



**Shibutse & another v Keya & 3 others (Environment & Land Case 247 of 2014 & 237 of 2015 (Consolidated)) [2022] KEELC 15047 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15047 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 247 OF 2014 & 237 OF 2015 (CONSOLIDATED)  
DO OHUNGO, J  
NOVEMBER 22, 2022**

**BETWEEN**

**REUBEN SHIBUTSE ..... PLAINTIFF**

**AND**

**ATANAS MANYALA KEYA ..... 1<sup>ST</sup> DEFENDANT**

**FESTUS NYIKULI SHITUNDO ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF LANDS, KAKAMEGA ..... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 237 OF 2015**

**BETWEEN**

**ATANAS MANYALA KEYA ..... PLAINTIFF**

**AND**

**ROBERT SHIBUTSE ..... DEFENDANT**

**JUDGMENT**

1. Proceedings herein concern two consolidated suits: ELCC Number 247 of 2014 and ELCC Number 237 of 2015. ELCC Number 247 of 2014 was initially filed in the Environment and Land Division of the High Court as Kakamega HC E&LC No 278 of 2012. It was later transferred to this court, hence its current case number. By plaint dated 10<sup>th</sup> October 2012, the plaintiff in ELCC Number 247 of 2014 averred that he was the registered owner of land parcel No. Butsotso/Indangalasia/786 (the suit property) and that the suit property had been unlawfully and fraudulently transferred by the first



defendant to himself and with the connivance and/or knowledge and support of the second and third defendants.

2. The plaintiff therefore prayed for judgement against the defendants jointly and severally for:
  - a. A declaration that land parcel No. Butso/Indangalasia/786 Kakamega is the property of the plaintiff Reuben Shibutse
  - b. A declaration that the purported transfer of land parcel No. Butso/Indangalasia/786 Kakamega to the 1<sup>st</sup> defendants on or about 5<sup>th</sup> and 8<sup>th</sup> July 2012 is unlawful and unconstitutional.
  - c. A declaration that the transfer of Land Parcel Title No. Butso/Indangalasia/786 Kakamega is a violation of the Petitioner's constitutional rights to property under Section 40 (sic) of the Constitution.
  - d. A declaration that the transfer of land parcel No. Butso/Indangalasia/786 Kakamega is a grave abuse of the due process of law, and is malicious, mala fides and oppressive to the plaintiff and is contrary to law and public policy.
  - e. A permanent injunction prohibiting the defendants from interfering, transacting, dealing or proceeding in any manner whatsoever with regard to land parcel No. Butso/Indangalasia/786 Kakamega without the applicant's express and written authority
  - f. An order directed to the registrar, Kakamega lands registry, the defendant herein to expunge from the record and rectify any purported transfer of land parcel No. Butso/Indangalasia/786 to the 1<sup>st</sup> respondent and cancel any title or interest that may have been given in favour of the 1<sup>st</sup> defendant.
  - g. The 1<sup>st</sup> defendant be ordered to pay specific and general damages for the pain and anxiety caused to the applicant
  - h. The 2<sup>nd</sup> defendant be ordered to pay specific and general damages for the pain and anxiety caused to the applicant
  - i. The 3<sup>rd</sup> defendant be ordered to pay general damages to the Plaintiff for breach of statutory duty
  - j. The defendants be jointly and severally liable to pay the costs of this action.
  - k. Such other and further orders as the court may deem necessary and just to grant.
3. In response to the plaint in ELCC Number 247 of 2014, the first defendant in the said case filed statement of defence under protest on 21<sup>st</sup> January 2013 wherein he stated that he lawfully purchased the suit property from the second defendant who was the lawful registered owner as at 7<sup>th</sup> March 2012 and that upon paying the agreed consideration and complying with all legal requirements regarding registration of title, he became the registered proprietor thereof on 8<sup>th</sup> June 2012 and was lawfully issued with a title deed. It was the first defendant's further averment that he was never served with any process and only learnt of the proceedings through a good Samaritan, hence the protest. He therefore prayed that the plaintiff's suit against him be dismissed with costs.
4. The plaintiff filed a response to the first defendant's statement of defence on 19<sup>th</sup> February 2014 and reiterated that he was the lawful owner of the suit property. He denied having received any consideration for the suit property and added that the person who the first defendant paid consideration to was a stranger to him and did not give the consideration to him. The plaintiff further



