



Methodist Church in Kenya Registered Trustees v Gitari t/a Geo-Acre Survey & 2 others (Environment & Land Case 305 of 2017) [2022] KEELC 13781 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13781 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 305 OF 2017
A NYUKURI, J
OCTOBER 19, 2022**

BETWEEN

METHODIST CHURCH IN KENYA REGISTERED TRUSTEES PLAINTIFF

AND

JOSEPH GACHOKI GITARI T/A GEO-ACRE SURVEY 1ST DEFENDANT

MICHAEL MULI MUSEMBI (SUED AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPHAT GEORGE MUSEMBI KITAVI) 2ND DEFENDANT

MONICA NDUNGE MUSEMBI 3RD DEFENDANT

JUDGMENT

Introduction

1. By amended plaint dated April 9, 2019 and filed on April 16, 2019, the plaintiff herein filed suit against the defendants seeking for judgment in the following terms;
 - a. A declaration that the plaintiff church and members are legal, lawful and bona fide innocent purchasers for value and entitled to possess and own plot numbers 9, 10, 37 and 38 of land parcel number Mavoko Block 3/3 Machakos county.
 - b. An order compelling the 1st defendant to pay to the 2nd and 3rd defendants the equivalent or the value of the portion of land occupied by the plaintiff in form of plot numbers 9, 10, 37 and 38 as may be determined, due and owing in respect thereof.
 - c. In the alternative to (aa) above, this honourable court to order the 1st defendant to pay for the developments done on plot numbers 9, 10, 37 and on land block 3/3 Mavoko as per the valuation report on the developments therein.



- d. An order compelling the 2nd and 3rd defendants upon payment of the value claimed of plot numbers 9, 10, 37 and 38 on Mavoko Town Block 3/3 Machakos county to process and issue the plaintiff with a title deed or certificate of title to land plots numbers 9, 10, 37 and 38 on Mavoko Town Block 3/3 Machakos county.
 - e. And in the alternative in case the defendants fail to process and/or issue the plaintiff with title deed or certificate of title to plot numbers 9, 10, 37 and 38 Mavoko Town Block 3/3 Machakos county, the plaintiff to cause a registered surveyor to process the title deed or certificate of title in the name of the plaintiff at the expenses of the 1st defendant and the transfer documents to be executed by the deputy registrar of the High Court.
 - f. An order directed to the 1st defendant to pay general damages and all other expenses incurred by the parties in this matter.
 - g. Any other relief that this honourable court may deem fit and expedient.
 - h. Costs of this suit.
2. In the amended plaint, the plaintiff described themselves as a connectional church registered and operating within Kenya, Uganda, Tanzania and South Sudan and whose congregations owned and held properties in the plaintiff's name, and one such congregation was "Joska MCK Church".
 3. The plaintiff further stated that between 2006 and 2009, the 1st defendant, a registered surveyor, for a consideration of Kshs 270,000/-, offered the plaintiff 4 plots namely, plot numbers 9, 10, 37 and 38 on Block 3/3 Mavoko Township within Machakos county (suit property). That each plot measured 0.02 Ha, and that the plaintiff paid the entire consideration of Kshs 270,000/- and was issued with a receipt and share certificate in the name of the 1st defendant.
 4. It was the plaintiff's position that upon payment of the deposit in 2006, the plaintiff took possession of the suit property and constructed a church sanctuary, nursery school and a borehole. They maintained that they knew that the 1st defendant had purchased the suit property from one George Musembi Kitavi (deceased) now represented by his son, who is the administrator of his estate. According to the plaintiff, the late George Musembi Kitavi and now the administrator of his estate knew of the plaintiff's entry and reasons for their entry on the suit property. The plaintiff averred that they had spent Kshs 8,700,000/- for developing the suit property in the construction of the church sanctuary, ablution block, borehole, fencing and junior church sanctuary/nursery school.
 5. The plaintiff alleged that the suit property was surveyed by the 1st defendant and all they were waiting from him was the title document. That in a turn of events in the year 2016, the plaintiff received a demand letter from the defence counsel on behalf of the family of the late George Musembi Kitavi claiming that the plaintiff had invaded their land and demanded payment of Kshs 900,000/- per a plot. The plaintiff alleges that the 2nd and 3rd defendants actions are mischievous, unjustified, fraudulent, negligent and a breach of trust.
 6. The plaintiff blamed the 1st defendant for receiving Kshs 270,000/- from them and putting them in possession of the suit property. They also blamed the 2nd and 3rd defendants for allowing the plaintiff to take possession of the suit property upon allowing the 1st defendant to enter, survey, allocate and receive money from the plaintiff. Their position was that there was collusion between all the defendants to defraud the plaintiff as the 2nd and 3rd defendants failed to notify members of the public and innocent purchasers of the dispute between the 1st defendant and the 2nd and 3rd defendants. They averred that



