



REPUBLIC OF KENYA



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Patel v Mwangi (Land Case 1 of 2016)
[2022] KEELC 12603 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12603 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE 1 OF 2016
FM NJOROGE, J
SEPTEMBER 29, 2022

BETWEEN

DILEEP MANIBHAI PATEL PLAINTIFF

AND

SAMUEL MBURUGU MWANGI DEFENDANT

JUDGMENT

1. By an Amended Complaint dated September 6, 2019 and filed in court on September 9, 2019 the plaintiff sought the following orders against the defendants: -
 - a. The title deed in respect of the parcels of land known as Miti Mingi/mbaruk Block 8/1205 (Kianjoya D) and Miti Mingi/mbaruk Block 8/1206 (Kianjoya D) be revoked and the land register be rectified to reflect the plaintiff as the registered owner of the land.
 - b. That the Land Registrar Naivasha land registry to pay damages to the plaintiff herein for misfeasance of public office which led to the fraudulent conveyance of the plaintiff's land.
 - c. Costs of the suit be paid by the defendants jointly and severally.

The plaintiff's case

2. The plaintiff averred that the Land Registrar Naivasha registered him as the absolute owner of the parcels of land known as Miti Mingi/mbaruk Block 8/1205 (Kianjoya D) and Miti Mingi/mbaruk Block 8/1206 (Kianjoya D) [the suit properties herein].
3. He further averred that on unknown dates the defendant presented documents for the transfer of the suit properties to himself. He also stated that the Land Registrar in concert with the defendant registered a conveyance of the suit properties from the plaintiff to the 1st defendant and entered the latter's name in the register as the registered owner.



The defendant's case

4. The defendant in his defence dated September 7, 2017 denied any fraud in his acquisition of the suit properties. He averred that he lawfully purchased the suit properties from one Dehboor Mohamed Abdulgafoor and obtained titles thereto in his name. He admitted that he had sold the parcel of land to Mr Lee Pius Muchiri Kamau on November 21, 2014 and executed all necessary documents to effect transfer to Mr Lee before any complaint was lodged. He prayed that the plaintiff's suit be dismissed with costs.
5. The plaintiff had joined the Land Registrar Naivasha and the Attorney General as the 2nd and 3rd defendants. They filed a notice of indemnity against co-defendant addressed to the defendant dated November 20, 2019. They claimed from him full indemnity in respect of all the plaintiff's claims, all damages loss, expense and costs of the suit. They alleged that he skillfully and with intent to deceive misled the Land Registrar Naivasha that he was the proprietor of the suit lands; that the Land Registrar, and other lands officers were not party to his machinations to defraud the plaintiff, that the Land Registrar did not benefit from the proceeds of his fraudulent dealings and the plaintiff's claim lies solely against him and not against the other defendants. However, later on November 26, 2019, the plaintiff filed a notice of withdrawal of the suit against the 2nd and 3rd defendants.

