



REPUBLIC OF KENYA



KENYA LAW
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**Godana v Abdalla & 3 others (Environment & Land Case
663 of 2015) [2022] KEELC 3963 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3963 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 663 OF 2015
A OMBWAYO, J
JULY 28, 2022
(FORMERL HIGH COURT CIVIL CASE NO 119 OF 2011)**

BETWEEN

MAKTAR HUSSEN GODANA PLAINTIFF

AND

KASSIM WERE ABDALLA 1ST DEFENDANT

ISABELLAH AWINO NYAMENYA 2ND DEFENDANT

THE DISTRICT LAND REGISTRAR KISUMU 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

Introduction

1. Maktar Hussen Godana (hereinafter referred to as the plaintiff) has come to this court *vide* a plaint dated February 17, 2011 stating that at all material times he was the registered owner of all that land known as Kisumu/Kogony/1374 measuring approximately 0.26 Ha and that on June 2, 2002, the 1st defendant with the assistance of the 2nd defendant illegally, fraudulently and without the plaintiff's consent nor knowledge procured the transfer of the whole of the suit parcel of land from the plaintiff's name into the 1st defendant's name.
2. It is alleged that the 1st defendant subsequently sub-divided the suit parcel of land and sold and or transferred all the resultant parcels of land being Kisumu/Kogony/4622,4623,4624 and 4625 continued unabated and as per the certificates of official searches obtained by the plaintiff, the 2nd defendant was the registered owner of land parcels number Kisumu/Kogony/4623,4624 & 4625 while the search certificate on Kisumu/Kogony/4622 did not reveal the registered owner.



3. It was the plaintiff's case that he has been deprived his constitutional right to own property thus causing him loss and damages. The plaintiff therefore sought for judgment to be entered against the defendants jointly and /or severally as follows:
 - a) A declaration that the transfer of land parcel number Kisumu/Kogony/1374 from the plaintiff's name to the 1st defendant's name, the sub-division thereof and consequently all the subsequent transactions /transfers on/of the resultant parcels being land parcels number Kisumu/Kogony/4622,4623,4624 and 4625 were fraudulent/illegal and thus null and void.
 - b) That this honourable court be pleased to revoke the titles of land parcel numbers Kisumu/Kogony/4622,4623,4624 and 4625 and to restore the plaintiff as the registered owner of land parcel number Kisumu/Kogony/1374 or the resultant parcels after sub-division of the same being Kisumu/Kogony/4622,4623,4624 and 4625 and to order the 3rd defendant to rectify the lands register to reflect the same.
 - c) The 2nd defendant be ordered to surrender the certificates of titles to land parcel numbers Kisumu/Kogony/4622,4623,4624 and 4625 to the 3rd defendant and to vacate the said parcels of land.
 - d) Alternatively, the court do award the plaintiff as um equivalent to the current market value of land parcel number Kisumu/Kogony/1374 or the resultant parcels after sub-division of the same being Kisumu/Kogony/4622,4623,4624 and 4625 plus mense profits thereon, against the 1st and 3rd defendant's jointly and severally.
 - e) Costs and interests.
4. The 1st defendant herein entered appearance and filed his statement of defence where he stated that at all material times the plaintiff was not the registered owner of the suit parcel and that the plaintiff shall be put to strict proof as the suit parcel was first registered in the name of the 1st defendant's late brother Mohamed Okore in 1992.
5. The 1st defendant denied the allegations of fraud on his part and enumerated the particulars of fraud committed by the plaintiff. It was the 1st defendant's case that the plaintiff is not entitled to the orders sought and prayed that the suit be dismissed with costs.
6. The 2nd defendant filed her statement of defence she averred that she is the registered owner of land parcel number Kisumu/Kogony/4623,4624 and 4625 as she is an innocent purchaser for value. The 2nd defendant denied the plaintiff's allegations and stated that the plaintiff will be put to strict proof.
7. The 3rd and 4th defendants' herein entered appearance and also filed their statement of defence on May 18, 2012 where they denied the plaintiff's allegations and stated that the plaintiff will be put to strict proof. The 3rd and 4th defendant prayed that the suit dismissed with costs.

Plaintiff's Case

8. Maktar Hussen Godana testified as PW1 that he bought the suit property from Mohamed Okore and was issued with a title deed in 1994 as he had followed the procedure required. PW1 stated that he left Kisumu and went to Nairobi and when he came back to Kisumu in 2010, he found out that his land had been subdivided into 5 plots. That he conducted a search and found out that Kassim Were Abdalla the 1st defendant herein had taken the plot.



