



REPUBLIC OF KENYA



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**Wachegu v Vindo Multipurpose Cooperative Society Limited & 2 others (Civil Suit 309 of 2014) [2022] KEELC 2923 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2923 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 309 OF 2014**

**M SILA, J**

**JUNE 16, 2022**

**(PLAINTIFF AND 2ND DEFENDANT BEING MEMBERS OF THE 1ST DEFENDANT, A LAND BUYING COMPANY, AND ENTITLED TO BE ALLOCATED LAND; PLAINTIFF'S PLOT BEING ALLOCATED TO THE 2ND DEFENDANT THROUGH AN ERROR IN THE REGISTER OF THE 1ST DEFENDANT; APPARENT THAT THE TITLE OF THE 2ND DEFENDANT WAS ISSUED BY MISTAKE; PLAINTIFF NOW SEEKING CANCELLATION OF THE SAID TITLE AND FOR THE SAME TO BE ISSUED TO HER; INSTANCES IN WHICH TITLE CAN BE CHALLENGED; SECTION 26 LAND REGISTRATION ACT; TITLE INTER ALIA IMPEACHABLE IF ISSUED UNPROCEDURALLY; A TITLE ISSUED BY MISTAKE QUALIFIES TO BE A TITLE THAT HAS BEEN ISSUED UNPROCEDURALLY AND IS THUS SUBJECT TO CHALLENGE AND MAY BE CANCELLED; TITLE OF THE 2ND DEFENDANT CANCELLED AND ORDER ISSUED THAT THE PLAINTIFF BE REGISTERED AS PROPRIETOR THEREOF)**

**BETWEEN**

**DEBORAH HANNAH WACHEGU ..... PLAINTIFF**

**AND**

**VINDO MULTIPURPOSE COOPERATIVE SOCIETY LIMITED .... 1<sup>ST</sup>  
DEFENDANT**

**ESTHER MSHAI TOLE ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, WUNDANYI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced through a plaint which was filed on 29 October 2014. In the plaint, the plaintiff has pleaded that she is the proprietor in possession and use of the Plot No. 1068 within Vindo Multipurpose Cooperative Society in Voi, whose actual registration is Voi Municipality/Block I/1068 (the suit land also simply referred to herein as Plot No. 1068). The plaintiff contends that the



2<sup>nd</sup> defendant was wrongfully allocated the suit land by the 1<sup>st</sup> defendant and duly issued with title by the 3<sup>rd</sup> defendant. The plaintiff avers to be a member of the 1<sup>st</sup> defendant, and that in the year 2001, she was allocated a 2 acre piece of land, being Plot No. 1916, within the Block 11. She avers that the plots at the time had not been properly demarcated or surveyed and subsequently surveyors were engaged. It is pleaded that in the process of survey the plot number kept changing from 1916, to 1762 and finally to Plot No. 1068, but the size and location of the land remained the same. The plaintiff avers to have moved into the suit land, cleared the bush, cultivated and developed a permanent building. The plaintiff pleads that the survey exercise was completed in the year 2012 and title deeds were thereafter issued. She pleads that the 1<sup>st</sup> defendant secretly and fraudulently allocated to the 2<sup>nd</sup> defendant the suit land and purported to issue to her (plaintiff) a plot No. 1028 which is at another site and is undeveloped. She avers that upon learning of the acts above, she rejected the Plot No. 1028 and demanded to have back her plot No. 1068, and continued being in possession of it. This demand was however not fulfilled and the 2<sup>nd</sup> defendant remains the registered owner of the Plot No. 1068. In the suit, the plaintiff seeks the following orders (slightly paraphrased for brevity) :-

- (a) An order of permanent injunction against the defendants from trespassing into or dealing with the suit land, Plot No. 1068.
  - (b) An order for the recall and revocation of the title of the 2<sup>nd</sup> defendant to the Plot No. 1068.
  - (c) Such other or further orders the court may grant in the interests of justice.
2. The 1<sup>st</sup> defendant entered appearance and filed defence. In it, she pleaded that the plaintiff and the 2<sup>nd</sup> defendant are both members of the 1<sup>st</sup> defendant and were each entitled to be allocated a 2 acre plot. Due to numerous surveys the plot numbers were altered, and as a result of the confusion, the 2<sup>nd</sup> defendant was allocated the Plot No. 1068 instead of Plot No. 1028. It is pleaded that upon discovery of the mistake, the 1<sup>st</sup> defendant held a meeting between the plaintiff and the 2<sup>nd</sup> defendant to amicably resolve the issue but the plaintiff became uncooperative. A mediator was got but the parties did not cooperate.
  3. The 2<sup>nd</sup> defendant did not enter appearance nor file defence despite being served. She also did not attend the hearing of the case although service of hearing notices was effected upon her.
  4. In her evidence, the plaintiff stated that she was initially allocated a Plot No.376 in Block 3 but she found people settled on it. She was then moved to Block No. 8 but again there were squatters and she asked to be transferred. She paid a search and transfer fee. In the 2001, she was allocated another plot in Block 11, identified as Plot No. 1916. With subsequent surveys, the number of this Plot changed to 1762 then eventually 1068 when survey was completed in 2012. This is the plot in dispute. When she went to make payment for issue of title, the receipt given to her showed Plot No. 1028. On 3 January 2013, she was called to be shown her plot and she was taken to a different site, which is where the Plot No. 1028 is located. She refused to accept it. She later came to learn that title to the Plot No. 1068 was given to the 2<sup>nd</sup> defendant. She stated that she has been cultivating her land and wondered why title was given to somebody else.
  5. The 1<sup>st</sup> defendant called Benedict Mganha Karani as its witness. He is the Chairman of the 1<sup>st</sup> defendant and has been Chairman since the year 2007. He explained that the 1<sup>st</sup> defendant is a land buying company and both plaintiff and 2<sup>nd</sup> defendant are its members. He admitted in cross-examination that the plaintiff was initially allocated the Plot No. 1068 and that she has made developments on it, whereas the 2<sup>nd</sup> defendant was initially allocated the Plot No. 1028. Their allocation register however reflected the plaintiff in the Plot No. 1028 and the 2<sup>nd</sup> defendant in the Plot No. 1068. Both Plot No. 1068 and Plot No. 1028 measure 2 acres. Plot No. 1028 has no developments.



