



REPUBLIC OF KENYA



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**Syan v Kinjunje Gardens Ltd & 2 others (Environment & Land Case
743 of 2017) [2022] KEELC 15154 (KLR) (15 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15154 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 743 OF 2017**

JA MOGENI, J

NOVEMBER 15, 2022

BETWEEN

KANWALJIT SINGH SYAN PLAINTIFF

AND

KINJUNJE GARDENS LTD 1ST DEFENDANT

SPIRE BANK LIMITED 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

1. By an Amended Complaint dated 23/05/2022, the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -
 - a. A declaration that the plaintiff holds the original title
 - b. A permanent injunction restraining the 2nd defendant by his servant, agents or any one acting upon his instruction from selling, charging or in any way interfering with the Plaintiff's title, occupation and quiet enjoyment of the suit property
 - c. An order for cancellation of entries made fraudulently on the title.
 - d. Damages for unlawful and wrongful deprivation of title to property and mental torture together with interest until payment in full
 - e. Costs of the suit together with interest until payment in full
2. In its Statement of Claim, the Plaintiff averred that it is the registered owner of the suit property known as LR and Reference Number 209/8000/45, situate in Muthaiga.



3. That the Plaintiff lost his original title and reported the loss to the police on or about September 2014. He then filed an application for provisional certificate of title.
4. That the Registrar advertised the loss of the title and provision of provisional certificate which was issued vide Kenya Gazette No 7260 dated 17/10/2014.
5. He avers that having obtained the provisional certificate he realized that the property had been transferred to the 1st defendant Kinyunje Gardens Limited and the company obtained a loan from Spire bank.
6. The plaintiff avers that he also noted the property had been advertised for sale on 11/12/2017. He claims that the defendants fraudulently transferred the property and used it to obtain a loan.
7. In the Amended Plaintiff, the Plaintiff seeks to have the transfer made by the defendants cancelled and the property reversed back to him.
8. The suit is opposed by the 2nd defendant. Through its amended defence dated 27/10/2021 the 2nd defendant avers that around April 2015 they offered a facility of a loan advanced to the 1st defendant of Kshs 64,000,000 the facility was used to finance the purchase a house in Muthaiga LR No 209/8000/45 (IR 27505). It was to be repaid in 60 months in 60 equal instalments of Kshs 1,625,179. It was secured through a charge in the name of the 1st defendant backed with personal guarantees of Patrick Kang'ethe and Margaret Kang'ethe of Kshs 64,000,000 each.
9. The 1st defendant did not enter appearance nor file any defence
10. The 3rd defendant did not file any defence although it was represented by Advocate Allan Kamau who cross-examined the witnesses of both the plaintiff and the 2nd defendant.
11. The 2nd defendant filed an amended defence in response to the amended plaintiff and denied liability and stated the circumstances that led to the charging of the suit property. The 2nd defendant stated that due process was followed when the 2nd defendant sought to exercise its statutory mandate once the 1st defendant was in arrears amounting to Kshs 3, 147,053.15/- as at 11/08/2016.
12. Further the 2nd defendant filed a Notice of Claim against the 1st defendant seeking for indemnity in full and costs of defending the suit. The Notice of Claim contains 7 (seven) grounds on the face of it.
13. The 2nd defendant avers that if at all there was any fraud committed against the plaintiff then it was instigated by the 1st defendant and the 2nd defendant is an innocent chargee for value and that is why they have instituted the Notice of Claim.
14. That 2nd defendant states that the 1st defendant breached the terms of the Facility letter by failing to settle the monthly instalments. As a result, the 2nd defendant had to resort to its statutory power of sale. It was the 1st Defendant's further contention that it had authority to deal with the land as it deemed fit.
15. The 2nd defendant denied all allegations made in the amended defence and averred that the 1st defendant is the one who breached the terms of the facility advanced and also denied conniving with any party.
16. The suit proceeded by way of Viva Voce evidence and the Plaintiff called one witness 9/06/2022. The 1st defendant never entered appearance. The 2nd defendant called one witness who testified on 9/06/2022.