The plaintiff's evidence

6. The hearing of the case took place on various days the first day being February 8, 2021 where Ravindra Dileep Patel (PW1) gave evidence. He testified that he is the plaintiff's son and that he resides in Birmingham, Alabama USA. He adopted his witness statement November 30, 2020 as part of his evidence. He testified that he has been the custodian of his father's property documents and produced a copy of title for parcel No 1205 (P Exh 1) and parcel No 1206 (P Exh 2). He stated that the plaintiff is the owner of the suit properties and that he learnt of fraudulent dealings on the suit property from his uncle Bhapendra Manibhai Patel who then pursued criminal investigations regarding the fraud. He produced a copy of the official search and green card for the suit properties (P Exh 3A, P Exh 3B) and (P Exh 4A, P Exh 4B) respectively. He testified that when he looked at the searches and green cards, he realised that there had been a purported transfer from the Plaintiff to a Mr Mehboob Mohamed Abdulgafoor in November 1999 as well as another purported transfer in June 2006 to the defendant. He further testified that between 1999 and 2006, the plaintiff was in the USA hence it was impossible for him to have entered into any agreement to dispose of the suit properties at that time. He also testified that the plaintiff never executed any sale agreement or appeared before any Land Control Board hence the purported transfer from the plaintiff to Mehboob Abdulgafoor Mohamed was fraudulent.
7. PW1 testified that he had never seen any title for the suit properties in the name of the defendant and therefore it was impossible for him to have titles when PW1 held the original titles. He testified that he had obtained from the Criminal Investigations Directorate a copy of a purported sale agreement dated November 21, 2014 between the defendant and Lee Pius Muchiri Kamau (P Exh 5). He testified that the Land Registrar wrote a report dated April 26, 2016 relating to the suit properties (P Exh 6). He produced a copy of the extract of the members' register of Kianjoya (P Exh 7) which showed that the plaintiff was the original allottee of the suit properties and that the defendant was either a fraudster or a beneficiary of a fraudulent transaction. In conclusion, PW1 testified that there was no evidence of payment of any consideration by the defendant and prayed for judgment as per the plaint.
8. Upon cross-examination, PW1 averred that the plaintiff's name is spelt "Dileep Manibhai Patel" and that both the names "Dilip" and "Dileep" refer to the plaintiff. He further stated that he was not aware of the outcome of the police investigations but also maintained that the green card indicated that



there was fraud. He also testified that the plaintiff regularly travels abroad but he did not have the plaintiff's passport to show his itinerary during the period the suspect transactions allegedly took place. He further maintained that the plaintiff herein was the original owner of the parcels acquired through allotment.

9. On re-examination, PW1 stated that his witness statement filed on November 30, 2020 was notarized before Victor F Nichols on November 24, 2020. He also stated that there had not been any doubt previously that the plaintiff's name was Dilip or Dileep and that the defendant had never claimed that he acquired the suit properties from a person named "Dilip".
10. On June 15, 2021 PW1 was recalled where he produced a copy of a letter dated April 6, 2021 (P Exh 8) from the Director National Registration Bureau. That letter indicated that the ID number card number alleged to be Mehboor Mohamed abdulgafoor does not belong to him. Attached to that letter is an identification report from the Director of National Registration, showing that the quoted national card number reflected in the green card that is individual No 01273835 as belonging to Mehboor is the individual identification number that belongs to one Debora Helida Okoth of Homa Bay County. He produced that identification report, printed on May 15, 2015, as (P Exh 9). He also explained that the spelling of his name was due to a phonetical difference between his culture and that of the plaintiff's advocate; that in Gujarati, the sound "ee" is written as "i" and that is why, he stated, his own name was spelt as "Dileep".
11. Russos Ritho Mwangi, the Land Registrar, Naivasha testified as PW2. He testified that he had been working at the Naivasha Lands Registry for 6 months by the time of his giving evidence; that the suit properties are under the Naivasha Land Registry and the initial allottee was Dileep Manibhai Patel. He explained that the Kianjoya Company Ltd original members register was used to allocate the suit lands and a free hold title issued. He testified that the Green Card showed transfer to one Mohamed Abdulgafoor. After he had checked the registry records, he confirmed that there were no transfer forms or evidence of payment of any stamp duty for the separate transactions purporting to transfer the land to Mohamed Abdulgafoor and to the defendant respectively in this suit. He testified that his predecessor Ms Karani had written a report (PEXH 6) about the transactions complained of and termed them as forgeries. He also stated that on his part, he suspected that the alleged transactions were fraudulent. He explained that since there were no transfer documents in their record, he suspected fraud and testified that according to the procedures, the entries were illegal. He stated that the first registered owner Dilip Manubhai Patel, was the property owner of the suit lands.
12. On June 6, 2022 PW2 was recalled where he testified that he had a certified copy of the members' register showing the plaintiff was the owner of the suit land. He further testified that he did not have any information as to whether the defendant or any officer at the Land Registry was ever charged with criminal fraud. He also explained that he did not have any information as to whether any of the officers at Naivasha Land Registry had been summoned by their seniors for questioning over the matter.
13. On re-examination by Mr Githui counsel for the plaintiff, PW2 confirmed that the information he gave was from the land registry records. He further confirmed that there are green cards in the land registry for both Miti Mingi/Mbaruk Block 8/1205 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1206 (Kianjoya D). He also explained that they had a certified copy of the members' register and that if there had been any transaction as alleged by the defendant, the registry would have had copies of the transfers which it did not.
14. Upon re-examination by the court, PW2 reiterated that the registry binder had green cards and that the parcel file would have had the transfers.
15. The plaintiff closed his case at this point.