- the 1st defendant held out as having authority and consent from the 2nd and 3rd defendants to demarcate, subdivide, allocate and process titles in respect of the suit property.
7. On October 5, 2017, the 1st defendant filed his statement of defence dated the even date. He averred that although he made an offer of 4 plots to the plaintiff, the plaintiff partially paid the consideration and only took possession of two plots and could not make any developments on the said plots.
 8. The 1st defendant insisted that the contract between him and the late George Musembi Kitavi was finalized, which allowed him to enter into contract with the plaintiff. He stated that the agreement to survey the suit property was a different agreement and not related to the agreement for sale between him and the plaintiff.
 9. The 1st defendant denied the plaintiff's claim and stated that as the plaintiff had not complied with the terms of the contract with the 1st defendant, they were not entitled to the orders sought.
 10. The 2nd and 3rd defendant's filed a defence and counterclaim on October 4, 2017. They denied the plaintiff's claim and averred that there is no agreement for sale of the suit property between the plaintiff and the defendants as required under section 38(1) of the Land Act and section 3(3) of the Law of Contract Act, hence no claim to be determined by this court. They also stated that this court lacked jurisdiction as the claim herein did not fall within the ambit of article 162 (2) (b) of the Constitution of Kenya 2010 and section 13 of the Environment and Land Court Act, No 19 of 2019.
 11. The 2nd and 3rd defendants stated that there is no land parcel known as plot numbers 9, 10, 37 and 38 and Mavoko Town Block 3/3 anywhere in the Republic of Kenya. They denied receiving Kshs 270,000/- from the plaintiff or having contracted a third party including the 1st defendant, to receive money on their behalf and stated that the plaintiff was a trespasser on the suit property.
 12. Their position was that on September 28, 2015, the plaintiff together with other trespassers made a counter offer to the 3rd defendant's advocate with a view to purchase the suit property and that the other trespassers have vacated the suit property or negotiated a date with the 3rd defendant.
 13. According to the 2nd and 3rd defendants, the plaintiff's occupation of the suit property was in violation of a court order as the said occupation was successfully challenged in court and hence the same amounted to trespass and was not justified in law.
 14. They stated that they did not owe the plaintiff any duty of trust and that the plaintiff was negligent which led them to fall victim of the 1st defendant's fraudulent activities. They blamed the plaintiff for failure to sign an agreement for sale, failure to obtain official search, failure to seek to be joined to civil suit No 1239 of 2008 and failure to object to the succession cause for the Estate of Josephat George Musembi Kitavi (deceased). They denied authorising the 1st defendant to survey, subdivide or allocate the suit property.
 15. The 3rd defendant averred that the plaintiff's unlawful use of the suit property which is registered in the 3rd defendant's name, deprived her for 11 years of the use of her land. She made a counter claim for the following orders;
 - a. That the plaintiff be evicted from the suit properties Mavoko Town Block 3/59990 and Mavoko Town Block 3/59991.
 - b. That a declaration be made by this court that the Plaintiff is a trespasser and ought to vacate the suit properties immediately.



- c. That the plaintiff demolishes and removes the illegal structures on Mavoko Town Block 3/59990 and Mavoko Town Block 3/59991 at its own costs and in default the 3rd defendant removes the illegal structures on the suit property at the expense of the plaintiff.
- d. That a permanent injunction restraining the plaintiff, its agents, workers and all others whether or not deriving title from both or either of them or any other persons from entering or occupying or trespassing on or claiming title to or in any way buying or selling or charging or mortgaging or allowing others to enter into or erecting any structures in or in any manner whatsoever occupying or dealing with title to Mavoko Town Block 3/59990 and Mavoko Town Block 3/59991 in any manner inconsistent with the rights or interests of the 3rd defendant.
- e. General damages and/or exemplary damages and/or aggravated damages and/or punitive damages against the plaintiff for loss of business to be assessed and quantified and proved at the hearing of this suit.
- f. Mesne profits against the profit at a rate to be determined based on a professional valuation and quantified and proved at the hearing thereof.
- g. Costs of the suit with interest thereon at court rates.
- h. Interest on general damages on the above at the rate of 12% per annum from the date of judgment until payment in full.