9. It is the plaintiff's case that the green card indicates that the plots were changed into the name of the 1st defendant and then transferred to other people. After the plaintiff found out that his land had been subdivided and transferred to different people, he reported the matter to the police and the 1st defendant was charged in Kisumu Criminal Case No 556/2010. The plaintiff testified that he wrote a demand letter to the Land Registrar, to the Ethics and Anti-Corruption Commission, the 2nd defendant and a statutory notice to the Attorney General. He stated that he bought the land from Mohammed Okore who died in 1997 and not 1993 as the 1st defendant says in his defence and he participated in his burial.
10. He further testified that he did a valuation of the plots with Acumen Real Estates and produced the report as PEx 12.
11. On cross examination, he stated that he lost the agreement for sale between him and the late Mohamed Okore and confirmed that the 1st defendant was not present when he bought the suit property. On reexamination, he stated that the transfer forms are not before court because he took them to the Land's Registry.
12. Hassan Mwinyi Amili PW2 adopted his statement as evidence in chief where he stated that he is the one who signed the application for late registration of death and on cross examination, he stated that he was the acting chief of Kogony sub location and before signing the application, he enquired from the village elder whether the applicant was related to the deceased and it was confirmed that the applicant was the brother of the deceased.
13. PW3 also adopted his statement as evidence in chief and cross examination by Ken Omollo Counsel for the 1st defendant, he stated that he was in Kogony Chief's office when PW2 called him and asked him whether he knew the 1st defendant and was later called by the CID about the death of the 1st defendant's brother where confirmed that the 1st defendant's brother died on July 29, 1997. On further cross examination by PD Onyango for the 2nd defendant, he stated that he became a village elder in 1997 and he attended the burial of the 1st defendant's brother.
14. PW4 stated that he was the Assistant Chief of Kogony Sub Location in 1994 and on cross examination, he stated that he has no document to show that he was the then Assistant chief but if the documents are needed, he can get them from the archives.
15. PW5 Boniface Bwongo working with Kisumu High Court produced Kisumu HCC Criminal Appeal No 44 of 2012 where the appellant was the 1st defendant and the last order shows that the appeal was marked abandoned.
16. PW6 a Civil Registration Officer stated that he issued the Death certificate for Mohamed Okore where it is indicated that the late Mohamed Okore died on August 10, 1993 and the application for the death certificate was made on September 23, 2011 by Kassim Were who indicated that the deceased was his brother
17. He further testified that Kassim Were filed the appropriate form which he presented to the Acting Chief (PW2) who then issued a notification. That he later learnt that the CID interrogated the chief who later wrote to the office to cancel the certificate of death as investigation had shown that the deceased had died in hospital and a genuine register of death was issued and after investigation it was confirmed that Mohamed Okore died on July 29, 1997 and the death certificate has since been cancelled.



18. On cross examination, PW6 confirmed that the person named in the Register of deaths Mohamed Okore who died on July 29, 1997 is contrary to the information in the death certificate issued in 2011.

1st Defendant's Case

19. Kassim Were Abdala, the 1st defendant herein adopted his statement as evidence in chief and stated that he filed a counterclaim in 2015 as the plaintiff took his brother's land. He testified that the suit property belonged to his brother and he showed the lands people the burial certificate and the lands officials transferred the suit property into his name and he subdivided the land and sold. He stated his brother died at a government hospital in 1993 and not 1997. That the plaintiff did not get the land genuinely as there is no agreement nor transfer. He further stated that the suit should be dismissed and he is ready to refund the money to the persons who bought land from him or give them alternative land.
20. On cross examination, he stated that the plaintiff does not have records of the Land Control Board meeting and that they were not present when the plaintiff was buying the land. He further stated that he applied for late registration of death and obtained the death certificate on October 11, 2011.
21. He confirmed that the death certificate was obtained two months after this suit was filed. It was the 1st defendant's case that he does not agree with the hospital's date of death and he did not do succession. He further stated that in the criminal case he was charged with forgery.