The defendant's evidence

16. Samuel Burugu Mwangi the defendant herein testified as DW1. He relied on his witness statement filed on September 2, 2017 which the court adopted as part of his evidence. His evidence is that he bought the suit lands from Dehboor Mohammed Abdulghafoor on or about June 27, 2006; that he conducted due diligence by establishing that the seller was the owner of the suit premises before purchasing the land; that in 2014, he sold the suit premises to one Lee Pius Muchiri Kamau on a willing buyer – willing seller basis. He denied having colluded with any other person while purchasing or selling the suit premises and asserted that the transactions were genuine and had been confirmed by the land registry to be so. He criticized the plaintiff for the delay in lodging a complaint for 8 years after the suit premises were purportedly transferred to the defendant.
17. He testified that he had never been charged or summoned as a witness in a criminal case with any offence of forgery. He also stated that he had never been summoned by Lands office. He further testified that the registry gave him title deeds as per the green cards produced (P Exh 4) which he then gave to Mr Lee Muchiri. He further testified that the agreement dated November 21, 2014 was between himself and Muchiri which agreement he produced as (DEXh 1). He stated that the plaintiff's case was not genuine and urged the court to dismiss it.
18. Upon cross-examination by Mr Githui for the plaintiff, DW1 testified that he is a businessman who sells properties including houses, *shambas* and plots. He testified that he was familiar with the land buying process and he briefly explained some of the steps taken. He testified that he only had the agreement between himself and Mr Lee Muchiri; he did not have the agreement between him and Mr Mohamed Abdulghafoor. He further testified that in 2006, Dehboor the seller left his identification card No 1273835 with the lawyer who was to conduct the whole transaction; DW1 was not present personally when Dehboor the vendor signed the agreement. The documents were subsequently lodged in the land registry by the lawyer. He testified that the lawyer paid stamp duty but stated that he did not have any stamp duty receipt for the transaction. He also admitted that a Land Control board was necessary but confirmed that he had not attended the Land Control Board; he did not have any letter of consent from the Land Control Board. He testified that he had bought the land for Kshs 3 million which monies he claims to have been depositing with his lawyer who then gave him a receipt that got lost.
19. It was his further evidence that he had given a copy of a certain agreement to his lawyer but the lawyer never brought it to court, that an official search was done that showed the seller(Dehboor) was the owner but admitted that he did not have the search document.
20. DW1 was also referred to a letter dated April 24, 2019 and upon being pressed by Mr Githui in further cross examination, he admitted that he had other cases relating to the lands in Kianjoya where the suit lands are situate, but averred that he did not know their exact citations. He stated that he did not have even a copy of his title as he had given his lawyer all the documents. He admitted that to his knowledge, a second title cannot be issued while first title was still with the owner.
21. Upon re-examination, the witness DW1 testified that he had given all the documents to Mr Muchiri the buyer. He stated that the ID number on the green card was 1273835 while the one in the report was 01273835. He further stated that he had never seen PExh 9 and that he never knew Deborah and that the CID and Lands office had never summoned him regarding the titles. He stated that he had followed the procedure and obtained titles to the suit properties.
22. After DW1 completed giving evidence, the defendant's case was marked as closed and parties were directed to file and serve their submissions.



