



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kiuna v Mubea & 2 others (Environment & Land Case 32 of 2020)
[2022] KEELC 2587 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2587 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 32 OF 2020
LA OMOLLO, J
JULY 21, 2022**

BETWEEN

THOMAS NJUGI KIUNA PLAINTIFF

AND

SAMMY KARINGA MUBEA 1ST DEFENDANT

NAKURU DISTRICT LAND REGISTRAR 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff instituted this suit by way of a Plaint dated 25th March, 2020.
2. He avers that he is the registered owner of all that parcel of land known as Nakuru Municipality Block 17/97.
3. It is his averment that he purchased the said land from one Bernard Rono on 18th November, 2013 for Kshs. 6,000,000.
4. He avers that the 1st Defendant colluded with the officials of the 2nd Defendant to fraudulently and illegally acquire his land.
5. The Plaintiff prays for judgement against the Defendants for:
 - a) An order of injunction restraining the 1st Defendant either by himself, servants and/or agents from entering, alienating, selling, transferring, leasing, disposing and /or interfering in any manner whatsoever with the property known as Nakuru Municipality Block 17/97.
 - b) A Declaration that the Plaintiff is the rightful owner of Nakuru Municipality Block17/97.



- c) Cancellation, revocation or annulment of the certificate of lease Nakuru Municipality Block17/97 issued to the 1st Defendant and the same registered to the Plaintiff.
 - d) In the alternative and without prejudice to the above prayers sought compensation to the Plaintiff at market rates by the Defendants herein.
 - e) Cost and interests of this suit.
 - f) Any other relief that this Honourable Court may deem fit and just to grant.
6. The 1st Defendant was served by way of substituted service but neither entered appearance nor filed a statement of defence.
 7. The 2nd and 3rd Defendants filed their Statement of Defence dated 3rd August, 2020 on 5th August, 2020. They deny all the averments in the plaint and the particulars of fraud, collusion and illegality.

Plaintiffs Evidence.

8. At the hearing, Thomas Njugi Kiuna testified as PW1. His witness statement dated 25th March, 2020 was adopted as part of his evidence.
9. He also produced a list of documents dated 27th September, 2017 which the court adopted as part of his evidence.
10. PW1 testified that he is the owner of the suit parcel and that he possesses a title deed which was issued on 10th September, 2014. He produced the Certificate of Lease which was marked as Exhibit P1.
11. He further testified that he worked as a banker and while employed, he acquired the suit property upon signing a sale agreement between himself and Benard Rono the vendor.
12. He also testified that a search was conducted by his advocates and he produced a Copy of the Search dated 15th October, 2013 which was marked as Exhibit P2. He explained that the search shows that Benard Rono was the registered owner as at 11th August, 1997.
13. He went on to testify that he entered into a sale agreement with Benard Rono for purchase of the suit property and that he purchase price was Kshs. 6,000,000. He explained that the terms of the sale were that 10% be paid upon execution of the agreement which amount he paid via Real-Time Gross settlement (RTGS). He produced a copy of the Sale Agreement dated 18th November, 2013 which was marked as Exhibit P3.
14. He went on to testify that for the balance of Kshs. 5,400,000, he took a loan with the bank and that this amount was also paid via RTGS by his advocates.
15. In his witness statement dated 25th March, 2020 and filed on the 18th May, 2020 the Plaintiff also states that in order to facilitate charging of the property, Benard Rono surrendered to the Plaintiff's advocates all the transfer instruments to allow for transfer and charge of the suit property.
16. It was his testimony that the transfer was affected by Lands office. He produced a Copy of the Transfer registered on 4th September, 2014. It was produced and marked as Exhibit P4.
17. It was his further testimony that a charge dated 3rd September, 2014 was created over the suit property between himself and the financier Bank of Africa.



