



**Kahira v Hoimedale & 4 others (Environment & Land Case 581 of 2017)
[2022] KEELC 4848 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4848 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 581 OF 2017
CA OCHIENG, J
SEPTEMBER 20, 2022**

BETWEEN

GEORGE KAHIRA PLAINTIFF

AND

ZEGARD HOIMEDALE 1ST DEFENDANT

BEHARD FOYEN 2ND DEFENDANT

JAMES NJUGUNA KARANJA 3RD DEFENDANT

REGISTRAR- KAJIADO 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. Through a plaint dated the June 11, 2015, the plaintiff prays that Judgment be entered against the defendants for:
 - a) A declaration that the original Plot No Kajiado/ Oloolotikoshi/ Kitengela/2404 or any subsequent sub-divisions thereof, is the property of the plaintiff and the first three defendants have no legal right to encroach upon it.
 - b) Declaration of validity of original title in the name of George N Kahira and subsequent rectification of the same in the register and the green card.
 - c) Cancellation of the subsequent titles illegally issued by the fourth defendant.
 - d) A further cancellation that the first three defendants' remedy and/ or redress can only emanate from the 4th defendant, who in his official capacity facilitated the fraud.



- e) A permanent injunction to restrain the defendants either by themselves, their agents, employees, servants or otherwise whatsoever from alienating, trespassing, encroaching upon or in any way or manner dealing with the subject matter of Plot No Kajiado/Ololoitikoshi/Kitengela/2404.
 - f) An order of this honourable court directed to the defendants' to demolish the structures/developments illegally erected on the original Plot No Kajiado/Ololoitikoshi/Kitengela/2404, or in the alternative an eviction order against the three defendants or a refund by the defendants jointly and/or severally, to the plaintiff of the current market value's worth of the land, to be determined by an independent court appointed valuer.
 - g) Costs of this suit plus interest at court rates.
 - h) Any other relief this honourable court may deem fit and just to grant.
2. The 1st and 2nd defendants filed their statement of defence dated the March 10, 2016 where they denied the averments in the plaint except the descriptive and jurisdiction of the court. They contend that it is awkward that the plaintiff decided to visit the suit land after 25 years from the date of the purported purchase for him to find permanent structures on it. They ponder why the estate of the late Simon Kimani Njau had not been sued in the proceedings herein. They aver that they are purchasers for value without notice, having exercised due diligence in terms of conducting a search, prior to purchasing the suit land. They reiterate that plot No Kajiado/Ololoitikoshi/Kitengela/2404 hereinafter referred to as the 'suit land', does not exist, as upon sub division it gave rise to the plots they currently have. They state that the plaintiff has not pleaded any fraud or cause of action against them. They sought for the plaintiff's suit to be dismissed with costs.
 3. The 3rd defendant did not enter appearance nor file any defence to controvert the plaintiff's averments.
 4. The 4th and 5th defendants filed their defence denying all the averments in the plaint except the jurisdiction of the court and descriptive.
 5. The plaintiff later filed a reply to defence reiterating his averments as per the plaint.
 6. The matter proceeded for hearing where the plaintiff had two witnesses while the defendants' called one witness.

Evidence of the plaintiff

7. The plaintiff as PW1 claims to have purchased the suit land measuring five (5) acres from Simon Kimani Njau in 1989 and paid valuable consideration amounting to Kshs 70,000 to Simon Kimani Njau's lawyer messrs Waruinge & Co Advocates on May 18, 1989 and July 10, 1989 respectively. He explained that on August 11, 1989, the vendor wrote to him, asking him to pay additional Kshs 10,800 to his lawyer, which he did on September 14, 1989. He was subsequently issued with a title deed on December 27, 1989 which indicates his land measures 1.94 hectares from the mother title Kajiado/Kitengela/25. In his testimony, PW1 explained the features of his title which he held to date, and indicated that the name therein is George N Kahira, ID No 4830XXX of PO Box 58510 Nairobi. PW1 testified that the vendor Simon Njau who is since deceased, later proceeded to procure a fake title which read Kjd/Kitengela/2404 measuring 1.87 hectares under the name George Ngige Kahira, of P O Box 72384 Nairobi, subdivided the said land to Kajiado/Ololoitikoshi/ Kitengela 16929, 16930 and 16931 and sold to the 1st, 2nd and 3rd defendants respectively. Further, that the 1st to 3rd defendants have put up permanent structures on the resultant subdivisions. He seeks for orders as per