Submissions

23. The plaintiff filed his submissions dated October 20, 2022 on the same day where he gave a background of the case and submitted that the case against the defendant is twofold. One, that the defendant is culpable of fraud which led to the illegal registration of the title of the two parcels of land in his favour and in the alternative, the defendant is a beneficiary of an illegal process leading to the registration of the titles in his names. He relied on section 26 of the [Land Registration Act](#) and cited the case of [Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others](#) [2015] eKLR that dealt with impeachment of a title on the basis that the title was acquired by fraud and misrepresentation.
24. On the first issue of fraud, the plaintiff submitted that the defendant never produced any sale agreement by which the suit premises were purportedly sold to him. He submitted that if the defendant had indeed purchased the suit property from the purported vendor, then he would have been certain regarding the vendor's name and identity. He further submitted that the defendant failed to produce any transfer documents executed between him and the said vendor, a consent letter from the Land Control Board, receipt of payment of stamp duty or even a copy of the title deed in his name. He also submitted that the defendant claimed that his advocate did the entire transaction on his behalf but he never called him to corroborate his testimony. He placed reliance on the case of [Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 4 Others](#) [2012] eKLR and submitted that failure by a party to produce evidence in his possession relevant to the matter in issue is an invitation to the court to draw an adverse inference that such evidence is prejudicial to that party's case.
25. The plaintiff submitted that the Land Registrar stated that the parcel file at the lands registry only had the green card and a copy of the members' register, that in respect of the missing conveyance documents, the Land Registrar had written a letter that gave an account of the fraudulent practices relating to the said registry, that the discrepancy on the identification number for the vendor as per PExh 9 was evidence of fraud and illegality perpetrated by his advocate and that if the defendant had wished to show that the identification card number 1273835 belonged to the purported vendor, he should have called him to testify in court and produced his identity card. The plaintiff finally submitted on the present issue that the defendant was an active participant in the fraud and his registration as proprietor of the suit land ought to be revoked.
26. On the second issue of illegality in registration of the defendant as the owner of the suit land, the plaintiff relied on section 3(3) of the [Law of Contract Act](#) which provided that a contract for sale of land ought to be evidenced by way of a note or memorandum. The plaintiff also cited section 112 of the [Evidence Act](#) and submitted that there was no evidence produced by the defendant to wit: the sale agreement, stamp duty receipt, transfer forms, Land Control Board Consent, land rent and rates paid or a copy of the title to prove the transaction was genuine. He finally submitted that from the above, the registration and entry of the defendant's name could not stand scrutiny and urges the court to cancel his registration and order that the land register be rectified to reflect the plaintiff's name as the registered owner.
27. The defendant filed his submissions dated July 8, 2022 on July 13, 2022 where he identified 11 issues for determination. First is the issue of whether the case against the defendant stands given the withdrawal of the suit against the Land Registrar and the Attorney General - 2nd and 3rd defendants. He submitted that without an amendment that pointed out that he acted by himself to obtain the title to the suit property, the withdrawal of the suit against the 2nd and 3rd defendants affects paragraphs 6 to 10 of the amended plaint, which he interprets to mean that the suit against him was also effectively withdrawn.