- averred that he has never surrendered the original title document to the Registrar of Lands at Kakamega and therefore the purported registration of the first defendant's title was fraudulent and unlawful.
5. Despite being served, the second and third defendants neither entered appearance nor filed defence. Litigation counsels from the office of the Attorney General attended several of the hearings on behalf of the third defendant but did not offer any evidence.
  6. The plaintiff in ELCC Number 247 of 2014 passed away on 29<sup>th</sup> March 2021 and was substituted on 23<sup>rd</sup> February 2022 by his son Robert Shibutse.
  7. Later, ELCC Number 237 of 2015 was filed. The plaintiff therein averred that he was the registered proprietor of the suit property having acquired it for valuable consideration from its previous owner in 2012 and that the defendant therein had without any colour of right encroached upon the suit property and begun construction thereon thereby denying him quiet enjoyment of the suit property. He therefore prayed for judgment against the defendant therein for orders of eviction, permanent injunction barring the defendant from trespassing, encroaching, or working upon the suit property and mesne profits from the date of encroachment until cessation at the rate of KShs 5,000 per month.
  8. The defendant in ELCC Number 237 of 2015 filed a defence under protest on 2<sup>nd</sup> September 2015. He averred that he was a stranger to the plaintiff in ELCC Number 237 of 2015's registration and ownership of the suit property. He added that the suit property was at all material times registered in the name of and in the occupation of Reuben Shibutse who was his biological father.
  9. Both suits were consolidated through a consent order made on 19<sup>th</sup> September 2018 and ELCC Number 247 of 2014 was chosen as the lead file. It was further ordered that the plaint in ELCC Number 237 of 2015 be deemed as a counterclaim.
  10. At the hearing, Robert Shibutse testified as PW1. He stated that the plaintiff in ELCC Number 247 of 2014 was his father. He produced a power of attorney to act on his father's behalf and adopted a witness statement which his father had signed and filed prior to his death. He stated that his father was the registered owner of the suit property and that on or about 2<sup>nd</sup> March 2012, the first defendant called his father indicating his wish to purchase the suit property and his father requested the first defendant that they set up a face-to-face meeting which the first defendant agreed to and the parties scheduled a meeting to take place on 21<sup>st</sup> March 2012 at the first defendant's office. That during the meeting, his father indicated to the first defendant that he had no intention of selling the suit property and the first defendant insisted that he wanted to build a hotel on the suit property and requested his father to reconsider. That the first defendant promised to get in touch with his father after an overseas trip, but the first defendant never communicated again after the meeting of 21<sup>st</sup> March 2012.
  11. PW1 added that his father conducted a search on the suit property on 5<sup>th</sup> July 2012 when his father discovered that the suit property had been transferred to the first defendant and that the first defendant had been issued with a title deed on 8<sup>th</sup> June 2012. PW1 further testified that the first defendant acted maliciously and fraudulently by transferring the suit property to himself with the full knowledge that his father was not desirous of selling or transferring it to him. That no sale agreement, transfer, or any other authorisation for the transfer of the suit property was ever signed by his father. He added that the register in respect of the suit property indicates that in 2011 the suit property was transferred to the second defendant. That they learnt of the second defendant through first defendant, but they could not trace the second defendant.
  12. The plaintiff's case was then closed.