Plaintiff's Case

17. PW1 – Mr Kanwaljit Singh Syan testified and adopted his witness statement dated 28/06/2022 and produced a list of documents. It was his testimony that he is the registered owner of title LR



No 209/8000/45 the suit property situated in Muthaiga. He stated that he lost his original title in September 2014 and he reported the loss to the police and he applied for a provisional certificate of title. The loss was gazetted in the official government gazette on 7/10/2017 by Mr Chege the Land Registrar and thereafter he was issued with a provisional certificate.

18. He avers that he was however shocked that on 11/12/2017 he saw an advertisement for sale of his property by Graham Auctioneers demanding redemption of debts he knew nothing about. He obtained a court order injunction the sale of the property. He avers that he is the registered proprietor of the parcel of land situate in Muthaiga LR No 209/8000/45. That he lost his original certificate and reported to the police on 31/12/2013 and was issued with a police abstract which he used to apply for a provisional certificate of title.
19. That vide the Kenya Gazette dated 17/10/2014 gazette notice number 7260 the Registrar a Mr C.N Kituyi carried the notice under the Land Registration Act for issuance of a provisional certificate. The provisional certificate was finally issued and it is dated 16/01/2015 and an entry was made on the even date, entry number 14. That the provisional certificate of title is grant number. IR 27505/1. That the suit property is the matrimonial home for plaintiff.
20. That when he learnt about the sale by auction he went to court and obtained an interlocutory injunction stopping the sale on 07/12/2017.
21. During cross-examination by Mr Mutiso the advocate for the 2nd defendant the plaintiff stated that he got registered as the owner of the suit property on 21/11/1979 jointly with his father. He had the original title. It was however lost during the bomb blast; it was in the locker at the bank. Further that he applied for the provisional certificate through his advocate and he was issued with a provisional certificate in lieu on 16/01/2015.
22. He stated that he noticed that the property was charged on 30/05/2018 and he conducted a search and found the following entries in favor of:
 - a. Kinjunje Gardens
 - b. Equatorial Bank (which is now Spire Bank)He testified that that he has never signed an agreement of transfer from Patrick Njuguna Kangethe and Margaret Wambui Kangethe who are directors of Kinjunje Gardens.
23. He reiterated that the original certificate is held by him and there is no way any bank would have charged it. That any charge to any title is fraudulent because Kinjunje had no legal title to charge.
24. When he was cross-examined further by Mr Allan Kamau the Advocate for 3rd defendant the Chief Land Registrar, he averred that he had never transferred his property even after getting the provisional certificate of title. Further that he did not know the directors of the 1st defendant, Patrick Njuguna Kangethe and Margaret Wambui Kangethe but had read about them in transactions in Commercial Bank of Africa, Kenya Commercial Bank and articles in the Business Daily.
25. He testified that he did not have any evidence of a search showing that the 1st defendant was the owner of the suit property. He stated that he sued the Land Registrar because he believes that they were party to Equatorial bank, Kinjunje Gardens and Spire Bank team. He then closed his case.

Defendant's Case

26. DW 1- David Sajabi. The 2nd defendant also had one witness Mr David Sajabi who testified that he was the Acting Head of Credit and Risk at Spire Bank Limited. He testified that the 1st defendant has