28. On the second issue as to whether the letter dated April 26, 2016 by the Land Registrar (P Exh 6) stands against him, he submits that the said letter is wanting in content and credibility as it seemed to have been written in solicitation by the plaintiff and that it is in conflict with itself.
29. The third issue is on whether the reliefs in the Plaintiff are capable of being granted. The defendant relies on the case of *Pricilla Nyambura Njue v Geobem Middle Limited, Kenya Bureau of Standards (Interested Party)* [2021] eKLR and submitted that prayers (b) and (c) of the Amended Plaintiff cannot be granted on account that it stands against what was withdrawn.
30. The fourth issue is whether the plaintiff had proved to the required standard that the defendant acted fraudulently whether in concert with the 2nd defendant or not. The defendant submitted that the plaintiff has not proved to the required standards the elements of fraud. He cited among other cases the Court of Appeal case of *Demutilla Nanyama Pururmu v Salim Mohammed Salim* 138 of 2018.
31. On the fifth issue, whether PW1 produced authority to testify or prosecute the case on behalf of the plaintiff, the defendant submitted that PW1 never produced a statement made by the plaintiff or authority from the plaintiff authorizing PW1 to testify on his behalf.
32. On the sixth issue regarding the credibility of PW1's evidence, the defendant submits that PW1 solicited assistance from the 2nd and 3rd defendants whose original dimension of their cases changed midway, thus allegedly laying an attack on the defendant albeit without sufficient evidence. He also submits that PW1 did not have an affidavit clarifying that the name Dilip and Dileep are one and the same.
33. The seventh issue was whether PW1 had evidence that his father was not within the country at the time of the sale transaction. The defendant submitted that PW1 did not produce his father's passport to prove that he was not present at the time of the sale transaction.
34. On the eighth issue, whether the report from National Bureau was authentic, he submitted that the report from the Director of National Registration Bureau concerned ID No 01273835 and not 1273835.
35. The ninth issue is regarding the effect of the defendant's indication in the defence that he purchased the suit property from "Dehboor" yet in the affidavit that he had purchased from "Mehboob". He submitted that in the green card and supporting affidavit indicates that the seller was "Mehboob".
36. On the tenth issue on whether the testimony of PW2 contradicts the 2nd and 3rd defendants defence, he relied on the Supreme Court case of *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR. He submitted that the testimony of PW2 does not stand since it contradicts their defence and that it is trite law that the testimony and/or evidence tendered in court must be in consonance with the pleadings.
37. The final issue was whether DW1 had failed to avail transfer documents whereas he submits that by the time of being sued, he had surrendered the ownership documents to a third party who then sold it. He contends that had he produced the sale agreement, it could still not have changed the fact that he had sold the suit premises to Lee Pius Muchiri Kamau.

Determination

38. This court upon reviewing the pleadings, evidence and submissions by the parties is of the view that the principal issues for determination are as follows: -