13. During defence hearing, Atanas Manyala Keya testified as DW1. He stated that he was the registered proprietor of the suit property which he acquired by purchase in 2012 and that while on routine check on the suit property 3<sup>rd</sup> August 2015, he confronted a contractor on site who informed him that he was there courtesy of the plaintiff. DW1 further testified that he knew the second defendant who sold to him the suit property in 2012 after which he obtained title. That the second defendant attended the Land Control Board and obtained consent and that the second defendant was introduced to him by a land broker. That he did not know the second defendant's whereabouts as of the date of his testimony.
14. DW1 further stated that he knew the plaintiff before this case was filed but did not know that the suit property belonged to him. He added that he never negotiated to buy the land from the plaintiff and conceded that as per the documents he had produced, the transfer was applied for before purchase. He further conceded that the plaintiff still had the original of his title with him.
15. Defence cases were then closed. The second and third defendants did not offer any evidence. Parties were thereafter ordered to file and exchange written submissions.
16. The plaintiff filed his submissions on 16<sup>th</sup> May 2022, and he gave a brief introduction of the suits herein and the proceedings at the hearing. The plaintiff submitted on the following issues for consideration: whether the transfer of land from the plaintiff to the second defendant was legal and procedural, whether the second defendant had good title to pass to the first defendant, whether the first defendant is a purchaser for value without notice and whether the transfer of the suit land from the plaintiff to the second defendant was legal and procedural.
17. The plaintiff submitted that upon discovering that he had allegedly transferred his land to the second defendant, he wrote to the third defendant requesting for the transfer instrument but the same could not be produced by the registrar since it did not exist and that equally, there was no transfer instrument transferring the suit land from the second defendant to the first defendant. It was also the plaintiff's submission that despite having been served, the second defendant neither filed a defence nor appeared in court to defend the title he allegedly acquired and subsequently transferred to the first defendant. That there is no single record with the registrar showing how the land was transferred from the plaintiff to the second defendant and that neither was there any explanation as to how the registrar issued a title deed without cancelling the previous one, thus making one parcel of land have two different registered owners. The plaintiff therefore submitted that his title remains indefeasible as per the provisions of Sections 24 and 26 (1) of the [Land Registration Act](#).
18. The plaintiff further relied on Sections 24 (a), 26 (1), 30 (2), 31, 36 (1) and 37 of the [Land Registration Act](#) and submitted that the transfer of land from the plaintiff to the second defendant was not legal and procedural and that his title remains indefeasible. That the second defendant did not obtain any title capable of being passed to another person.
19. On whether the first defendant is a purchaser for value without notice, the plaintiff submitted that the conduct of the first defendant clearly depicts that he was well aware of the fraudulent transactions as he admitted to have known the plaintiff very well and even met before he bought the suit property and that the first defendant could not explain how an application for transfer of the suit land to him was made before he bought the land and that the application for consent for transfer was made on 3<sup>rd</sup> March 2012 while the first defendant purchased the land on 7<sup>th</sup> March 2012. The Plaintiff further submitted that the first and third defendants cannot dissociate themselves from the fraudulent activities that led to the transfer of the suit land from the plaintiff to the second defendant and subsequently to the first defendant and as such the first defendant does not qualify to be a purchaser for value without notice.



20. It was the plaintiff's further submission that in any event the court is compelled to find that the first defendant is an innocent purchaser for value without notice, then he did not obtain a clean title and the same ought to be cancelled. The plaintiff therefore submitted that he has proven his case on a balance of probability and prayed that the suit be allowed as prayed and that the defendant's counter claim in form of ELC No. 237 of 2015 be dismissed and the costs be awarded to the plaintiff.
21. The first defendant filed his submissions on 13<sup>th</sup> May 2022 and submitted on the following issues for determination: whether the land sale agreement between the first defendant and the second defendant is lawful, regular, valid and or enforceable in law, and lastly, whether the first defendant is a bona fide purchaser for value without notice.
22. On whether the land sale agreement between the first defendant and the second defendant is lawful, regular, valid and or enforceable in law, the first defendant submitted that he entered into a land sale agreement contract dated 7<sup>th</sup> March 2012 with the second defendant and subsequently paid the agreed purchase price either directly to him or to his servants/agents. The first defendant submitted that the sale agreement is lawful, regular, valid and or enforceable in law.
23. On whether the first defendant is a bona fide purchaser for value without notice, the first defendant submitted that he properly entered into an agreement for sale of land which was properly attested and executed and that he has been living in a peaceful quiet enjoyment of the land with no dispute whatsoever from the plaintiff until later when the plaintiff started claiming that the suit property still belongs to him as he had not sold it to the second defendant and as such the second defendant could not have sold it to the first defendant. In further submitting that irrespective of how the court shall rule on the land agreement question as between the first defendant and the second defendant, that it has clearly come out that the first defendant has proper proprietary rights over the suit parcel as a bona fide purchaser for value without notice. In explaining the position, the first defendant relied on *David Peterson Kiengo & 2 others v Kariuki Thuo* [2012] eKLR and *Hannington Njuki v William Nyanzi* High Court Civil Suit Number 434 of 1996 as cited in the case of *Joseph Muriithi Njeru v Mary Wanjiru Njuguna and another* [2018] eKLR. The first defendant therefore urged the court to dismiss the suit with costs.
24. I have carefully considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether suit property was lawfully acquired by the second and first defendants, whether the first defendant is a bona fide purchaser for value without notice and whether the reliefs sought should issue.
25. Since both parties laying a claim to the suit property and since the first defendant's title is challenged on grounds of fraud and irregularities, it is important to investigate the root of the title. It is trite law that a registered proprietor whose title is under challenge must do more than merely waving the impugned title. In the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, the Court of Appeal stated as follows:

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony...



26. From the material on record, the plaintiff was initially the registered proprietor of the suit property with title deed being issued to him on 17<sup>th</sup> May 1972, as is indeed confirmed by the register that the first defendant produced. The property was transferred to the second defendant on 17<sup>th</sup> February 2011 and ultimately to the first defendant on 5<sup>th</sup> June 2012. Currently, the first defendant is the registered proprietor of the suit property. Ordinarily, the court would be duty bound under Section 26 of the [Land Registration Act](#) to accept his certificate of title as proof of ownership. Nevertheless, a registered proprietor's title can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme.
27. Pursuant to Section 36 (1) of the [Land Registration Act](#), no interest in registered land is to be disposed of or dealt with except in accordance with the said Act and any attempt to dispose of any such interest otherwise than in accordance with the Act or other law shall not, extinguish, transfer, vary or affect any right or interest in the land. The transfer in favour of the second plaintiff was registered on 17<sup>th</sup> February 2011, under the then applicable [Registered Land Act](#), which was shortly thereafter repealed. Provisions similar to those at Section 36 (1) of the [Land Registration Act](#) were found at Section 38 (1) of the [Registered Land Act](#) (repealed).
28. Further, Section 33 of the [Registered Land Act](#) (repealed) provided:
- (1) If a title deed or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the title deed or the certificate shows all subsisting entries in the register, a note of the registration shall be made on the title deed or the certificate.
  - (2) If the disposition is a transfer, the certificate if produced shall be destroyed, and in that case a new certificate may be issued to the new proprietor.
29. According to the first defendant, a sale agreement was entered into on 7<sup>th</sup> March 2012 between him and the second defendant wherein the second defendant sold to him the suit property. Despite being aware of the challenge to his title and the plaintiff's position that he never transferred the suit property to the second defendant, the defendants did not produce any instruments of transfer to demonstrate how the first and second defendants became registered owners of the suit property.
30. The plaintiff maintained that he does not know the second defendant and that he did not deal with him. On the other hand, the first defendant both knew and dealt with the second defendant. That notwithstanding, the first defendant did not show any effort to get the second defendant to explain how he obtained transfer from the plaintiff without the plaintiff's title being surrendered and cancelled as required by law. The first defendant was content to wave his title despite openly acknowledging in court that the plaintiff still has the original of his title. The Land Registrar who is a party to the case maintained a loud silence and did not bother to testify to produce the instruments of transfer. Even the plaintiff's demand to the land registrar through letters from his advocates and even payment for copies of the records did not result in any records being availed.
31. There is a lot of inference to be drawn from the stance of a proprietor who while claiming to have lawfully acquired a property, is unwilling to place before the court the supporting documents that yielded his title. Title to property that is obtained fraudulently or illegally in violation of the provisions of the statute is not sacrosanct. See [Chemey Investment Limited v Attorney General & 2 others](#) [2018] eKLR. The first defendant having been unable to show the root of the second defendant's title to enable him to transfer the title to the first defendant, it follows that the first defendant's title can be



impeached. I am persuaded that the suit property was not lawfully acquired by the second and first defendants.