18. PW1 testified that after registration of the charge, he did a search which confirmed that he is the registered owner which property has a charge to Bank of Africa. He produced a Copy of the Search dated 10th September, 2014 which was marked as Exhibit P5.
19. He testified that he signed the charge which was then registered on 4th September, 2014. He produced a Copy of the Charge as Exhibit P6.
20. It is his testimony that he paid the loan and upon completion, he wrote to the bank requesting to be issued with the title and discharge of charge adding that he subsequently, through his advocate, approached Lands office to register the discharge of charge. He produced a Copy of the Discharge of Charge as Exhibit P7.
21. In his witness statement, the Plaintiff states that his advocate upon lodging the discharge of charge at lands office was informed that that the suit land was not in the Plaintiff's name.
22. He states that this turn of events prompted his advocate obtained a certified copy of the white card which showed that the suit land was owned by the 1st Defendant herein on 30th November, 2007. He produced a certified copy of the White Card which was marked as Exhibit P8.
23. It is his testimony that he got the original title from the bank. He testified that the bank wrote a letter releasing the said title to him on 7th June, 2019. He produced a copy of the letter from Bank of Africa dated 7th June, 2019 which was marked as Exhibit P9.
24. He testified that he is in occupation of the suit property and that nobody has come to claim ownership. He further testified that he has never sold the property to anyone and that he does not know what happened at the Lands office.
25. He concluded that he has never been summoned by Lands office in regard to the suit property and requested the court to grant the prayers as contained in the plaint.
26. On cross examination, he was referred to Exhibit P9 where he testified that the letter is signed by Human Resource Officer- one Mr. Eric Kagose and Jim Waluchio.
27. He confirmed that the letter is not signed by the Managing Director or Legal officer. PW1 explained that the Human Resource Office deals with staff issues, he was a staff member and that the loan was a staff facility.
28. PW1 was referred to Exhibit P1- the certificate of lease- and he stated that the lessor is the government of Kenya while the lessee is Benard Rono. He admitted that he did not see a consent from the government authorizing Benard to sell it to him.
29. PW1 was also referred to Exhibit P7 where he testified that the lease has entry No. 5 and 6. He further admitted that the entry indicates charge dated 3rd September, 2014 registered as entry No. 1 in the encumbrance section.
30. He admitted that the encumbrance section in the title is different and that he didn't know the reason.
31. PW1 testified that the charge has some alterations on the date as August is cancelled and September inserted. It was his testimony that he was not aware that 3rd August, 2014 was a weekend. He also testified that regarding the certification on the charge document; he appeared on 20th December, 2013 to sign the charge.
32. He testified that he was issued with the title on 10th September, 2014. It was also his testimony that on the date he appeared before the advocate on 20th September, 2013, he did not have the title documents.



33. He was referred to Exhibit P4 and he confirmed that the date is also altered from August to September. He further testified that the transfer has Benard's phone number, PIN and signature and that his passport and PIN number is blank.
34. PW1 was referred to Exhibit P7 where he confirmed that it has no bank seal but only advocates stamp and that it is also not dated.
35. He testified that he is in occupation of the suit property but he has not constructed anything. He further testified that he registered a caution as indicated in the search dated 10th September, 2014 and that the white card does not have any caution.
36. He concluded by asserting that the land is his.
37. On re-examination he confirmed that he used the services of an advocate in the process and that he is not familiar with consent to transfer.
38. He testified that there was never any breach regarding the process and that all documents were submitted to the Lands office. He further testified that though the charge has an alteration on the date, his signature has not been altered.
39. It was his testimony that he is not aware of his advocates working hours and that it is possible that they work on weekends. He further confirmed that the discharge of charge has some discrepancies and that he was not the one who prepared it.
40. He testified that the discharge of charge could not be registered as his advocate informed him that the white card indicated the 1st Defendant as the owner of the suit property.
41. He further testified that he signed the charge on 20th December, 2019 and the title followed after. He referred to PExhibit P5 and testified that both the charge and transfer were registered simultaneously on 4th September, 2014.
42. He also referred to the search documents and Exhibit P8 and testified that they were all issued at Lands office. He testified that he is shocked at the irregularity between his documents and those from the Lands office.
43. In conclusion, he testified that he filed this suit on 18th May, 2020 and he is not aware of any caution against the title held by the 1st Defendant.
44. This marked the close of the Plaintiffs case.

Defendant's Case.

45. The 1st Defendant did not enter appearance and did not participated in the proceedings despite service.
46. The 2nd and 3rd Defendant's advocate indicated that she did not intend to call any witness and proceeded to close their case.
47. Parties were directed to file and exchange written submissions.