- been a long-standing customer of the 2nd defendant from 2014 and has enjoyed continued borrowing from the 2nd defendant.
27. That the 2nd defendant advanced a facility of Kshs 64,000,000 pursuant to a facility letter dated 16/04/2015 which was to be paid in 60 months in equal instalments of Kshs 1,625,179 and it was secured by a legal charge over Land Reference Number 209/8000/45 which is the suit property backed by a personal guarantee by Patrick Kang'ethe and Margaret Wambui Kang'ethe for Kshs 64,000,000 each.
 28. The 2nd defendant's advocates Messrs Maina Muiruri Advocates conducted a search which showed the plaintiff as the owner of the suit property and it was free from encumbrances. The suit property was then transferred to the 1st defendant on 18/06/2018 and a charge was registered on the property on 17/06/2015 in favour of the 2nd defendant as No IR 27505/16 and the same was registered at the Companies' registry on 19/06/2015. The 2nd defendant then disbursed the funds to the 1st defendant's account.
 29. He stated that the 1st defendant however fell in arrears of the monthly payments totaling Ksh 3,147,053.15/- as at 11/08/2016 and the 2nd defendant issued a three-month statutory notice and appointed Grama Investment Auctioneers to conduct an auction after the lapse of the statutory notice.
 30. He testified that the 2nd defendant conducted due diligence before financing the purchase and that if at all any fraud was involved then the 1st and 3rd defendants would be responsible but not the 2nd defendant. The 2nd defendant testified that they had filed a Notice of Claim attached to the defence.
 31. When he was cross-examined by Mr Singh was appearing in person, he stated that the loan was disbursed to Mr and Mrs Kangethe. The funds were released to them though the law firm of Khaemba Advocates who were acting on behalf of Kinjunje Gardens. He further stated that there was no money paid or released to Mr Singh the plaintiff.
 32. When further cross-examined Mr Allan Kamau advocate for the 3rd defendant, he stated that the directors of the 1st defendant were long-standing customers of the bank. He stated that he was not the head of Risk Management but a Senior Credit Manager at the bank. He stated that apart from the suit property, there was no other security provided in relation to the facility and the personal guarantees. He testified that he did not carry out any due diligence himself but that he instructed the law firm of Messrs Maina Muiruri Advocates. He however testified that he had not produced any documents before the court to show that the firm of advocates carried out due diligence.
 33. It was his testimony that he had not seen any registered Transfer of Property document between the Plaintiff and Kinjunje Gardens. He also stated that the 2nd defendant never transmitted any monies to the vendor but the monies were sent to the purchaser. He stated that he was aware of the fraud that the Kang'ethes (1st defendant directors) have committed against other banks but that they were still their long standing customers.
 34. In further cross-examination it was his evidence that at paragraph 7 of this witness statement he talks about the pre-registration search but he has not produced this document in court. That at page 60 entries numbers 15 and 16 show transfer but there are no actual entries made. He stated that he did not have evidence of post-registration search either and that other than the instructions that the 2nd defendant issued to the Auctioneer there is no other effort made to recover the money advanced to the 1st defendant.



35. It was his testimony that the 1st defendant had the original title but since they were not in court, the 2nd defendant will seek to produce the original title later. He sated that he was not aware of the search dated 14/06/2021 which showed that the plaintiff is the owner of the suit property and not the 1st defendant.
36. In re-examination, he restated that Muiruri Advocates, registered the charge as per the document he produced in the bundle of the 2nd defendant's documents at page 21. Further that at page 23 there is a receiving stamp showing the booking to register a charge and this was the sole reason that the 2nd defendant sent the Auctioneers.
37. He started that they did not have the transfer documents and neither did they have the original title which could be produced at a later stage. He also clarified that it is not possible to register a charge before a transfer is executed. Further it was his testimony that it is common practice to transfer funds to the advocates acting for the purchaser and so they transferred the Kshs 64,000,000 to the lawyer of the purchaser and not the vendor. The 2nd defendant closed its case.
38. Parties were instructed to file their submissions and judgment reserved for 18/10/2022.
39. The 2nd defendant filed its submissions dated 11/07/2022. The plaintiff did not file any submissions by the time of writing this judgment there was none on the CTS portal.
40. The 2nd defendant in his submissions has relied on the case of *Laban Omuhaka Otumbula v Truphosa Okutoyi* [2019] eKLR. They further stated that the title presented to the bank seemed genuine. That in the event the title was fraudulently obtained then the fraud must have been orchestrated by the 1st and 3rd defendants. Further that the 2nd defendant was an innocent chargee for value without notice of defect in title.
41. In my view the plaintiff, having denied selling the suit property the burden shifted to the 1st and 2nd defendants to prove that they had the documents that would have facilitated a transfer to the suit property. In the absence of the 1st defendant, the 2nd defendant fell short of establishing this fact. It therefore means the suit property was not sold to the 1st defendant as alleged. The upshot of the matter is that the plaintiff is the registered owner of the suit and he never sold it to the 1st defendant or anyone else.
42. From the evidence presented it appears the 1st defendant fell into the hands of fraudsters who somehow had the plaintiff's details but not the original certificate of title. I believe the 1st and 2nd defendants failed to do due diligence before engaging in the said transaction. Sadly, the advocate who prepared the charge as DW1 has stated was in charge of due diligence but there is no document to show that he conducted any due diligence. Further the 2nd defendant never called him as a witness to shade light on what exactly transpired.