He stated that the 1<sup>st</sup> defendant cannot effect change of ownership because the 2<sup>nd</sup> defendant now has title to the Plot No. 1068. He acknowledged that this was an error on their part. They tried to have the two parties resolve the issue in vain.

6. The 3<sup>rd</sup> defendant did not file defence and did not call a witness though Mr. Makuto, learned State Counsel, fully participated in the proceedings. All he asked for was that his client should not be condemned to costs.
7. I have taken all the above into account and also taken into consideration the submissions of Mr. Nyange, learned counsel for the plaintiff. Mr. Mwakireti, learned counsel for the 1<sup>st</sup> defendant, did not file any submissions despite opportunity to do so being given.
8. From the evidence of DW-1, there is admission that the allocation of the suit plot to the 2<sup>nd</sup> defendant was done in error. The witness did admit that the plaintiff was indeed allocated the suit plot, No. 1068, but due to an error, their register ended up reflecting her name against the Plot No. 1028. This Plot No. 1028 was to be allocated to the 2<sup>nd</sup> defendant, but owing to the mistake, the 2<sup>nd</sup> defendant ended up with title to the Plot No. 1068. Is the plaintiff entitled to the order that the title of the 2<sup>nd</sup> defendant be cancelled and she be issued with title to the Plot No. 1068 ?
9. The law is extremely protective of title and in fact the default position is that a title is good unless demonstrated otherwise. Nevertheless, the law acknowledges that there are instances which may lead to the cancellation of a title. This is brought out by Section 26 of the *Land Registration Act*, Act No. 6 of 2012, which provides as follows:-

26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
  - c) 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.
10. From the above, it will be seen firstly, that a certificate of title is to be taken as prima facie evidence, that the person named as proprietor is the absolute and indefeasible owner of the land. The import of this is that the burden of proving that a title is bad is on the person asserting so. Secondly, it will be seen that title can be challenged. It means that title is not indefeasible. The first mode of challenge of title is Under Section 26 (1) (a). Here, title can be challenged on the grounds of fraud or misrepresentation, to which the person is proved to be a party. “Person” in the context herein would be the person who is registered as proprietor. So to impeach title under Section 26 (1) (a), you need to demonstrate that the proprietor acquired title by means of fraud or misrepresentation of which he participated. Under Section 26 (1) (b), title can be challenged on the basis that the title was acquired illegally, unprocedurally, or through a corrupt scheme. Now you will notice that under Section 26 (1) (b), there is no rider that the proprietor needs to have participated in such illegality, procedural impropriety, or the corrupt scheme. The import is that the title of a proprietor, however innocent he may be, can be challenged and cancelled, if a person demonstrates that the title was issued illegally, unprocedurally, or through a corrupt scheme.



The proprietor need not have participated in these vitiating factors, so long as his end product is a result of them. It is not therefore a defence, for a proprietor to assert his innocence. True, he may be innocent, but his title is still impeachable under Section 26 (1) (b). The common law defence of an innocent purchaser for value, or holder of a title in good faith, cannot therefore stand in face of the explicit provisions of Section 26 (1) (b).

11. Turning back to the case at hand, there is evidence that the title of the 2<sup>nd</sup> defendant was issued by mistake. That title actually ought to have issued to the plaintiff if it was not for the error in the register of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant, who is the beneficiary of that title, has not come to court to defend it, and she has not offered any evidence to controvert the position that the title was not supposed to be issued to her but to the plaintiff. On a balance of probabilities, it is my finding that the title of the 2<sup>nd</sup> defendant was issued by mistake. In my opinion, a title that has been issued through mistake, is a title that has been issued unprocedurally. It can thus be challenged on the basis of the provisions of Section 26 (1) (b) which allows for title to be challenged if issued unprocedurally. As I have explained above, the innocence of the title holder is immaterial.
12. Where a court is satisfied that title has been issued unprocedurally, the court has the power to cancel it. That is exactly what I am going to do. I issue an order cancelling the title of the 2<sup>nd</sup> defendant to the land parcel Voi Municipality/Block I/1068. I issue a further order directing that the plaintiff be registered as proprietor of the said land and title be issued in her name. I further direct the 1<sup>st</sup> defendant to correct its records so that the name of the plaintiff will be reflected against the allotment of the Plot No. 1068.
13. The only issue left is costs. I would have issued costs against the 1<sup>st</sup> defendant since it was its mistake that resulted in title being issued to the 2<sup>nd</sup> defendant. But I have seen that the 1<sup>st</sup> defendant tried to make amends and resolve the matter amicably. DW-1 stated that once title was issued to the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant was handicapped as it does not have power to cancel a title. I have no evidence that the 2<sup>nd</sup> defendant caused the mistake that led to title being issued to her. I will assume therefore that the 2<sup>nd</sup> defendant got title through no mistake of her own. Given that position, and the fact that the parties are members of the 1<sup>st</sup> defendant, I will make no orders as to costs.
14. Judgment accordingly.

**DATED AND DELIVERED THIS 16 DAY OF JUNE 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