32. That takes us to the other issue for determination: whether the first defendant is a bona fide purchaser for value without notice. The term “bona fide purchaser” is defined in *Black’s law Dictionary* 8<sup>th</sup> Edition as

One 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 seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.

33. To qualify to be a bona fide purchaser, the first defendant would need to satisfy the test in the Ugandan case of *Katende v Haridar & Company Limited* [2008] 2 EA 173 cited with approval by our Court of Appeal in *C O Okere v Esther Nduta Kiiyukia & 2 others* [2019] eKLR:

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:

- a) he holds a certificate of title;
- b) he purchased the property in good faith;
- c) he had no knowledge of the fraud;
- d) he purchased for valuable consideration;
- e) the vendors had apparent valid title;
- f) he purchased without notice of any fraud;
- g) he was not party to any fraud...

34. From the material on record, it is apparent that the first defendant knew the background of the suit property and got actively involved. He admitted having known the plaintiff before he purportedly bought the suit property. He even met the plaintiff on 21<sup>st</sup> March 2012 long before the property was transferred to him. The application for consent of the Land Control Board to transfer the suit property from the second defendant to himself which he produced is dated 3<sup>rd</sup> March 2012, before the date of the sale agreement. He could not explain how or why the application predated the sale agreement.

35. The sale agreement which the first defendant produced purports that the purchase price which he paid to the second defendant was KShs 3,000,000 in instalments of KShs 950,000 on execution and the balance of KShs 2,050,000 in three monthly instalments ending on 8<sup>th</sup> June 2012. Those amounts are substantial, and one would expect some evidence of actual movement of funds. No such evidence was produced to demonstrate actual payment to the second defendant. There is thus no proof of valuable consideration. Further, as already noted, the first defendant did not produce anything to show that the second defendant demonstrated to him that he validly obtained transfer from the plaintiff. In other words, he has not shown that the second defendant as vendor had apparent valid title. I am not persuaded that the first defendant is a bona fide purchaser for value without notice.

36. In view of the foregoing discourse, I am persuaded that the plaintiff in ELCC Number 247 of 2014 has established his case on a balance of probabilities and I will therefore grant him appropriate reliefs.



On the other hand, I find no merit in ELCC Number 237 of 2015. Consequently, the reliefs sought in ELCC Number 237 of 2015 will not issue.

37. In the result, I make the following orders:

- a. As between parties to the consolidated cases herein, it is hereby declared that land parcel number Butsotso/Indangalasia/786 is the property of the plaintiff (Reuben Shibutse).
- b. It is hereby declared that the purported transfer of land parcel number Butsotso/Indangalasia/786 to the first defendant (Atanas Manyala Keya) on 5<sup>th</sup> June 2012 is unlawful.
- c. A permanent injunction is hereby granted prohibiting the first defendant (Atanas Manyala Keya) and the second defendant (Festus Nyikuli Shitundo) from interfering, transacting or dealing in any manner whatsoever with land parcel number Butsotso/Indangalasia/786 without the express and written authority of the administrators of the estate of Reuben Shibutse (deceased).
- d. An order is hereby issued, directed to the Land Registrar Kakamega to expunge from the record and rectify any purported transfer of land parcel number Butsotso/Indangalasia/786 to the first defendant (Atanas Manyala Keya) and the second defendant (Festus Nyikuli Shitundo) and cancel any title or interest that may have been given in favour of the first defendant (Atanas Manyala Keya) and the second defendant (Festus Nyikuli Shitundo).
- e. ELCC Number 237 of 2015 is dismissed.
- f. The estate of Reuben Shibutse (deceased) shall have costs of the consolidated case. The first defendant (Atanas Manyala Keya) and the second defendant (Festus Nyikuli Shitundo) shall pay the said costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 22<sup>ND</sup> DAY OF NOVEMBER 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Iddi holding brief for Ms Rauto for the plaintiff

No appearance for the first defendant

No appearance for the second defendant

No appearance for the third defendant

Court Assistant: E. Juma