2nd Defendant's Case

22. The 2nd defendant stated that she has three land parcels related to this suit that is Kisumu/Kogony/4624,4632 and 4625 and he got the parcels from Peter Otieno Ayub as an agreement for sale was signed between her and Peter Otieno Ayub. She testified that she purchased the parcels for Kshs 1.1 Million and the land was transferred to her on February 10, 2010. She produced the title deed for the three parcels.
23. She stated that before the purchase of the three parcels, she did a search and the parcels were in the name of Peter Otieno Ayub. That parcel 4624 was in the name of the 2nd defendant who was selling to Edward Owino Okello and she bought parcel 4624 from Edward Owino Okello.
24. It was the 2nd defendant's case that the 2nd defendant transferred parcel 4624 directly to her. She stated that the properties originated from parcel number 1374 and produced the mutation form. She stated that the suit should be dismissed as she is the owner of the three parcels and has stayed there for 13 years.
25. On cross examination, she confirmed that the 1st defendant was the proprietor of the suit property and she does not know the plaintiff or any fraud with regards to the suit property.

3rd And 4th Defendant's Case

26. Mr Ogeto, the Land Registrar stated that from entry number 6 there is irregularity and the date when the title was issued was on a Sunday which was not a working day. That Kisumu/Kogony/1374 was closed for subdivision and new numbers issued from 4622-4625 which numbers have been transacted upon.
27. He testified that entries number 6 and 7 were irregularly entered and from their records there are no supporting documents.



Plaintiff's Submissions

28. The plaintiff filed his submission on May 5, 2022 where he relied on article 40 (6) of the Constitution on sanctity of title and stated that the resultant titles from the suit property cannot be protected by article 40 of the Constitution. He relied on the doctrine of nemo dat quod non habet which states that the transfer of goods cannot pass a better title than he himself possesses.
29. The plaintiff relied on the case of Peter Muiruri Kamau v Mary Mwihaki Kamau [2017] eKLR and Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR where the court emphasized on the effect of fraudulent transfer of land to third parties.
30. It was submitted that the law does not support illegal transactions and the 1st defendant's title to the suit property was found by a court of competent jurisdiction to have been obtained by false pretenses contrary to section 320 of the Penal Code. The plaintiff therefore prayed that the orders sought be granted as prayed. The 1st defendant failed to file his submissions as directed by the court.

2nd Defendant's Submissions

31. The 2nd defendant filed his submissions on July 5, 2022 where she stated that the plaintiff has failed to prove his case against the 2nd defendant and the suit should be dismissed with costs. It was stated that she is an innocent purchaser for value with respect to land parcel number Kisumu/Kogony/4623,4624 and 4625.
32. She stated that she bought the three parcels of land after conducting due diligence and the parcels were in the name of the 1st defendant and two parcels in the name of Peter Otieno Ayub and she was not aware of any allegations of fraud. She further stated that by the time she was buying the two parcels from Peter Otieno Ayub, there was no restriction or caution or claim by a third party and that a restriction was lodged after the 2nd defendant had obtained her title deed.
33. It was submitted that the green card of the mother title of land parcel number Kisumu/Kogony/1374 that was produced by the Land Registrar shows that the said parcel was registered in the name of the 1st defendant on June 2, 2002 before the same was closed for subdivision on March 3, 2008. The 2nd defendant submitted that she was an innocent purchaser for value and relied in the case of Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR.
34. The 2nd defendant further submitted that the court needs to uphold the sanctity of titled deed which has been lawfully issued by the land office where the courts have held that sanctity of title deed is protected by article 40 (6) of the Constitution and that a title deed is indefeasible and can only be revoked when the same is unlawfully procured and the owner of the title must have had knowledge of the fraud or party to it as was held in Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR, Eunice Grace Njambi Kamau & another v The Attorney Generaland Shimoni Resort v Registrar of Titles & 5 others [2016] eKLR.
35. It was the 2nd defendant's submission that she acquired the three parcels lawfully as per section 26 of the Land Registration Act 2012 and there is no evidence to show that the 2nd defendant was a party to fraud or misrepresentation that led to the registration of the said title deeds. That the 2nd defendant has invested heavily on the said parcels as per the evidence in court since she has been residing on the suit property for the past 13 years and it will be a miscarriage of justice to have her title deeds revoked and be evicted from the suit parcels over something she is not aware about.