Plaintiffs Submissions.

48. The Plaintiffs in their submissions gave a summary of their case and the defence case.
49. The Plaintiff identified the following issued for determination:



- a. Whether the Plaintiff acquired his title legally and lawfully and therefore is the legitimate owner of the suit land.
 - b. Whether the Defendants committed fraud and illegality in having the 1st Defendant entered in their records as the registered owner.
 - c. Whether the Plaintiff is entitled to the orders sought.
50. On the first issue and second issue, the Plaintiff relied on Section 26 of the [Land Registration Act 2012](#) and submitted that he has sufficiently proved that he acquired his title legitimately and that the court ought to declare as such.
 51. The Plaintiff also submits that the root of his acquisition can be traced.
 52. He submits that the 2nd Defendant did not prove how after issuing two searches and a certificate of lease, the records changed from the Plaintiff being the owner of the suit parcel to it being registered in the name of the 1st Defendant.
 53. He submits that the Plaintiff has laid a foundation to warrant this court to hold that acts of fraud, illegality, collusion or mistake occurred.
 54. On the question of fraud and illegality, the Plaintiff submits that he did not sell or transfer the suit property to anyone and that before he completed paying the loan, the title was in the safe custody of the bank.
 55. He submits that the 2nd Defendant has failed to demonstrate how 1st Defendant acquired title and how he became the registered owner adding that failure by them to offer any explanation points to fraud, mistake or corruption.
 56. The Plaintiff states that the 2nd Defendant is the custodian of land records and failure by them to offer an explanation on how the 1st Defendant became the registered owner is suspicious.
 57. The Plaintiff refers to the decision in *Moses Parantai & Persis Wanjiku Vs Stephen Njoroge Macharia* Civil Appeal No. 411 of 2018 in support of his assertion that he has proved fraud.
 58. On the third question, the Plaintiff relied on Section 80 of the [Land Registration Act](#), from which this court derives power to rectification of the register by ordering cancellation and amendment if it is satisfied that the registration was obtained made or omitted by fraud or mistake and section 80 (2) which speaks to the circumstances under which the court may decline to order rectification of the register.
 59. The Plaintiff submits that in the event that that court find that the Plaintiff is not entitled to orders sought, then the Plaintiff has a right to be indemnified under section 81 of the [Land Registration Act](#).
 60. The Plaintiff ends his submissions by praying for costs.

2nd & 3rd defendants' submissions.

61. The 2nd and 3rd Defendants' in their submissions identified the following issues for determination:
 - a. Whether the Plaintiff is the legal owner of the suit land.
 - b. Whether the Plaintiff is eligible for compensation.
 - c. Who is to bear costs of the suit.