Plaintiff's Case:

- 16. PW1, Professor Zablon Nthamburi, adopted his witness statement dated July 13, 2017 and filed on even date as his evidence in chief. He testified that he was the former Presiding Bishop of the Methodist Church of Kenya and one of the church's registered trustees, having worked for the church for about 50 years and was conversant with the church's operations.
- 17. He stated that Joska Methodist Church, one of the plaintiff's churches, purchased four plots numbers 9, 10, 37 and 38 to be excised from land parcel Mavoko Block 3/3 Machakos county, from Geo-Acre Survey. That the consideration was paid in instalments between 2006 to 2009. He stated that the church paid a total of Kshs 270,000/- for the plots and was issued with receipts and share certificate pending issuance of title deeds.
- 18. He further testified that the church was given possession of two plots and the right to build on them as they had fully paid for them in 2006 and later was given possession of the other two plots. According to PW1, the plaintiff developed the suit property by constructing a church sanctuary, nursery school, borehole and other developments at a cost of Kshs 5,700,000/-. That the church has 70 adults and 30 children who regularly hold meetings in the church sanctuary. He stated that the church had asked the 1st defendant who is a registered surveyor and public figure to issue the church with title documents in vain, although the 1st defendant had surveyed the property.
- 19. PW1 complained that the church was now being threatened with eviction as the 3rd defendant had demanded payment of Kshs 900,000/- per plot before causing the suit property to be transferred to the plaintiff. That the 2nd and 3rd defendants with their family have been aware of the suit property as the plaintiff has conducted their affairs openly and in broad daylight.
- 20. On cross examination, PW1 conceded that there is no agreement for sale between the plaintiff and the 3rd defendant or the late Josephat George Musembi Kitavi, neither were there payments of the purchase



price to the 3rd defendant from the plaintiff. The witness also confirmed that he did not have any letter of authority from the 3rd defendant or Josephat Musembi Kitavi to the 1st defendant to sell the suit property to the plaintiff. In re-examination, the witness stated that the 1st defendant had not refunded the purchase price although the plaintiff's dealings were with only the 1st defendant. He insisted that his claim was that the church gets the plots in issue or be compensated by the 1st defendant.

21. PW2, Henry Ntarichia adopted his witness statement dated July 13, 2017 and filed on even date, as his evidence in chief. He stated that he was the vice chairman of Joska Methodist Church. That in 2006, the church members authorized the management of the church to purchase land for purposes of constructing a church sanctuary and other projects. He testified that the church identified some plots which were being sold by Geo-Acre Surveys who informed them that they had acquired parcel number Mavoko Town Block 3/3 which they were now selling.
22. He further stated that upon visiting the suit property and being satisfied with the same, they began making payments towards the purchase of the same. That they acquired 4 plots from Geo-Acre Surveys being plot numbers 9, 10, 37 and 38 to be excised from Mavoko Block 3/3 Machakos county, and that the purchase price was paid by instalments between 2006 to 2009. He stated further that they were initially allowed to occupy two plots and later, on payment of the entire purchase price, occupied the other two plots.
23. The witness further stated that they paid a total of Kshs 270,000/- for all the four plots whereof they were given receipts and share certificate. His position was that they had spent Kshs 5.7 million in the development of the suit property and that they have conducted their affairs openly and in broad daylight on the plots with the knowledge of the late Michael Muli Musembi and his family. That the church has a congregation of 100 people which keeps growing and who use the church sanctuary on the suit property. That their requests to have title to the suit property have been in vain and instead they have been threatened with eviction notice from the family of Michael Muli Musembi, who sold the entire land to Geo-Acre Survey. That the 3rd defendant is now demanding to be paid Kshs 900,000/- per a plot.
24. The witness produced several documents in support of his case. He produced the witness statement of the chairman of the plaintiff's church as p-exhibit 1. He also produced a bundle of payment receipts as p-exhibit 2; two copies of certificate of ownership as p-exhibit 3; bundle of photographs as p-exhibit 4; copy of memo as p-exhibit 5; letter dated October 16, 2015 as p-exhibit 6; letter dated March 30, 2016 as p-exhibit 7; letter dated March 31, 2016 as p-exhibit 8; letters dated April 26, 2016 and May 4, 2016 as p-exhibit 9; letter dated July 26, 2016 as p-exhibit 10; letter dated March 30, 2017 as p-exhibit 11 and a valuation report dated October 12, 2021 as p-exhibit 12.
25. On cross examination, the witness confirmed that all payments were made to the 1st defendant. He stated that he had no agreement between the 1st defendant and the family of Musembi.
26. PW3, Dalmat Mbai Kisilu, stated that he was a practising valuer and property manager for the Methodist Church in Kenya, and a consultant with Oasis Real Estate Limited. He produced the valuation report made by Mr Jones Kioko Mutinda the principal valuer. He stated that he had accompanied the latter to the suit property during valuation. The witness adopted his witness statement dated October 7, 2021 as his evidence in chief. He stated that the church had developed the suit property, the conservative value thereof being Kshs 8,000,000/- as at 2021 although the same were estimated at Kshs 6,000,000/- at the time of filing suit.
27. On cross examination, the witness stated that he did not have an agreement between members of the church and the 1st defendant. He also confirmed that he did not produce any document showing