- a. Whether the plaintiff has established that the purported transfers of the suit premises to the Mehboob Mohamed Abdulghafoor and subsequently to the defendant respectively were tainted with fraud;
 - b. Who shall bear the costs of the costs of this suit?
39. On a preliminary note, this court will not put much stock into speculation by the defendant that the name “Dilip” refers to any person other than the plaintiff. PW1 had explained that the issue on the spelling of his name was due to a phonetical difference between his culture and that of their advocate. In the light of the explanation regarding phonetics as given by PW1 and which was addressed earlier in this judgment, this court is satisfied that the names refer to the plaintiff. In any event the issue does not arise from the pleadings and it is trite that a party can not be allowed to agitate in evidence issues other than those arising from the pleadings in a suit as seen in the case of *Ayub Ndungu v Marion Waitibera Gacheru* [2006] eKLR among others.
40. On a second preliminary issue, it is indisputable that the suit premises were registered in the name of Dilip Manibhai Patel before any other party on September 8, 1997. The defendant himself has not controverted this fact and it is self-evident from the land register. The Land Registrar, Naivasha testified as PW2 and explained that the original Kianjoya Company Limited members Register was used to allocate the suit land to members, and a free hold title had been issued to the plaintiff.
41. It logically follows therefore that the only issues of consequence in this matter can be summarised into two namely: whether the suit premises were transmitted legally or by way of fraud from the plaintiff’s name to Mehboob Mohamed Abdulghafoor and whether the same were legally transferred to the defendant thereafter and who should pay the costs of the suit.
42. In determining the first issue, the court notes that PW1 gave evidence that he is the custodian of his father’s property documents where he produced a copy of title for the suit parcel No 1205 P Exh 1. He testified that the plaintiff is the owner of the suit property who later learnt of some fraudulent dealings on the suit properties as evidenced from the official search and green card. He further testified that the plaintiff never executed any sale agreement or appeared before any Land Control Board hence the purported transfer from the plaintiff to Abdulghafoor Mohamed was fraudulent. He stated that the defendant was either a fraudster or a beneficiary of a fraudulent transaction.
43. PW1 also produced a letter dated April 6, 2021 P Exh 8 from the Director National Registration Bureau in an attempt to prove that Abdulghafoor Mohamed’s ID number as reflected in the green cards produced in evidence did not match the number in the records of the National Registration Bureau. He produced an identification report (P Exh 9) that showed that one Debora Helida Okoth was the holder of ID No 215421499. Regarding this evidence on identity card numbers, I agree with the defendant’s submission that there is a discrepancy. The discrepancy arises from the fact that the number extracted from P Exh 9 is described as an “individual number” while the green card gives a purported “identity card number” that is on all fours with the individual number in PExh 9. The vital detail here is that P Exh 9 gives both the “identity card number” and the “individual number”. For it to be shown that Mehboob did not possess identity card number ID No 01273835 and that it belonged to Debora Helidah Okoth, Mehboob’s identity card number had to appear in P Exh 9 as an identity card number yet it did not. As stated earlier, the identity card number in P Exh 9 is a different one. This court refuses to confuse the identity card number and the individual number and assume that they mean one and the same thing and, on that basis parse, conclude that the proper investigations concerning Mehboobs’ true identity were conducted, and that the results were satisfactory. I find the investigations results in respect of identity of Mehboob as reflected in P Exh 8 and P Exh 9 shoddy and



unfit to be relied on in evidence in this suit so as to prejudice the defendant and I therefore reject the plaintiff's evidence in that regard.

44. Notwithstanding the foregoing, it is not lost on this court that the defendant rather than seek to join Mehboob to the suit and claim indemnity or other remedy against him, opted to fight the battle against the plaintiff single handedly. This conduct raises doubt as to whether Mehboob, the alleged seller, exists. In this court's view it is the joinder of the seller as a party that would have relieved the defendant from a great burden, or a substantial portion thereof, of establishing that the purported transfer from the plaintiff to Mehboob, and the subsequent purported transfer from Mehboob to the defendant, was regular.
45. PW2 the Land Registrar testified that the Green Card showed transfer to Mohamed Abdulgafoor but the parcel file did not contain transfer documents, evidence of payment or evidence of payment of any stamp duty. It was incumbent on the defendant to produce copies of transfers registered both in favour of Mehboob and himself with regard to the suit land, the stamp duty receipts for the transactions, the copies of titles issued to them, the relevant land control board consents and any proof of payment of consideration for the alleged purchase from the plaintiff and from Mehboob. Strangely, these were not produced in evidence, yet the defendant testified that he is not new in the business of buying and selling real property, and was thus familiar with the land buying process. To shield himself from scrutiny of the court he explained that his lawyer attended to the entire transaction. In addition to his confessed lack of vital transactional documents mentioned above, he further testified that he had bought the land for Kshs 3,000,000/= but produced no evidence of that. That such a person experienced in Land sale transaction did not deem it fit to store copies of documents including his bank account statements showing transfers of funds that would exonerate him from a possible claim of fraud by the plaintiff or any other person, involving transfers of the suit premises, but only had an agreement between himself and a Mr Lee Muchiri the person he purportedly sold the land to stinks of fraud and reveals a character whose evidence is unworthy of being believed by court.
46. The defendant also, in attempts to convince this court that the transfers to Mehboob and subsequently to himself and that he is the lawful owner of the suit properties, testified that he had never been charged or summoned as a witness in a criminal case with any offence of forgery. In this court's view, I think the defendant should have reserved that for some other credulous forum not acquainted with the social circumstances of the nation we live in. I am aware of the unfathomable breadth and depth of the agony of many a hapless plaintiff who have pending civil cases that on a cursory glance reveal to a civil or Land court Judge prima facie criminally reprehensible fraud perpetrated against them by defendants who have for some Kafkaesque reasons escaped prosecution before courts by law enforcement arms of government, and I am certain that the reasons for that default may be as kaleidoscopic and labyrinthine as the diversity of human thought ways.
47. This court finds that the plaintiff's evidence was consistent and reliable and that it has not been controverted. It is this court's view that the defendant cannot shield himself with the copy of green card and therefore the claim that he bought the suit property from Mehbor Mohammed Abdugafor was false. The nocturnal act of merely inserting names into green cards without any valid supporting transfer documents is illegal and unprocedural. It is obvious that land registries are not manned by angels, but it is also highly unlikely that even the most wayward of persons in land registries would in their wildest distribution of favours bestow avuncular bounties of free registration of land title to unsuspecting and innocent citizens out there. The last time manna was received was some two thousand five hundred years or so back, and it was certainly not rained from the nib of a man-made pen in a land registry but in a desert and by divine power, and even that event was consequent upon supplicatory requisition by needy, wandering souls. Consequently, it needs no belabouring the point