3rd and 4th Defendants' Submissions

36. The 3rd and 4th defendants filed their submissions on May 18, 2022 where it was stated that the main issue for determination is whether the court should revoke the resultant subsequent titles that is Kisumu/Kogony/4622, 4623, 4624 and 4625 and submitted that as per the plaintiff's allegations and the evidence adduced by DW1 and the Land Registrar, it is clear that there was a fraudulent transfer and the allegations were concluded in Kisumu CMC Criminal Case No 556 of 2010 where the 1st defendant was charged for unlawfully obtaining the title number Kisumu/Kogony/1374 and falsely recording that he is the registered owner.
37. It was further submitted that a judgment delivered by a competent court in any criminal proceedings may be taken as conclusive evidence that the person so convicted was guilty of the offence as charged as per section 47A of the *Evidence Act*. It was stated that the Land Registrar in his testimony stated that the 6th and 7th entry were missing and as they tried to retrieve the number in the presentation book they realized that the irregularities were done on a Sunday which is not a working day. It was further stated that the original title that is Kisumu/Kogony/1374 was never cancelled as the original title was never produced for cancellation. Reliance was placed in the case of *Evanson Wambugu Gachugi v Simon Wainaina Gatwiki & 2 others* [2014] eKLR.
38. It was the 3rd and 4th respondents' submission that the 1st defendant having acquired the title by way of fraud means the title cannot be protected as provided for under section 26 of the *Land Registration Act*. That the title in this suit is impeachable by dint of section 26 and subsequent transactions must be cancelled as well. Reliance was placed in the case of *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* [2017] eKLR and *Alberta Mae Gacci v Attorney General & 4 others* [2006] eKLR.
39. The 3rd and 4th defendants prayed that this suit should be dismissed against them.

Analysis and Determination

40. I have considered the pleadings, the evidence on record and the submissions filed by the parties and I am of the view that the following issues need to be determined:

a. Whether The Plaintiff Is The Registered Owner Of The Suit Property

41. The plaintiff adduced evidence to show that he is the registered owner of the suit property. During hearing he stated that he bought the suit property from one Mohamed Okore (deceased), the 1st defendant's brother. The plaintiff produced a title deed Pex 2 which confirmed that he was the proprietor of land parcel number Kisumu/Kogony/1374.

Section 24 of the *Land Registration Act* 2012 provides as follows:

24. Subject to this *Act*—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.



42. In the case of *Willy Kipsongok Morogo v Albert K Morogo* [2017] eKLR the court held as follows:
- ‘the evidence on record shows that the suit parcel of land is registered in the names of the plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the [Land Registration Act](#).’
43. In the case of *Joseph NK Arap Ng’ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR, where the Court of Appeal held that
- “Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”
44. Further, in Civil Appeal No 246 of 2013 *Arthi Highway Developers Limited v West End Butchery Limited* and others, the Court of Appeal expressly stated thus:
- “Section 23(1) of the then Registration of Titles Act (now reproduced substantially as sections 25 and 26 of the [Land Registration Act](#) set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law take precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
45. There was no agreement for sale to prove that indeed the plaintiff bought the suit property from the 1st defendant’s deceased brother however on cross examination he confirmed that there was a sale Agreement between him and the late Mohamed Okore but he lost the same. During hearing, the Land Registrar confirmed that the Plaintiff obtained the suit property from the deceased and the transfer forms and the consents are in the file and there is no missing document. The title deed produced by the plaintiff is sufficient proof that he is the registered owners of the suit property.

b. Whether The 1st Defendant Transferred The Suit Parcel To Himself Through Fraudulent Means

46. It is the plaintiff’s case that the 1st defendant transferred land parcel number Kisumu/Kogony/1374 to his name through fraudulent means and without consent nor knowledge from the plaintiff. The plaintiff alleged that the 1st defendant transferred the suit property to himself without obtaining the necessary documents.
47. Sections 107 and 112 of the [Evidence Act](#) chapter 80 of laws of Kenya are relevant in this instance and states as follows;
- “ 107
- (1) Whoever desires any court to give judgment as to why any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

“ 112.

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

48. Section 26 of the [Land Registration Act](#) 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.

- (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."

49. The plaintiff found out that his property had been transferred to the 1st defendant without his knowledge in 2010 while the 1st defendant on the other hand stated that the suit property belonged to his late brother. The 1st defendant only visited the lands offices and showed the land officials the late Mohamed Okore’s burial certificate and the property was transferred to him.

50. This court is of the view that the 1st defendant did not transfer the suit property legally since his brother had died, he was supposed to obtain grant of letters of administration.

51. Section 45 of the [Law of Succession Act](#) provides as follows: -

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall—
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.