authority by the 3rd defendant to the 1st defendant to sell the suit property. He stated that the valuation was based on the use of the suit property. That marked the close of the plaintiff's case.

28. The 2nd defendant was said to have passed on, and therefore it is the 3rd defendant who testified.

3rd Defendant's Case

29. DW1, Dr Thomas Kania Musembi testified as the witness for the 3rd defendant. He stated that he was the son of Monica Ndunge Musembi, the 3rd defendant who by the time of hearing, had lost her sight, was sickly and was aged over 80 years. The witness adopted as his evidence in chief, his witness statement dated January 11, 2022 and filed on January 22, 2022. He testified that his late father Josephat Musembi was the registered proprietor of Mavoko Town Block 3/3 and that he entered into a sale agreement with the 1st defendant for sale of the same at a consideration of Kshs 1,050,000/-. Further, that the 1st defendant was to make a deposit of Kshs 400,000/- as initial deposit whereof he drew a cheque for the said sum in favour of Josephat Musembi, but which cheque was dishonoured for lack of funds in the 1st defendant's account. That no payment therefore was made in respect of the aforesaid agreement, and that Josephat Musembi died on February 7, 2006; 14 days after execution of the agreement and a few days after the cheque was dishonoured.
30. He testified further that the 1st defendant took advantage of the death of Josephat Musembi, invaded the suit property and subdivided it and proceeded to sell it to members of the public including the plaintiff. He blamed the purchasers who included the plaintiff for falling victim of the 1st defendant's schemes for their failure to exercise due diligence.
31. He also stated that on realizing the invasion of the suit property, the estate of Josephat Musembi through Michael Muli Musembi instituted Machakos civil suit No 1239 of 2008; Michael Muli Musembi v Joseph Gachoki Gitari t/a Geo-Acre Surveys, challenging the 1st defendant's dealings on the suit property. That the court issued a temporary injunction pending determination of the case and on hearing the suit, cancelled the agreement dated January 23, 2006 hence extinguishing the proprietary rights of the 1st defendant. That thereafter, a succession case was determined thereby transmitting the suit property to the 3rd defendant who was the widow of the late Josephat Musembi Kitavi.
32. The witness further stated that he reported the matter to the Kenya Anti-Corruption Commission and that the DCI wrote a letter confirming that the documents held by the 1st defendant were not genuine. Further that the 3rd defendant attempted negotiating with the trespassers to regularise their occupation and wrote to them asking them to either vacate the property or purchase the same. He maintained that the plaintiff's occupation of the suit property was unlawful and that the suit herein was unjustified. He sought for payment of the full purchase price or in the alternative the plaintiff to vacate the suit property.
33. DW1 produced a sale agreement dated January 23, 2006 as d-exhibit 1; letter to Kenya Anti-Corruption Commission dated September 10, 2017 as d-exhibit 2; court order of April 1, 2009 as d-exhibit 3; statement of Michael Musembi dated July 20, 2010 as d-exhibit 4; letter from CID dated July 20, 2010 as d-exhibit 5; judgment dated October 10, 2013 as d-exhibit 6; letter to OCS Kangundo police station dated April 12, 2014 as d-exhibit 7; letter to Kevin & Associates dated September 28, 2015 as d-exhibit 8; letter from Kevin & Associates dated October 2, 2015 as d-exhibit 9; letter from Kevin & Associates dated March 5, 2016 as d-exhibit 10; letter to Kevin & Associates dated March 30, 2016 as d-exhibit 11; letter from Kevin & Associates dated March 31, 2016 as d-exhibit 12; email from Kevin & Associates dated May 18, 2016 as d-exhibit 13; letter from Kevin & Associates dated March 30, 2017 as d-exhibit 14; copy of title for Mavoko Town Block 3/3 as d-exhibit 15; Title for Mavoko Town Block 3/59990 as