the plaintiff. The plaintiff produced the following documents as exhibits: copy of title deed issued to George Ngige Kahira dated the December 27, 1989; mutation form dated November 11, 2002; letter of consent to George Ngige Kahira dated September 11, 2002; fee receipt for stamp duty dated November 11, 2002; forged transfer of land document dated November 11, 2002; A self-recorded statement by the plaintiff dated June 17, 2014; extract of green card for Kajiado/ Oloolokitikoshi/Kitengela/2404; application for official search by Peter N. Mwaura; certificate of official search that shows Simon Kimani Njau as the proprietor dated 11th November, November 11, 2002; Copies of receipts for alleged payment by George Ngige Kahira to Waruinge & Company Advocates being payment of Kajiado/ Kitengela/25; A copy of an original title belonging to Elias SMK. Muthondu, in respect to LR No Kajiado/Oloolokitikoshi/Kitengela/2402; and a copy of a letter to the plaintiff by SK Njau confirming payment dated the August 11, 1989.

Evidence of defendants

8. The 1st to 3rd defendants never tendered any evidence in court to support their averments.
9. The 4th and 5th defendants tendered evidence through the Land Registrar, Kajiado, Mr Paul Tanui who confirmed that as per their records the vendor Simon Kimani Njau indeed transferred suit land to the plaintiff in 1989. He further testified that the suit land was reverted to the vendor in 2002 but there was no evidence of the said transaction as per their records. It was his testimony that they have records to confirm the vendor proceeded to subdivide the suit land into three which he sold to the 1st to 3rd defendants. He explained that it was not possible for the transaction between the vendor Simon Njau and the 1st to 3rd defendants to have been undertaken in one day. The Land Registrar produced his report including extract of the Presentation Book as an exhibit.

Submissions

Plaintiff's submissions

10. The plaintiff in his submissions reiterated the oral evidence presented and contended that he is the rightful owner of the suit land. He contended that any titles held by the 1st to 3rd defendants are based on a fraudulent transaction using a fake title and a flawed transfer cannot confer legal ownership of land. He stated that the 1st to 3rd defendants are not *bona fide* purchasers for value. He reiterated that the defendants' titles should be impeached. Further, that he is entitled to the orders sought in the plaint. To support his arguments he relied on section 26(1) of the *Land Registration Act* as well as the following decisions: *Chemei Investments Limited v The Attorney General & Others National Petition No 94 of 2005*; *Arthi Highway Developers Ltd v West End Butcheries Limited & 6 Others* [2015] eKLR; *Munyu Maina v Hiran Gathiba Maina* Civil Appeal No 239 of 2009; *Daudi Kiptugen v Commissioner of Lands & 4 others* [2015] eKLR; *Zacharia Wambugu Gathimu v John Ndungu Maina* [2019] eKLR; *Kenya National Highway Authority v Shalien Masood Mughal & 5 Others* [2017] eKLR; *Albert Mae Gacci v Attorney General & 4 Others* [2006] eKLR; *Sai Office Supplies Limited v Rosemary Alivista Luseno & Another* [2014] eKLR and *William Ndinya Omollo v Con Africa Limited* [2004] eKLR.

Defendants' submissions

11. The 1st and 2nd defendants' in their submissions insist they conducted due diligence before they purchased their respective parcels of land. Further, they did so in good faith. They further submitted that from the report produced by the Land Registrar, there were no records of the transfer of land from Simon Kimani to George N Kahira and no supporting documents to wit: transfer, or consent for the same transaction. They reiterated that there was a sub division done by Simon Kimani Njau on November 11, 2002 and subsequent transfer to them. Further, documents supporting the transfer



from Simon Kimani Njau to the 1st and 2nd defendants were captured in the Land records. They aver that the transfer was approved by the land's office.

The 3rd to 5th defendants never filed written submissions.

Analysis and Determination

12. Upon consideration of the parties' respective pleadings filed herein including witness testimonies and exhibits, the main issues for determination are: Who is/was the registered proprietor of land parcel number Kajiado/ Oloolokitikoshi/Kitengela/2404 (suit land). Whether the 1st, 2nd and 3rd defendants are bona fide purchasers for value without notice. Whether the plaintiffs are entitled to orders sought in the plaint.
13. As to who is/was the registered proprietor of land parcel number Kajiado/ Oloolokitikoshi/Kitengela/2404 (suit land).
14. The plaintiff in his evidence contended that he is the registered proprietor of the suit land which he bought from Simon Kimani Njau in 1989. He produced a Certificate of Title dated the December 27, 1989 as well as various documents including copy of a Letter dated the August 11, 1989 from the vendor addressed to him, confirming payment of purchase price and directing him to pay other transaction fees, whose excerpt I wish to reproduce hereunder:

