that the late Johanna's family had an interest in the land. He must be taken to have visited the land prior to entering into an agreement with Charo. If he never conducted such a visit he must be held to have been negligent for failure to conduct due diligence.
29. In *Sehmi & another v Tarabana Company Limited & 5 others* (Petition E033 of 2023) the Supreme Court allegorized the doctrine of innocent purchaser for value without notice as follows:

“(62) For our purposes, the purchase must be in reference to a legal estate vis some vis an equitable interest in the suit land. In other words, the contending interests must be a legal estate and an equitable interest in the land. Fully stated therefore, the doctrine means that an innocent purchaser of a legal estate in land without notice of an equitable interest in the said land, takes free from the encumbrance of the latter interest. Say for example, x holds land in trust on behalf of y, the legal estate vests in x, while the equitable interest vests in y. Should z purchase the land from x without notice of the trust in favour of y, then he would acquire the land free from the encumbrance of y's interest.”
30. Therefore, if upon a visit to the suit land the plaintiff found the Johanna family still in occupation with the developments thereon and he still proceeded to purport to purchase the suit land, then he is taken to have had notice of the deceased's family's interest in the suit land and qualifies not as an innocent purchaser for value without notice.
31. In *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) it was held as follows:

“64. What about the argument to the effect that the appellant was an innocent purchaser for value without notice? It is obvious by now that such argument cannot hold in view of our pronouncements regarding the transactions between Renton and the appellant. ... there is evidence on record in the form of correspondence and minutes, confirming that DoD had been granted access by the defunct municipal council and had taken possession of, and erected public infrastructure upon the suit property before the purported purchase.... Further, it is on record that the Ministry of Lands and Settlement



was monitoring excision activities by NCC to ensure that the portion occupied by DoD was not affected.... Therefore, if the appellant was a diligent purchaser, it ought to have at least known of this fact. An innocent purchaser for value would also denote one was aware of what they were purchasing by inspecting the suit premises. This takes us to the question of whether the appellant had visited the suit premises and if so, what was its impression of the military installations on the suit premises? The fact that the suit land was occupied must have sounded a warning of “buyer be aware” to the appellant. We therefore find that it was not an innocent purchaser for value entitled to orders for restoration or compensation.”

32. On the basis of the very credible evidence adduced by the defendants in the present case, this court completely rejects the plaintiff’s allegation that the defendants wrongfully entered the suit property and put up permanent and semi-permanent structures while blatantly disregarding the Plaintiff’s interest therein.
33. It is also evident that the title deed to the suit property was first issued to Charo Ngala on 22/10/2012, meaning that as at the time the said Johanna purchased the suit property and until his demise, there was no title in respect to the suit property, but just an allocation number. Perhaps, this is why the vendor found it easy to disregard Johanna’s interest in the suit property.
34. In *Dina Management Limited v County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), the Supreme Court held as follows:

“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.”
35. In the foregoing, I have considered the totality of the evidence adduced and it is my finding that the evidence points irresistibly to the Plaintiff having obtained the registration of the transfer of the suit land unprocedurally and fraudulently. It is thus void. In the circumstances the issuance of a permanent injunction restraining the Defendants and any person claiming through them from utilizing the suit property known as Title No. Kilifi/Kibarani/122 or issuance of an order for vacant possession in favour of the plaintiff in this case would be a manifest injustice against them.
36. The Defendants did not seek any reliefs except dismissal of the Plaintiff’s suit, however, this court has power under Section 80(1) and (2) of the *Land Registration Act* to order a cancellation of title and rectification of the register in exercise of its inherent power and in accordance with the provisions of Sections 1A and 1B CPA which bind the court to the overriding objective, that is, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act and the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources, and also the timely disposal of proceedings at a cost affordable by the parties herein and to prevent unnecessary generation of supplementary proceedings in the Court.
37. In the premises, I hereby dismiss the plaintiff’s claim and I issue the following final orders:
 - a. The Land Registrar Kilifi shall forthwith cancel the registration of the Plaintiff as the owner of Title No. Kilifi/Kibarani/122 and in lieu thereof he shall promptly register Johanna Okwero as the owner thereof;
 - b. The costs of the present suit shall be borne by the plaintiff.



**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD
DAY OF APRIL 2025.**

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