d-exhibit 16; Title for Mavoko Town Block 3/59991 as d-exhibit 17 and death certificate dated August 14, 2012 as d-exhibit 18.

34. On cross examination, he stated that neither him nor the 3rd defendant ever met the 1st defendant. He stated that the 1st defendant never paid the purchase price for the suit property. He stated further that by the time of filing suit, there was nobody on the suit property and that they informed persons seen on the land including the plaintiff of the injunction issued by the court, but the latter ignored the court orders. He conceded that the church had developed a portion of the suit property and that the letter from the church dated March 30, 2016 showed that the church was aware of the dispute on the suit property. That marked the close of the 3rd defendant's case.
35. As the 1st defendant was absent despite service, his case was marked as closed and parties directed to file written submissions. On record are the plaintiff's submissions dated March 3, 2022 and the 3rd defendant's submissions dated March 16, 2022.

Plaintiff's Submissions

36. Counsel for the plaintiff submitted that the plaintiff was entitled to the occupation and possession of the 4 plots purchased from the 1st defendant. Counsel argued that the plaintiff was an innocent purchaser for value. Reliance was placed on the case of *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR, for the proposition that an innocent purchaser for value is a person who honestly purchased property with no intent to acquire it wrongly. Further reliance was placed on the case of *M. A Koinange v Joyce Gachuku & 2 others* [2015] eKLR, which this court has considered.
37. It was further submitted for the plaintiff that the suit property belonged to the 2nd and 3rd defendants and that the agreement between the 1st defendant and the late Josephat Musembi Kitavi was annulled by the court, prejudicing the plaintiff's interests. Counsel argued that judgment ought to be entered for the plaintiff as against the 1st defendant as claimed in the amended plaint. Counsel was of the view that the 2nd and 3rd defendants counterclaim only lay as against the 1st defendant and not against the plaintiff on grounds that it is the 1st defendant who breached its contract with the late Josephat Musembi. That the 1st defendant did not challenge the plaintiff's claim and that the 1st defendant received money from the plaintiff. Counsel referred to the case of *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* [2012] eKLR, for the proposition that where a fact is not challenged, it remains the truth.
38. Further, counsel submitted that the 3rd defendant was estopped from interfering with the plaintiff's occupation of the suit property as she did not challenge the plaintiff's entry and development of the suit property which happened in 2007. The case of *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR was cited for the proposition that a person cannot assert a right contrary to what is implied in their previous action. Counsel pointed out that it is only on March 5, 2016, that the 2nd and 3rd defendants asked the plaintiff to vacate the suit property which was 12 years after entry thereon.
39. Counsel further submitted that the plaintiff's claim against the 2nd and 3rd defendants was valid, justified and tenable as the plaintiff was an innocent purchaser for value; had developed the suit property; the 2nd and 3rd defendants were aware of the plaintiff's activities on the land; and that the father of the 2nd defendant had allowed the 1st defendant licence to enter the land and subdivide the same. They also argued that the plaintiff was not party to Machakos civil suit No 1239 of 2008 and was not made aware of the same.
40. On whether the 3rd defendant was entitled to mesne profits, counsel argued that the plaintiff's entry on the suit land was not unlawful as the same was based on the fact of being an innocent purchaser.