that a person who benefited from a registration that is ex facie illegal or irregular must be called to account and not be allowed to hide behind the claim that he already has a title issued by the relevant government officers and leave it at that; he must demonstrate step by step how he came to be registered, especially if he does not denounce the registration as an error. The law in article 40 of the *Constitution* and section 26 of the *Land Registration Act* is only meant to protect persons who genuinely entered into agreements for sale or transfer and who can establish their bona fides and not crooks who criminally interfere with government land records. As long as a transaction is not perceived by court to have been carried out in good faith, there will always be considerable doubt that a title can be protected, especially where the holder thereof does nothing to disabuse the court of the suspicion that it was illegally obtained, and keeps waltzing around the witness box proclaiming innocence and intermittently waving about a certified copy of the land register or title deed.

48. If it is anything to go by, the defendant being a businessman familiar with the land buying process clearly knew what he was doing from the onset and if he had conducted due diligence in a genuine transaction, he would have realized that the suit properties belonged to the plaintiff. The defendant stood to directly benefit from the impugned transfers of the suit premises. He has not produced any evidence before court to demonstrate that the transfer to him was regular. He appears to raise a few obfuscationist arguments that in my view, have little or no bearing on the pleadings and so which have no place in a trial of this nature. The defendant's defence and shabby evidence are absolutely of no succour to him in the suit. Having regard to the totality of the evidence of the parties in this suit, this court is persuaded that the plaintiff has established to the required standard that the defendant is culpable for fraud in the transfer of the suit premises to a fictitious person purportedly called "Mehboob Mohamed Abdulghafoor", and subsequently to himself. In fact, the most surprising thing now apparent is that the defendant even showed up and owned up to the transactions and attempted to defend his invalid title.

49. Section 24 of the *Land Registration Act* 2012 provides that:

"...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 that 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."

50. Section 25 of the same Act provides that:

"...the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in the Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register and that nothing in the section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."



51. Section 26 provides that:

“...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—on the ground of fraud or misrepresentation to which the person is proved to be a party where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

52. In the instant case, the plaintiff adduced evidence of the certificate of title to the suit properties and explained how he acquired it. PW2 corroborated his evidence by confirming that the plaintiff was indeed allotted the suit properties from a firm known as “Kianjoya” and that the register at the lands office did not have any transfer documents that could support the transfers to Mehboob or to the defendant. He further presented evidence in the form of a letter from his predecessor (PExh 6) that there had been some suspected fraudulent dealing regarding the suit properties. That evidence by the plaintiff was never rebutted by the defendant. The defendant alleges that he acquired the suit property by purchasing it from Mehboob Mohammed Abdughafoor at Kshs 3,000,000/= but he failed to produce the said sale agreement, proof of receipt of payment or transfer documents. He only produced a sale agreement between himself and Lee Pius Muchiri whom he alleges to have later sold the suit properties to. It is quite unfortunate that the defendant failed to produce any documentation linking him to a genuine transfer to him of the suit properties let alone call any witness to corroborate his testimony. It is therefore this court’s view that going by that alone the Defendant is not entitled to legal protection under the provisions of the [Land Registration Act](#) set out above.