Analysis and findings

43. I have considered the parties' pleadings, the evidence tendered by the plaintiff; and the written submissions of the 2nd defendant. I have also considered the relevant legal framework and jurisprudence on the key issues falling for determination in this suit. Parties did not frame or agree on a common statement of issues to be determined by the court. Taking into account the pleadings, evidence and submissions presented to the court, the following are the three key issues that fall for determination in this suit:



- i. Whether the charge registered on 18/06/ relating to Title Number LR No 209/8000/45 was procured fraudulently and/or illegally without the knowledge and/or involvement of the plaintiff;
 - ii. Whether the 2nd Defendant is an innocent chargee without notice to defect in title.
 - iii. Whether the Plaintiff is entitled to the substantive reliefs sought in the amended plaint; and
 - iv. What order should be made in relation to costs of this suit.
44. I will make brief sequential pronouncements on the three issues in the above order.
45. The first issue is whether the impugned encumbrance [charge] was procured fraudulently and/or illegally without the knowledge and/or involvement of the plaintiff. The plaintiff testified as PW1. He was categorical and consistent that he had never used his title as security to guarantee a loan extended to any borrower; he testified that he did not know the borrowers whom the 2nd defendant lent money. He further testified that he has never come across a document showing that the property had been transferred.
46. He testified that he had the original provisional title and that he got registered as the owner of the property on 21/11/1979 and the title was in the joint names of his father and himself. When the title got lost during the bomb blast he applied for a provisional title and he was issued with one in lieu on 16/01/2015. He stated that he noticed that the property was charged on 30/05/2018. He brought the original provisional title with him to court at the time of giving evidence for scrutiny on 13/06/2022; he did not execute any documents relating to the encumbrance; he did not know the advocate who witnessed the documents; and he was a total stranger to the 1st defendant who had a facility for a loan from the 2nd defendant.
47. The 1st defendant did not enter appearance in the matter.
48. The 2nd defendant's witness in his testimony stated that a pre-registration search indicated that Mr Singh, the plaintiff was the owner of the suit property. Further that there was a transfer to the 1st defendant on 18/06/2018 and the charge was registered on 17/06/2015. I note that when the witness was cross-examined by Mr Singh he testified that the loan was disbursed to the directors of the 1st defendant, Mr and Mrs Kangethe and to Advocate Khaemba who was acting for the 1st defendant and not to Mr Singh who was seller of the suit property. The 2nd defendant never produced the pre-registration search. Further the entries numbered 15 and 16 show that there was transfer but there is no information entered to show that transfers were made through these entries. The witness averred that the 1st defendant had the original title but did not produce this in court. The 2nd defendant also filed a Notice of Claim Against the 1st defendant claiming indemnity for the full judgment that will be entered against the 2nd defendant and costs of the suit.
49. The plaintiff in paragraph 4 and 5 of the amended plaint dated 28/05/2022 has made allegations of fraud against the defendant. However, in his evidence he did not endeavor to show or prove the particulars. No evidence was adduced to show the 1st defendant's collusion with the officials at the Lands Registry. I find that the plaintiff has failed to prove fraud on the part of the 1st defendant and 3rd defendant to the required standard of proof. The standard of proof required for a party to prove



fraud and forgery are well laid by the court of appeal in the case of *Dennis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another* [2018] eKLR where the court held as follows:-

“As regards standard of proof of fraud, the law is quite clear. In *R. G. Patel v Lalji Makanji* (supra) the former Court of Appeal for Eastern Africa stated thus;

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

50. Similarly in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR Tunoi JA stated that:-

“It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts”

51. I find that the plaintiff has failed to discharge his burden of proving fraud or forgery on the part of the 1st and 2nd defendants. He also failed to prove any collusion on the part of the 1st and 3rd Defendants. I therefore find that there was no collusion between the 1st and the 3rd defendants. The plaintiff is therefore not entitled to general damages.

52. Nevertheless, having found that the plaintiff has proved that he is the registered owner of the suit property and that he did not sell it to the 1st defendant or any other person, he is entitled to an order for discharge of the title since the names of Kinjunje and Equatorial Bank are not supposed to be charged to the plaintiff's title. The register has to reflect his name as the registered owner and any entries made deleted.