3rd Defendant's Submissions

41. Counsel for the 3rd defendant submitted that the plaintiff's evidence clearly showed that there was no written agreement for the plaintiff's purchase of the suit property and that there was no sale agreement between the plaintiff and the 3rd defendant or her late husband. Counsel pointed out that the plaintiff did not produce any evidence to show that the 1st defendant was authorized to sell the suit property. Further, that the plaintiff did not conduct due diligence and the documents relied on by the plaintiff are not known in law.
42. In addition, counsel stated that although there was an injunction as of April 1, 2009, the plaintiff and the 1st defendant continued transacting on the suit property and that *vide* their letter of March 30, 2016 the plaintiff confirmed knowledge of ownership dispute over the suit property. Counsel also stated that in the plaintiff's letter dated September 28, 2015, marked as d-exhibit 8, the plaintiff stated that they were willing to purchase the plots at a reasonable rate depending on the current market price, hence the plaintiff could not offer to purchase the suit property, if the initial purchase was valid in law.
43. Counsel relied on the case of *Esther Ndegi Njiru & another v Leonard Gatei* [2014] eKLR, for the proposition that section 26(1) (a) and (b) of the *Land Registration Act* No 3 of 2012 obligated a purchaser of titled property to ascertain the status of the property beyond carrying out an official search.
44. It was also submitted for the 3rd defendant that there was no sale agreement between the plaintiff and the 1st defendant and the plaintiff and the 3rd defendant contrary to section 38 of the *Land Act* No 6 of 2012 and section 3(3) of the *Law of Contract Act* cap 23. Counsel relied on the maxim that equity aids the vigilant and not the indolent. Counsel blamed the plaintiff for waiting for 11 years to seek to enforce their rights.
45. Counsel contended that the 1st defendant did not pass any title to the plaintiff as he had no title to transfer to the plaintiff. Counsel stated that the plaintiff failed to take the right steps in purchasing the suit property, which included search and inspection of title; preparation of offers and price negotiation; sale agreement and deposit payment; payment of land rates; transfer documents and consent to transfer; and valuation, payment of stamp duty and registration of transfer.
46. Counsel argued that section 107 of the *Evidence Act* placed the burden of proof on the person making the claim, in this case the plaintiff. To buttress that argument, reliance was placed on the case of *Mbuthia Macharia v Anna Mutua & another* [2017] eKLR, which the court has considered.
47. On whether the 3rd defendant was entitled to the prayers in the counterclaim, counsel submitted that the 3rd defendant had proved that she was the legal owner of the suit property. Further, that the plaintiff had admitted occupation of the suit property since 2006 despite the existence of a court order and demand notices to vacate. Counsel relied on the cases of *Philip Ayaya Aluchio v Christpinus Ngayo* [2014] eKLR, *Nakuru Industries Ltd v SS Mehta & Sons* [2016] eKLR, *Willesden Investments Limited v Kenya Hotel Properties Limited* Nbi HCC No 367 of 2000 to argue that the 3rd defendant was entitled to damages for trespass on her property.

Analysis and Determination

48. I have carefully considered the pleadings, the testimony of the parties and submissions. The issues that fall for consideration are as follows;
 - a. Whether the plaintiff was an innocent purchaser for value without notice.



- b. Whether remedies are available for an innocent purchaser for value as against the registered proprietor for registered property.
 - c. Whether the orders sought by the plaintiff should be granted.
 - d. Whether the 3rd defendant's counterclaim is justified.
49. The *Black's Law Dictionary* 11th Edition refers to an innocent purchaser as a *bona fide* purchaser and defines such purchaser as follows;
- “Someone who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the sellers title, one who has in good faith paid valuable consideration for property without notice of prior adverse claims.
50. Essentially, a *bona fide* purchaser is a person buying property in good faith, honestly believing that the person selling the same holds a good title or ownership of such property.
51. In the case of *Katende v Harindar & Company Ltd* [2008] 2 EA 173, the Court of Appeal in Uganda stated as follows;
- “For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as 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 that;
- i. He holds a certificate of title;
 - ii. He purchased the property in good faith;
 - iii. He had no knowledge of fraud;
 - iv. He purchased for valuable consideration;
 - v. The vendors had apparent valid title;
 - vi. He purchased without notice of any fraud;
 - vii. He was not party to any fraud.
52. It is clear that a bona fide purchaser must demonstrate that they honestly purchased the property in issue without any intention of wrongly acquiring the same and that the vendors title was apparently valid.
53. In the instant suit, the plaintiff's case is that they purchased from the 1st defendant plot numbers 9, 10, 37 and 38 to be excised from parcel Mavoko Block 3/3, at a consideration of Kshs 270,000/-, which they paid in full. It is not in dispute that there is no sale agreement in respect of those claims. The plaintiff allege in their pleadings and evidence that they knew that the 1st defendant had paid for the land allegedly acquired from Josephat George Musembi Kitavi. However, the plaintiff did not produce a copy of the sale agreement between the late Josephat George Musembi Kitavi and the 1st defendant or a letter of authority to show that the 1st defendant was authorized to sell the suit property.
54. It is clear from the pleadings and evidence of the plaintiff, that from the start, the plaintiff was aware that the late Josephat George Musembi Kitavi held a valid title to the suit property but they did not inquire to know when and on what terms the 1st defendant acquired the suit property, or how the 1st