53. Most worthy of note is the fact that the defendant did not produce the sale agreement between him and Mehboob Mohammed Abdughafoor whose name appears on the green card. Section 3 (3) of the [Law of Contract Act](#) provides as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

54. In the absence of a sale agreement, the defendant has no valid defence and cannot foist any liability on any other party, especially when the apparent fictitious nature of the alleged vendor is considered. On the other hand, the plaintiff has demonstrated that he was indeed allotted the suit properties by a Company he was a member of and he was issued with a certificate of title.



55. Article 40 (6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. This provision of the constitution coupled with the provision of section 26(1) (a) and (b) of the Land Registration Act in my view places a responsibility upon prospective purchasers of titled properties to diligently ascertain the status of a property before purchase.
56. The Court of Appeal in the case of Esther Ndengi Njiru & another v Leonard Gatei Mbugua [2020] eKLR in dismissing the appeal held as follows:
- “...Additionally, the appellants who had no sale agreement between themselves and Waiharo did not call Waiharo as their witness to substantiate the sale and legality of title (if at all) that he transferred to the appellants. It is on the basis of the evidence adduced and the non-denial of the respondent’s claims against Waiharo that the judge found that Waiharo “....did not hold a valid title to the suit property which he could sell and transfer”.
57. In the upshot, this court finds that the plaintiff is the lawful owner of the suit properties being Miti Mingi/mbaruk Block 8/1205 (kianjoya D) and Miti Mingi/mbaruk Block 8/1206 (kianjoya D).
58. The defendant in his supplementary submissions contends that PW1 did not have the plaintiff’s authority to testify on his behalf. This court is of the view that the defendant had the opportunity to rebut PW1’s evidence during trial but he failed to do so. At no point before the close of the plaintiff’s case did he object and request that PW1 produce a letter of authority from the plaintiff, instead he allowed the witness to testify and even cross-examined him. In the case of Nairobi Civil Appeal No 240 of 2011 Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR the court held as follows:
- “Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented...”
59. This court has considered the evidence, the documents produced, the submissions of counsels and the relevant judicial authorities and has come to the conclusion that the plaintiff has proved his case against the defendant on a balance of probabilities and I enter judgment in favour of the plaintiff. The defendant has failed to prove his defence by way of evidence.
60. In addition to the orders I will make at the end, I hereby order that a copy of this judgment be sent by the Deputy Registrar of this court to the Director of Criminal Investigations and I recommend that proper investigations be conducted by his office into the conduct of the persons said to have been involved in the transactions regarding the suit land and appropriate action be taken on the strength of the evidence unearthed.
61. I now therefore make the following final orders:
- a. That the plaintiff is the lawful registered proprietor of Miti Mingi/mbaruk Block 8/1205 (Kianjoya D) and Miti Mingi/mbaruk Block 8/1206 (Kianjoya D) the suit properties herein.
 - b. That the Land Registrar Naivasha shall rectify the Land register by striking out the entries reflecting “Mehboob Mohamed Abdighafoor” and the defendant as successive proprietors of the suit land and he shall reinstate the plaintiff’s name, being “Dilip Manibhai Patel”, as registered proprietor of Title No Miti Mingi/mbaruk Block 8/1205 (Kianjoya D) and Miti Mingi/mbaruk Block 8/1206 (Kianjoya D).



c. The defendant shall pay the costs of the suit to the plaintiff.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 29TH DAY OF SEPTEMBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