“The above shamba has now been transferred to me. You are required to pay m/s Waruinge & Co. Advocates your arrears by 15/9/89 for me to be able to transfer your land to you. If you fail to pay by the above date then the transfer will not be applicable. 1. shamba 5 acres arrear Shs NIL; 2. Survey fee arrears Shs 1400; 3 Advocate Fee arrears Shs 1200; 4. Land Board fee arrears Shs 2000; 5. Stamp duty arrears Shs 5600; 6 Title Deed arrears Shs 600.

The Shamba is already subdivided as 1 piece, I am now subdividing it into individual pieces as per your payment already done.”

15. The plaintiff further produced receipt a from messrs Waruinge & Company Advocates being payment of Kajiado/Kitengela/25 dated 14th August, 1989 for Kshs 10, 800. As per the green card for Kajiado/ Oloolokitikoshi /Kitengela/2404 which was also produced as an exhibit, it indicates at entry No 3 that a title deed had been issued to the plaintiff George N Kahira dated the December 27, 1989. At entry No 5, the land is reverted back to Simon Kimani Njau on November 11, 2002 after which the said title is closed on subdivision and refers to new numbers 16929 - 16931. PW2 Elias Muthondu who is the proprietor of land parcel number Kajiado/Oloolokitikoshi/Kitengela/2402 as evident in his title which was produced as an exhibit herein, confirmed he purchased his land the same time as the plaintiff. Further, that their respective parcels of land are a few metres apart. He reaffirmed that since 1989, he had always known that the plaintiff was owner of suit land. DW1 who was the Land Registrar in his report dated the December 3, 2019 which was produced as an exhibit explained that according to their records, there was a transfer to the plaintiff on December 27, 1989 but they were not able to access the documents. Further, that it was not clear how the land reverted back to Simon Kimani Njau on November 11, 2002 who carried out subdivisions, but there are documents supporting transfer from Simon Kimani Njau to the other beneficiaries. In cross-examination, DW1 confirmed that as at December 27, 1989 the proprietor of the suit land should have been George N Kahira, the plaintiff herein. He confirmed that a transfer from George N Kahira to Simon Kimani Njau on November 11, 2002 is not captured in their records and this means there was no transaction. He proceeded to explain that the subdivision and transfer to the 1st and 2nd defendants were done on November 11, 2002 all in one day, was not feasible as there should have been a consent to subdivide, then registration of



- subdivision including consent for transfer. He reiterated that ideally this should have taken a period of one month.
16. The 1st and 2nd defendants only filed their respective statements of defence but never appeared in court to tender evidence despite their Counsel having been present and even cross examined the plaintiff. Section 107 of the [Evidence Act](#) provides that:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
17. In the case of [Motex Knitwear Limited v Gopitex Knitwear Mills Limited](#) Nairobi (Milimani) HCCC No834 of 2002, Lesiit, J favourably cited the case of [Autar Singh Babra and Another vs Raju Govindji](#), HCCC No548 of 1998 where it was held that:
- “Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”
18. See also the decision of [Nelson Erick Mzee Vs Panal Freighters Limited](#) (2020) eKLR.
19. As for the 3rd defendant, he never entered appearance nor filed a defence to controvert the plaintiff’s averments.
20. In the circumstance, while associating myself with the decisions cited above, I find that 1st, 2nd and 3rd defendants failed to challenge the plaintiff’s evidence.
21. I note the plaintiff produced documents to prove he undertook a transaction with the vendor Simon Kimani Njau and was later issued with a title. Further, that he still held the original title deed dated the December 27, 1989 in his custody.
22. Based on the evidence presented before me, I find that the vendor Simon Kimani Njau did not adhere to the proper legal process to revert the transfer of the suit land on November 11, 2002 from the plaintiff to himself and hence this transaction was a nullity.
23. As to whether the 1st and 2nd defendants are *bona fide* purchasers for value. The 1st and 2nd defendants in their submissions contended that they adhered to the proper legal process to acquire their respective parcels of land. I note they however never tendered any evidence nor produced any documents to that effect but opted to rely on the evidence of the 4th and 5th defendants. They insist the plaintiff failed to prove how he acquired his land since there were no documents to support the transaction as per the land’s office, but I however beg to disagree as the plaintiff produced a letter from the vendor, receipts from the vendor’s lawyer, extract of green card and his title deed. Further, DW1 also confirmed that as at December 27, 1989, the plaintiff was the proprietor of the suit land before the subdivision.
24. This brings in the question on whether the vendor Simon Kimani Njau had a proper title to transfer to the 1st, 2nd and 3rd defendants. As I have held above that the vendor Simon Kimani Njau did not adhere to the proper legal process to revert the registration of the suit land back to his name in 2002, which title was registered under the [Registered Land Act](#) (now repealed). Further, since he obtained the title back to his name in an unprocedural manner and proceeded to subdivide including sell to third parties, I opine that he did not have clean titles to pass to the said 1st, 2nd and 3rd defendants respectively. Insofar as the plaintiff failed to prove fraud as against the 1st, 2nd and 3rd defendants, however since the root