defendant entered into an agreement with the late Josephat George Musembi Kitavi. They also did not bother to confirm if the terms of contract between Josephat Musembi Kitavi and the 1st defendant were complied with by the 1st defendant. They also did not bother to conduct a search of the suit property before purchase. This is not the conduct expected of a diligent bona fide purchaser. It is not enough for the plaintiff to state that their entry and activities on the suit land was in broad daylight, and that therefore the 3rd defendant was aware of their occupation. There is nothing special about taking possession of another person's land in broad daylight because even illegal acquisition or occupation can happen in broad daylight.

55. The plaintiff is a religious organization, who was represented in court by Professor Zablon Nthamburi, one of the trustees of the church, having custody of all instruments regarding the properties of the church. Even PW2, who was the local church treasurer, stated that he was a retired civil servant and the third witness was Mr Dalmat Mbai Kisilu, who testified that he was a practicing valuer and property manager at the Methodist Church of Kenya. I find it unsettling that with all these schooled persons, who are without a doubt enlightened persons, would allow the church to purchase property in the manner described in these proceedings, where there was no sale agreement and no search and effort to ascertain, beyond the 1st defendant's word, how the 1st defendant acquired the suit property.
56. As there was no evidence that the 1st defendant had an apparent valid title to the suit property, I am not satisfied that the plaintiff herein was a *bona fide*/innocent purchaser for value without notice.
57. Article 40 of the [Constitution](#) provides for protection of the right to property. However, article 40 (6) of the [Constitution](#) provides that the constitutional protection to the right to property does not extend to any property that is found to have been unlawfully acquired.
58. Part of the process for lawful acquisition of property is due diligence. As the plaintiff failed to attempt due diligence, their rights as against the rights of the registered proprietor cannot be upheld. In the amended plaint, the plaintiff sought for a declaration that they are innocent purchasers for value for plot numbers 9, 10, 37 and 38. Having not seen a trace of innocence on their part, that prayer must fail.
59. The plaintiff sought for an order to compel the 1st defendant to pay the 2nd and 3rd defendant's the value of the suit property. That prayer was not made by the 2nd and 3rd defendants and the plaintiff has no capacity or authority to make a claim on behalf of the 2nd and 3rd defendants. It is the plaintiff who engaged the 1st defendant. Now that it turned out that the 1st defendant was selling that which he did not purchase, the plaintiff cannot handover their challenge to the 2nd and 3rd defendants. The plaintiff dealt with the 1st defendant, and the latter actions remains their challenge to contend with. in the premises, the second prayer also fails.
60. On the issue as to whether the 2nd and 3rd defendants should issue the plaintiff with the title to the suit property, I have already found that the plaintiff was no innocent purchaser and therefore no claim can be laid at the door of the 2nd and 3rd defendants. Even if the plaintiff would have proved their innocence, my view is that where there is an innocent purchaser and an innocent registered proprietor, the title holder's innocence ought to be upheld, as a fraudster or any other party who does not have good title, cannot pass a good title to an innocent purchaser.
61. As concerns the plaintiff's claim against the 1st defendant, the plaintiff sought for payment of the cost of development on the suit property as per the valuation report produced in evidence. PW3, Henry Ntarichia produced a report dated October 12, 2021. He stated in the report that the plaintiff had constructed a church hall and office, residential house, a pit latrine, the mains electricity connection and underground well were on the property. The said property was valued at Kshs 6,500,000/-, which the plaintiff claims from the 1st defendant.