52. In the case of *Babola Mkalindi v Michael Seth Kseme & 2 others* [2012] eKLR the court held that;
- “The *Law of Succession Act*, cap 160 is concerned with the administration of the estate of deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was legally competent to freely dispose of during his lifetime, and in respect of which his interest has not been terminated by his death.
53. Section 55 of the *Law of Succession Act* stipulates that: -
- “No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71.”
54. Based on the evidence on record, it is clear that the 1st defendant did not comply with the provisions of the *Law of Succession Act* and it is therefore clear that he transferred the suit property to himself illegally. The plaintiff testified that the 1st defendant transferred the suit property to his name on June 2, 2001 and on cross examination the plaintiff confirmed that the deceased had a wife and children however the wife died in 2004. I am of the view that the *Law of Succession Act* is very clear on who should take out letters of administration and if indeed the plaintiff transferred the suit property to his name in 2001 yet his late brother’s wife and children were alive, he acted contrary to the law.
55. It is the defendant’s case that his brother died in 1993 while the plaintiff stated that the deceased died in 1997. PW6 testified that the 1st defendant made an application for death certificate where he indicated that the late Mohamed Okore died in the year 1993. Upon investigations it was later found out that the 1st defendant’s brother died in 1997 and not 1993 and the death certificate was cancelled.
56. The plaintiff alleged that after the 1st defendant transferred the suit property to his name, he subdivided the same into 4 plots that is Kisumu/Kogony/4622,4623,4624 and 4625 and during hearing he 1st defendant failed to confirm to this court how he subdivided the suit property and sold the same.
57. In *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR, Tunoi, JA as he then was stated that:
- “it is well established that fraud must be specifically pleaded and particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and proved and not allowable to leave fraud to be inferred from the facts.”
58. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR, Justice Sila Munyao held that:
- “It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above



provisions in the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another*, Eldoret ELC Case No 609 B of 2012 where I stated as follows: -

“...it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum.”

59. From the above case law, it is clear that the plaintiff has been able to prove that the 1st defendant acquired the suit property fraudulently, illegally and procedurally.

c. Whether The Plaintiff Is Entitled To Sums Equivalent To The Current Market Value Of The Suit Parcel Or The Resultant Parcels After Subdivision Plus Mesne Profits Against The 1st And 3rd Defendant

60. The plaintiff pleaded mesne profit but did not specifically prove what amount he had lost from the time he bought the suit property up to the time he was filing this suit.

61. Section 2 of the *Civil Procedure Act* cap 21 of the laws of Kenya defines mesne profits as follows: -

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

62. Order 21 rule 13 of the *Civil Procedure Rules* provides as follows: -

13.(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

- (a) for the possession of the property;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - (i) the delivery of possession to the decree-holder;
 - (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.



63. The court in *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR expressed that it is upon a party to place evidence before the court upon which an order of mesne profits could be made. It was stated;

“As regards the payment of mesne profits, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint and it appears to us *prima facie*, that there was no evidence to support the actual figure awarded....That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

“We agree with counsel for the appellant that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding the amount that was neither substantiated nor established.”

64. Although the plaintiff produced a valuer’s report from Acumen Real Estates, he failed to prove how much he had lost and I am guided by the above case law and do find that the plaintiff failed to specifically prove mense profit and this court therefore declines to award mense profit.

d. Whether The 2nd Defendant Acquired Land Parcel Number Kisumu/Kogony/4623,4624 And 4625 Lawfully

65. The 2nd defendant testified that she bought three parcels of land that is Kisumu/Kogony/4623,4624 and 4625. She stated that she bought land parcel number Kisumu/Kogony/4623 and 4625 from one Peyer Otieno Ayub for Kshs 1.1 Million and she produced DEX 2 and DEF2 (b) being the title deeds for the suit property respectively. For land parcel number Kisumu/Kogony/4624, it was the 2nd defendant’s testimony that she bought the said parcel of land from Edward Owino Okello who had bought it from the 1st defendant and the 1st defendant transferred the said parcel to her directly. The 2nd defendant did not produce the title document for parcel 4624 but produced DEX5 being the agreement for sale between her and one Edward Owino Okello.

66. Although the plaintiff stated that parcel the 1st defendant transferred the land parcel 4624 into her name, there was no proof that the 1st defendant transferred the suit to her. In her submissions, the 2nd defendant stated that she was a bona fide purchaser for value since when she bought the property, she had conducted due diligence and found out that the parcels of land had no restrictions.