53. To my mind, there is no evidence presented by the 2nd defendant that show that the 1st Defendant adhered to the proper legal process to acquire the suit property from the plaintiff. The 2nd defendant testified that it would not have been possible to register a charge before a transfer is executed but he never produced the transfer documents before the court. The witness was also not able to explain how the money for the charge was transferred to the advocate of the purchaser and not to the vendor. In line with the evidence above, I wish to make reference to section 26 of the *Land Registration Act* which provides as follows: -

26. (1) 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—

- 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.



- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
54. In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No239 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.”
55. From the above Court of Appeal case it shows that when a party’s title to land is called into question, the Party has an obligation to show the root of its title.
56. As already noted above, the 2nd defendant did not support its averments and therefore its statement of defence and Notice of Claim remained mere allegations and the Court finds and holds that the 2nd defendant did not prove the root of its title.
57. Based on the facts before me and the uncontroverted evidence of the Plaintiff by the 1st defendant while relying on the legal provisions cited above as well as associating myself with the decisions I have quoted, I find that the 1st defendant indeed purported to acquire the suit property in their name un-procedurally through fraud, misrepresentation and the same is hence not a good title as the root is challenged.
58. As to whether the 2nd Defendant is an innocent chargee without notice to defect in title.
59. DW1 testified that he did not carry out any due diligence instead he instructed the firm of Maina Muiruri & Co. Advocates. He however did not produce any documents before the court to show what the firm of advocates found out. Neither did he produce the sale agreement between the plaintiff and the 1st defendant. He insisted the 1st defendant was their long standing customers despite the negative information that has been stated about them.
60. In the case *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR my brother Judge while dealing with a situation almost similar to the case at hand held that:’
- “It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyanguara v Stephen Mungai Njuguna & another*, Eldoret ELC Case No 609 B of 2012 where I stated as follows:-
- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a



corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum.....Having considered all arguments I frankly do not see how the title of the 1st respondent, the star fraudster, can be upheld, and having nothing to charge, I do not see how the charge in favour of the bank can be upheld. It was argued that a decision to cancel the charge would be injurious to the economy. But it is no less, and in fact, it may probably be more injurious, if I am to deny the applicant and the heirs of the estate of the deceased their rightful inheritance, which comprises of the suit property. The charge has to be cancelled and I am afraid that in this instance, the bank will have to pursue the 1st respondent personally to recover its money.'

61. In relying on the evidence before me and associating myself with the decision cited above, I find that since the 1st Defendant failed to acquire a good title to Charge to the 2nd Defendant, the 2nd Defendant cannot claim to be an innocent chargee for value without notice to defect in title as it undertook due diligence before registering the said Charge. The 2nd Defendant in filing a Notice of Claim and in its submissions it is admitting it is actually the 1st defendant is to blame. From the testimony of DW1 it is clear someone in the bank was indeed assisting the 1st defendant whom he confirms was a very good customer of theirs. If so, I opine that they have a remedy to pursue their good customer because at this juncture, I am afraid, I cannot uphold a Charge which was registered using a fraudulently procured title as I have made an order that the said title should revert back to the plaintiff.
62. As to whether the Plaintiff is entitled to the orders sought in the Plaintiff.
63. The Plaintiff sought for various orders which are enumerated above. Based on my findings, I find that the Plaintiff is indeed entitled to the orders sought.
64. As to who should bear the costs of this suit.
65. I find that since the Plaintiff is the inconvenienced party, he should be granted the costs of this suit to be borne equally by the 1st and 2nd defendants.
66. It is against the foregoing that I find the Plaintiff has proved his case on a balance of probability and will proceed to make the following final orders:
 - i. A declaration that the plaintiff holds the original title
 - ii. A permanent injunction be and is hereby issued restraining the 2nd defendant by his servant, agents or any one acting upon his instruction from selling, charging or in any way interfering with the Plaintiff's title, occupation and quiet enjoyment of the suit property
 - iii. An order be and is hereby issued for cancellation of any entries made on the plaintiff's title in respect of a charge
 - iv. Costs of the suit is awarded to the Plaintiff, to be paid by the 2nd defendant.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF NOVEMBER 2022.

MOGENI J

JUDGE

In the virtual presence of;-

Mutiso 2nd Defendant

Mr Kanwaljit Singh Syan appearing in person.

Caroline Sagina: Court Assistant

MOGENI J

JUDGE