62. The 1st defendant admitted in his defence in paragraphs 3 and 4 thereof that the plaintiff paid for the two plots and took possession of the same. It is clear that the 1st defendant sold and allowed the plaintiff to occupy and develop the suit property knowing too well that he had not paid for that property, or lawfully acquired the same. As the third defendant testified, the 1st defendant never paid the consideration of the suit property. He produced an agreement that showed that the consideration thereof was Kshs 1,050,000/- which amount was never paid. The 1st defendant never testified to rebut this evidence. As the 1st defendant led the plaintiff in purchasing and developing land that he had not lawfully acquired, he is liable to pay for the liability incurred by the plaintiff. Therefore, the plaintiff's claim against the 1st defendant for Kshs 6,500,000/- being the value of the suit property and developments is allowed as prayed.
63. Besides, the plaintiff also sought for "general damages and all other expenses incurred by the parties in this matter", to be paid by the 1st defendant. It is trite law that damages need not only be pleaded but must also be proved. The plaintiff did not state the basis for the general damages and no attempt was made in proving the same. Therefore, that claim fails.
64. On the other hand, the 3rd defendant sought for an injunction, the plaintiff's eviction and a declaration that the plaintiff is a trespasser. The *Blacks Law Dictionary* 11th Edition defines "trespasser" as follows;
- "Someone who commits a trespass; one who intentionally and without consent or privilege enters another's property."
65. Having regard to the evidence herein, it is clear that the plaintiff entered the suit property knowing that the same was registered in the name of the late Josephat Musembi Kitavi, without any evidence that the 1st defendant who allowed the plaintiff's entry on the suit property, had an apparent valid title or claim over the suit property. Therefore, the plaintiff's entry on the suit property was without consent of the 3rd defendant and I therefore find that the plaintiff is a trespasser on the suit property.
66. The remedy for the title holder against a trespasser are inter alia orders of eviction and injunction. In the premises, the plaintiff must vacate the suit property and in default eviction orders shall issue. Therefore, orders of eviction and permanent injunction are proper orders for protection of a title holder against a trespasser.
67. The 3rd defendant sought for general, exemplary, punitive and aggravated damages for loss of business which were to be proved at the hearing. During hearing, no evidence was led as to the nature of business lost or damages suffered. I therefore find that there was no proof of general, exemplary, aggravated or punitive damages as sought by the 3rd defendant, hence that claim fails. The 3rd defendant also sought for mesne profits as per valuation report to be proved at the hearing. As no valuation report was produced by the 3rd defendant as pleaded, I am not satisfied that the 3rd defendant is entitled to mesne profits.
68. In view of the above reasons, I make the following orders;
- a. The plaintiff's suit as against the 2nd and 3rd defendants be and is hereby dismissed with costs.
 - b. Judgment be and is hereby entered for the plaintiff against the 1st defendant for the sum of Kshs 6, 500,000/- plus interest at court rates from the date of judgment.
 - c. The plaintiff's costs shall be borne by the 1st defendant.
 - d. Judgment be and is hereby entered for the 3rd defendant as against the plaintiff in the following terms;



- i. That a declaration be and is hereby made that the plaintiff is a trespasser and ought to vacate the suit property.
- ii. That the plaintiff is hereby ordered to vacate parcel numbers Mavoko Town Block 3/59990 and Mavoko Town Block 3/59991 and remove illegal structures thereon at their own costs within 90 days of this judgment. In default, the 3rd defendant to remove the illegal structures on the suit property at the plaintiff's cost.
- iii. A permanent injunction be and is hereby issued restraining the plaintiff, their agents, workers and all others whether or not deriving title from both or either of them or any other persons from entering or occupying or trespassing on or claiming title to or in any way buying or selling or charging or mortgaging or allowing others to enter into or erecting any structures on or in any manner whatsoever occupying or dealing with title to Mavoko Town Block 3/59990 and Mavoko Town Block 3/59991 in any manner inconsistent with the rights or interests of the 3rd defendant
- iv. The 3rd defendant's costs of the suit shall be borne by the plaintiff.

69. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 19TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms. Kinya holding brief for Mr. Mwalo for the 3rd Defendant

Mr. Muriuki for the Plaintiff

No appearance for the 1st Defendant

Ashley – Court Assistant

mks elc case no. 305 of 2017 – judgment	37
---	----