62. On the question whether the Plaintiff is the legal owner of the suit land, the 2nd and 3rd Defendants relied on the Court of Appeal decision in *Joseph Arap Ngok Vs Justice Moyo Ole Keiwa & 5 Others*, Civil Appeal No. Nairobi 60 of 1997 and submitted that the Plaintiff is not the legal owner of the suit land.
63. They submit that the Plaintiff did not produce a consent from the government authorising Mr. Rono to sell the land to him.
64. They also submit that the suit land has been registered in the name of the 1st Defendant from 30th November, 2007 to date.
65. They submit that had the Plaintiff followed the correct procedure, his name would be on the green card. They also question the failure by the Plaintiff to join Benard Rono in the suit.
66. The 2nd and 3rd Defendant submit that the discharge is a forgery for the following reasons
 - a. It does not bear the seal of the bank,
 - b. The entries differ from those in the certificate of lease- the date of charge is indicated as 3rd September, 2014 registered as entry No. 1 on the encumbrance section and yet the title's entry No. 1 indicates that the Plaintiff as the owner.
 - c. The charge is not dated.
 - d. The letter showing that the loan is fully paid is from the human resource department and not legal officer or director of the bank
67. The 2nd and 3rd Defendants submit that the Plaintiff has failed to prove fraud on their part in accordance with the required standard. They rely on the decision in *Dr. Joseph Arap Ngok Vs Justice Moyo Ole Keiwa & 5 others*, NBI Civil Appeal No. 60 of 1997 which speaks to sanctity of title and that title can only be challenged on the grounds of fraud or misrepresentation.
68. On standard of proof of fraud, the 2nd and 3rd defendants have referred to the decisions in *Moses Parantai 7 Peris Wanjiku Mukuru Suing as the legal Representatives of the Estate of Sospeter Mukuru Mbeere (deceased) Vs Stephen Njoroge Macharia* (2020) eKLR and *Central Bank of Kenya Ltd Vs Trust Bank Limited & 4 Others* (1996) eKLR
69. The 2nd and 3rd Defendant submit that the Plaintiff is not a bonafide purchaser and refer to the decision in *Katende Vs Haridar and Co. Limited* [2008] 2 E.A. 173
70. On whether the Plaintiff is eligible for compensation, the 2nd and 3rd Defendants' relied on Article 40 of *the Constitution* and submitted that the Plaintiff does not qualify for any compensation.
71. They submit that the Plaintiff did not prove any damages he has suffered to warrant grant of damages and or compensation. They rely on the decision in *Moi Education Center Co. Ltd vs William Musembi & 16 others* (2017) eKLR wherein the learned Judges of Appeal held that the evictees were obliged to place material before the court on the basis of which an assessment of damages would be undertaken.
72. The 2nd and 3rd Defendant then prayed that the suit be dismissed with costs.

Analysis and determination.

73. Upon hearing of the testimony of the Plaintiff, perusal of the pleadings, submissions and judicial decisions cited it is my considered view that the issues for determination are:



- a) Whether Land Parcel No. Nakuru Municipality Block 19/97 was illegally and fraudulently transferred to the 1st Defendant.
- b) Whether a declaration should issue that the Plaintiff is the lawful owner of Land Parcel No. Nakuru Municipality Block 19/97.
- c) Whether the Plaintiff is entitled to orders of cancellation, revocation and annulment of the certificate of lease issued to the 1st Defendant.
- d) Whether the Plaintiff is entitled to an alternative order for compensation.
- e) Who should bear the costs of this suit.

74. I will analyse and determine each of the issues as set out above.

A. Whether Land Parcel No. Nakuru Municipality Block 19/97 was illegally and fraudulently transferred to the 1st Defendant.

75. The averments in the plaint, the written statement and testimony of the Plaintiff can be summarised as follows:

- a. As at 15th October, 2013 the suit parcel was registered in the name on Benard Rono.
- b. He purchased the suit land from one Benard Rono on 18th November, 2013.
- c. He paid for the suit land by way of RTGS after obtaining a loan from Bank of Africa (K) Ltd.
- d. Benard Rono executed transfer forms and the transfer was registered on 4th September, 2014.
- e. That the suit parcel was transferred to his name.
- f. On the same day, 4th September, 2014, the instrument of charge was received for registration and the suit property was charged to Bank of Africa (K) Ltd as security for loan of Kshs. 6,000,000.
- g. A search dated 10th September, 2014 confirms the fact of registration of the suit property in his name and the fact of charging of the suit property on Bank of Africa (K) Ltd.
- h. Subsequently, while attempting to register a discharge of charge, the same was not accepted for the reason that the suit property is registered in the name on one Sammy Karinga Mubea (the 1st Defendant). The suit property was registered in the 1st Defendant's name on 30th November, 2007.

76. The Plaintiff has particularized the fraud. Collusion and illegality on the part of the Defendants as follows;

- a. The Defendants colluding to illegally confer ownership upon the 1st Defendant, land belonging to the Plaintiff.
- b. Conspiring to defraud the Plaintiff of his land.
- c. Fraudulently registering the said title under the 1st Defendant.
- d. The 2nd Defendant illegally issuing another title over the same parcel of land while he knew or ought to have known that there was another existing title in the name of the Plaintiff.
- e. The 1st Defendant presenting false and fictitious documents to the land office.