67. In the case of *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR where the court stated what amounts to "bona fide purchaser for value, thus:

“... a *bona fide* purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of title.
- b. He purchased the property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;



f. He was not party to any fraud. “

68. Although it is clearly established that the 2nd defendant bought the three parcels in good faith and had no knowledge of fraud, the 2nd defendant failed to call the alleged vendors of the parcels of land that is Peter Otieno Ayub and Edward Owino Okello to testify and confirm that they bought the parcels of land from the 1st defendant. The 1st defendant on the other did not specify or confirm who he sold the subdivided parcels of land to.

e. Whether This Court Should Cancel The Titles Of The Suit Property Registered In The Name Of The 1st Defendant Or The Resultant Titles After Subdivision

69. The plaintiff testified that after he found out that his land had been subdivided by the 1st defendant who then transferred the parcels to various individuals, he reported the matter to the police and the 1st defendant was arrested and charged in Kisumu Criminal Case No 556 of 2010 where he was charged with obtaining registration of land by false pretenses and was found guilty. The plaintiff produced the proceedings as plaintiff Ex No 5.

70. PW5 gave his testimony where he stated that the 1st defendant appealed Criminal Case Number 556 of 2010 to the High Court and he produced exhibit 14 being proceedings for Kisumu High Court Criminal Case No 44 of 2012. From the said proceedings the last order issued indicated that the appeal was marked abandoned.

71. The Land Registrar during hearing adduced evidence that entry number 6 was an irregularity as the date therein was on a Sunday which is not a working day. He confirmed that for entry number in the green card, all the supporting documents are in the file while entry number 6 and 7 have no supporting documents

72. Section 80 of the *Land Registration Act* which provides as follows:

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.’

73. In the case of *Hubert L Martin & 2 others v Margaret J Kamar & 5 others* [2016] eKLR, the court held that;

“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 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 the property. The other party also has a similar document and there is therefore no



advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

74. In the case of *Wreck Motors Enterprises v The Commissioner of Lands and others* Civil Appeal Civil Appeal No 71 of 1997, where the court held that:

“Where there are two competing titles the one registered earlier is the one that takes priority ‘

75. The same position was held in the case of *Gitwany Investment Ltd v Tajmal Ltd & 3 others* [2006] eKLR where the Court held that: -

“... the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

76. In the case of *Elijah Makeri Nyangw v Stephen Mungai Njuguna & another* [2013] eKLR, Munyao, J held as follows:

“The evidence in this case puts no one in doubt that the title to the 1st defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of section 26 (1) (b) have been met and that the title of the 1st defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st defendant and his registration as proprietor of the suit land. The plaintiff should be registered as owner of the suit land. It is regretful that the 1st defendant was snared by the scheme perpetuated by the 2nd defendant. I sympathise with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.”

77. Based on the evidence adduced by the Land Registrar, it is clear that the plaintiff acquired the suit property legally while the 1st defendant and the 2nd defendant did not acquire the suit parcels legally. This is because the Land Registrar confirmed that entry number 6 and 7 in the green card were made irregularly. I am guided by the case laws above and as per the evidence on record, I am convinced that the 1st defendant obtained the suit property through forgery as the Land Registrar has also proved that there was no cancellation of Land parcel number 1374 where the 1st defendant produced the original title.

78. In the upshot, judgment is hereby entered in favour of the plaintiff and against the defendants jointly and severally for:

- a) A declaration that the transfer of land parcel number Kisumu/Kogony/1374 from the plaintiff's name to the 1st defendant's name, the sub-division on thereof and consequently all the subsequent transactions /transfers on/of the resultant parcels being land parcels number Kisumu/Kogony/4622, 4623, 4624 and 4625 were fraudulent/illegal and thus null and void.
- b) That this court revokes the titles of land parcel numbers Kisumu/Kogony/4622, 4623, 4624 and 4625 and restores the plaintiff as the registered owner of land parcel number Kisumu/Kogony/1374 or the resultant parcels after sub-division of the same being Kisumu/Kogony/4622, 4623, 4624 and 4625 and the 3rd defendant is hereby ordered to rectify the lands register to reflect the same.



- c) The 2nd defendant is hereby ordered to surrender the certificates of tiles to land parcel numbers Kisumu/Kogony/4622,4623,4624 and 4625 to the 3rd defendant and to vacate the said parcels of land.
- d) Costs and interests.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JULY 2022

ANTONY OMBWAYO

JUDGE

This judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the Covid-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on March 15, 2020.