of their titles are challenged as they acquired them from a person who did not obtain it procedurally or legally, the said titles cannot be deemed as indefeasible. Sections 26(1) (b) of the [Land Registration Act](#) states that:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”

25. In the case of Case of [Arthi Highway Developers Limited v West End Butchery Limited & 6 others](#) [2015] eKLR the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. Further, in the Uganda Court of Appeal Case of [Katende v Haridar & Company Ltd](#), the Court defined what amounts to a bona fide purchaser for value and stated 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 has 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.

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

26. Further in the case of [Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others](#) [2017] eKLR the Court of Appeal held that a party cannot claim a *bona fide* purchaser for value where the vendor did not have a valid title.

27. While in the case of [Munyu Maina v Hiram Gatbiha Maina](#), Civil Appeal No 239 of 2009, the Court of Appeal held that:-

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



28. Based on the facts as presented while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, it is my considered view that section 26(2) of the [Land Registration Act](#) does not confer protection to the 1st, 2nd and 3rd defendants in respect to their respective titles to their land. Insofar as I sympathize with their plight as they did not participate in the illegal process of revocation of the plaintiff's titles, I find that the vendor Simon Kimani Njau did not pass to them good titles and no wonder all the transactions were being done in one day yet the plaintiff had held his title for over twelve (12) years. In the circumstances, I find that the 1st, 2nd and 3rd defendants cannot be deemed as bona fide purchasers for value without notice. I opine that whatever losses they will incur, they still have a recourse as against the estate of the vendor Simon Kimani Njau.
29. As to whether the plaintiff is entitled to the orders sought in the Plaintiff. The plaintiff sought for various orders which I have enumerated above. Since I have already held that the vendor Simon Kimani Njau (deceased) did not pass a good title to the 1st, 2nd and 3rd defendants, I will proceed to make reference to section 143 of the [Registered Land Act](#) (repealed) that was the law in place at the time of registration of 1st, 2nd and 3rd defendants' titles, which stipulated thus:-
- “(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such 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 his act, neglect or default.”
30. These provisions are replicated in section 80 of the [Land Registration Act](#) which provides that:
- “(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 who is in possession and had acquired the land, lease or charge for valuable consideration, 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.”
31. Based on my findings above, I find that the plaintiff is indeed entitled to the orders as sought in the plaintiff.
32. It is against the foregoing that I find that the plaintiff has established his case on a balance of probability and will proceed to make the following final orders:
- i. A declaration be and is hereby issued that the plaintiff is the absolute proprietor of the original Plot No Kajiado/ Oloolokitikoshi/Kitengela/2404 or any subsequent subdivisions thereof, and the first three defendants have no legal right to encroach upon them (it).



- ii. The Land Registrar, Kajjado be and is hereby directed to rectify the Land Register in respect to Kajjado/Ololoitikoshi/ Kitengela/2404 and any resultant subdivisions therefrom to wit: new numbers 16929-16931 to reflect George N. Kahira as their owner.
- iii. A permanent injunction be and is hereby issued restraining the defendants either by themselves, their agents, employees, servants or otherwise whatsoever from alienating, trespassing, encroaching upon or in any way or manner dealing with the subject matter of Plot No Kajjado/ Ololoitikoshi/ Kitengela/2404 and any resultant subdivisions therefrom.
- iv. The 1st to 3rd defendants be and are hereby directed to demolish the structures/developments illegally erected on the original Plot No Kajjado/ Ololoitikoshi/Kitengela/2404 and the resultant subdivisions therefrom within ninety (90) days from the date hereof or compensate the plaintiff for the current market value of the aforementioned lands, failure of which an eviction order do issue against them.
- v. Costs of the suit is awarded to the plaintiff to be paid jointly by the 1st to 4th defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