- f. The 2nd Defendant failed to conduct due diligence and failed to exercise proper care on the documents presented and going ahead to issue another title to the 1st Defendant.
- g. The 2nd Defendant abusing his office and in collusion with the 1st Defendant removing or illegally and fraudulently altering the ownership records in the name of the Plaintiff and replacing them with those of the 1st Defendant.
77. As things remain, the 1st Defendant has not controverted the allegations of fraud made by the Plaintiff against him.
78. The 2nd Defendant did not call any witnesses to testify but in their submissions have taken issue with the following;
- a. That the Plaintiff has not sued Benard Rono – the person from whom he purchased the suit land.
- b. That the instrument of charge does not have the seal of the bank, that on the face of it, it is has an alteration of the month and that on 20.12.13 when the Plaintiff states that he appeared before the advocate, the title had not been issued.
79. In my view, the questions raised by the 2nd and 3rd Defendant on the instrument of charge are immaterial for the reason that the instrument of charge was lodged and duly registered by the 2nd Defendant.
80. It is my considered view that the 2nd Defendant had every opportunity to scrutinize the documents lodged in respect of the transfer and registration of charge of the suit property and after having satisfied himself that they were in order and/or that the Plaintiff had complied with the legal requirements in respect of registration, the 2nd Defendant proceeded to transfer and charge the suit property.
81. The 2nd and 3rd Defendants have also taken the liberty to speak on the internal procedures and processes of Bank of Africa (K) Ltd. Particularly, they state that discharge is a forgery because it doesn't bear the seal of the bank and is not verified. I am unable to agree with the 2nd and 3rd Defendant's submissions of the question of forgery of the documents emanating from a third party without any complaint from the said third party.
82. I am of the view that the 2nd Defendant has and/or had authority to write and make all necessary enquiries from the Chargee – Bank of Africa (K) Ltd if it had reason to doubt the authenticity of the discharge. They didn't and are precluded from alleging forgery.
83. The 2nd and 3rd Defendant submit that the Plaintiff has failed to prove his case on the required standard. As regards the standard of proof, the Court in the case of *Kinyanjui Kamau Vs George Kamau* [2015] eKLR expressed itself as follows;
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. *See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742* wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts”
84. The burden of proof on the Plaintiffs to prove on a standard higher than a balance of probability but lower than beyond reasonable doubt that indeed the Defendants engaged in acts of fraud. I find that the Plaintiff has been able to discharge this burden.



85. The 2nd and 3rd Defendants have made allegations of forgery and want of form on the documents presented for discharge of charge by the Plaintiff. They failed to call any evidence in support of these allegations in my view, are frivolous and I dismiss them as such.
86. The Plaintiff has explained the process through which he acquired title; from purchase to transfer and registration of charge. From the evidence tendered, it is not in disputed that the suit property was registered in the name of Benard Rono and transferred to the Plaintiff.
87. The persons charged with the process of receiving, approving and registration of documents in the land registries is the land Registrars. They are the ones also who are given the mandate to issue instruments of ownership of land such as title deeds and certificate of leases. The land Registrar who caused the registration to the plaintiff is the 2nd Defendant herein and chose not to tender evidence and/or explain the fact of the suit property being registered in the name of the plaintiff and the 1st Defendant.
88. It is not possible that the Plaintiff caused himself to be registered as a proprietor of the suit land and subsequently charged it without the approval of the Land Registrar.
89. I have no evidence whatsoever, as to how the suit property might have been acquired by the 1st Defendant. The evidence of the Plaintiff is therefore uncontroverted.
90. In *Daudi Kiptugen Vs Commissioner of Lands Nairobi Lands & 4 others* [2015] eKLR, the learned Judge held as follows;

“The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein...”

91. In the circumstances, I find that Land Parcel No. Nakuru Municipality Block 19/97 was illegally and fraudulently transferred to the 1st Defendant.

B. Whether a declaration should issue that the Plaintiff is the lawful owner of Land Parcel No. Nakuru Municipality Block 19/97.

92. The Plaintiff has challenged the title of the 1st Defendant and the 1st Defendant has offered no explanation whatsoever. In *Board of Trustee Meru Diocese Kirimara Parish Vs Dores Wanja Bore* [2020] eKLR, the Learned Judge offered insights into the question of uncontroverted evidence and he stated as follows;

“The evidence by the Plaintiff was not controverted. It is trite that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the Defendants fails to call a witness to adduce evidence and be cross-examined to test the evidence.

It follows that the statement of defence is nothing more than mere allegation. The issue of uncontroverted evidence was addressed by Justice Mwongo in *Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) -v-Thomas Ondiki Oduor & Another* 2019 eKLR where he stated: -



“There are any authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.

In the case of *Shaneebal Limited v County Government of Machakos* [2018] eKLR, Odunga, J, relied on the cases below in reaching his judgment. In *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others* Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

Similarly, in *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya)* Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that: “In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the [Evidence Act](#) are clear that he who asserts or pleads must support the same by way of evidence”.

In *Interchemie EA Limited Vs. Nakuru Veterinary Centre Limited* Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the Defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted.

Mulwa J, however in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR stated: “I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a Defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A Plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.”

93. I have the evidence of the Plaintiff as presented by him which evidence shows how he acquired the suit land. It is also evident, that the person from whom he purchased the the suit parcel had the suit parcel registered in his name as at 11th August 1997 before the alleged registration to the 1st Defendant- on 30th November, 2007.
94. The 1st Defendant was offered an opportunity to defend this suit and offer an explanation as to how he might have acquired the suit land- as is evidenced in the white card (Exhibit P8) but he chose not to. In the Court of Appeal in [Munyu Maina Vs Hiram Gathiba Maina](#) [2013] eKLR emphasized the duty of the holder of an impugned title in a claim such as the present one in the following words:

“We state that when a registered proprietors’ root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free



from any encumbrances, including any and all interests which need not be noted on the register.

95. Considering the fact that the evidence as presented by the Plaintiff not only remains uncontroverted but is plausible, I find and declare that Plaintiff is the lawful owner of Land Parcel No. Nakuru Municipality Block 19/97.

C. Whether the Plaintiff is entitled to orders of cancellation, revocation and annulment of the certificate of lease issued to the 1st Defendant.

96. Section 26 of the *Land Registration Act* provides as follows:

- (1) The certificate of title issued by the
- (2) 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. (Emphasis is mine.)

97. The import of section 26 is to uphold the sanctity of title. In the case of Dr. Joseph Arap Ngok Vs Justice Moyo Ole Keiwa & 5 Others, Civil Appeal No. Nairobi. 60 of 1997, the Court declared as follows;

“Section 23 (1) of the then Registration of Titles Act (now reproduced substantially as Section 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 takes 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 title and the entire system. In relation to ownership of property in Kenya would be placed in jeopardy.”

98. Taking into consideration my finding in (A) and (B) above, I have no doubt that and an order should issue for cancellation of the certificate of lease issued to the 1st Defendant.

D. Whether the Plaintiff is entitled to an alternative order for compensation.

99. The Plaintiff has not laid a basis for compensation whether in his pleadings and submissions and I decline to make an order under this heading.

100. It is noteworthy that the findings in (A), (B) and (C) above make this prayer superfluous.

E. Who should bear the costs of this suit.

101. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21).



102. In the case of *Jabir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others* SC. Petition No. 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

Disposition.

103. The Upshot of the foregoing is that the Plaintiff's suit against the Defendants succeeds.

104. Judgment is entered in favour of the Plaintiff in the following terms.

- a. A Declaration is hereby issued that the Plaintiff is the rightful owner of Nakuru Municipality Block 17/97.
- b. The Land Registrar, 2nd Defendant, shall rectify the register of Land parcel No. Nakuru Municipality Block 17/97 by deleting the 1st Defendant's names and restoring the names of the Plaintiff.
- c. An order of permanent injunction is hereby issued restraining the 1st Defendant either by himself, servants and/or agents from entering, alienating, selling, transferring, leasing, disposing and /or interfering in any manner whatsoever with the property known as Nakuru Municipality Block 17/97.
- d. The Plaintiff shall have costs of this suit and interest thereon from the date of judgment until payment in full.

105. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF JULY 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Barmao for Gatei for the Plaintiffs

Mr. Chepkurui for 2nd and 3rd Defendant

No appearance for the 1st Defendant

Court Assistant; Ms. Jeniffer Chepkorir.

