



REPUBLIC OF KENYA



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**Mwakirimu v Kinondo Amani Limited & another (Civil Suit 35 of 2021)
[2022] KEELC 15336 (KLR) (14 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
CIVIL SUIT 35 OF 2021
AE DENA, J
DECEMBER 14, 2022**

BETWEEN

SEIF SALIM MWAKIRIMU PLAINTIFF

AND

KINONDO AMANI LIMITED 1ST DEFENDANT

FORMATION HOUSE LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein instituted this suit vide an amended plaint dated 28/9/2012 for judgement against the Defendant for;
 - a. A declaration that the transfer and the registration of plot no Kwale/Galu Kinondo/40 in the name of the Defendant is null and void.
 - b. A declaration that no transaction could take place in light of orders in judicial review no 744/05 which suit is still active.
 - c. An order that the title issued to the Defendant to be cancelled and revoked.
 - d. An order directing the Land Registrar Kwale to correct the register and remove the Defendants name from the records of plot no Kwale/Galu Kinondo/40
 - e. A declaration that the Plaintiff is still the rightful owner of plot no Kwale/Galu Kinondo/40
 - f. Costs and interest of this suit
 - g. Any other relief this honourable court may deem appropriate to grant.
2. It is the Plaintiff's case that he is the rightful registered owner of the parcel of land no Kwale/Galu Kinondo/40 (hereinafter referred to as the suit land) having been registered as such on December



- 14, 2005 and a title deed issued to him on the same date. The plaintiff states that on November 17, 2009 he carried out a search on the suit property from the Kwale land registry and discovered that the property was registered in the name of the 1st defendant with the help of the 2nd Defendant without his knowledge or consent. The Plaintiff states that prior to the transfer to the 1st defendant there existed two orders of prohibition and injunction by the court and which orders had not been lifted. The transfer to the 1st Defendant is termed fraudulent and that the subsequent title to the Plaintiff's title should be rectified to reflect the position before the transfer.
3. It is averred that the plaintiff had filed a land claim No 16 of 2005 before the Land Tribunal against Rosemary Njoki Nyaga, Central Investment Limited and Formation House Ltd where judgement was entered in his favor which decision remains a legitimate decision of the court. That aware of this judgement and its own prohibiting orders in Judicial Review No 744 of 2005 the 2nd defendant, purportedly transferred the suit property to the 1st defendant. It is pleaded that this transfer was illegal null and void since by dint of the said judgement the 2nd defendant did not have proprietary rights over the suit property and was also barred by the orders of prohibition. Effectively the defendants jointly fraudulently procured the registration.
 4. The plaintiff further states that he had known the directors of the 1st defendant company for some time and who had immediately after the judgement in the land case no 16 of 2005 made a proposal to purchase the suit property but parties disagreed. That the 1st defendant has always known about the plaintiff's ownership of the suit land and a simple search would have established the true position as to ownership.
 5. The plaintiff has listed particulars of fraud against the 1st and 2nd defendants are highlighted and discussed elsewhere in this judgement. The plaintiff states that there exist two titles over the suit property and that the defendants title should be revoked and cancelled since the plaintiff title is still valid until the court orders otherwise.

Defence

6. In its amended defence dated November 13, 2017 the 1st defendant denies the contents of the plaint and states that there were no prohibitions on the title ordered by the court. The defendant in further response to the Plaintiff states that the said property was sold and transferred to the Defendant for value and consideration with no fraud whatsoever perpetuated by the 1st Defendant whose title to the property remains valid. That the Plaintiff should therefore direct his claims if any to Formation House Limited. The 1st Defendant avers that the alleged decision of the Land Tribunal was rendered null and void and lawfully quashed by the High Court including in Mombasa High Court Misc Civil Application No 438 of 2006 *Republic v Land Registrar (Kwale District Land Registrar) & Another ex parte Formation House Limited*.
7. It is averred that neither the Plaintiff nor the Tribunal have ever appealed against the valid decision of the court aforesaid. The 1st Defendant denies that the Transfer of the Suit Property was illegal and that the 2nd Defendant procured the Transfer and registration of the same illegally. It is stated that the 2nd Defendant was free to Transfer the property following the nullification and voidance of the purported decision of the Land Tribunal. The 1st Defendant further avers that it obtained a valid and good title lawfully and validly issued by the Republic of Kenya through the Kwale District Land Registry.
8. It is the 1st defendants' case that the Plaintiff having failed to lodge an appeal against the decision of the Court in Misc Civil Application No 438 of 2006 aforementioned is unlawfully attempting to go behind that decision through these proceedings which is an abuse of the process of the Court. The 1st



Defendant denies that there was any valid order restricting transaction over the Suit Property, denies knowledge of the same and puts the Plaintiff to strict proof thereof.

9. The 2nd defendant did not enter appearance despite being duly served by way of substituted service.

Hearing

The plaintiffs case

10. The suit was heard on 7/12/2021 and each party presented one witness to give evidence in court. PW1 was Seif Salim Mwakarimu the plaintiff. He told this court that the suit property belonged to his grandfather who did not have title as there were no titles then. That there were three titles in respect of the same suit property for the 1st, 2nd defendants and the plaintiff. That his title was issued on December 14, 2005. He also adopted his witness statement dated 28/09/12 as his evidence and produced the documents listed in the plaintiffs list of documents dated 17/7/09, 24/09/09 and 28/09/12. He told the court that the 1st court case was filed by the 2nd defendant but he was not aware of the outcome as he did not participate. He was also aware a case filed in the tribunal whose import was that he was the rightful owner of the land. That there was an entry in the green card prohibiting the doing of anything with the suit property though he was not aware whether it was lifted or not. He testified that the current position at the registry was that the 1st defendant is the registered owner of the suit property having purchased it from the 2nd defendant which was not right as he too held a title. He asked the court to declare him the legal owner of the suit property.
11. The witness was cross examined at length by Ms Soweto counsel for the defendant which I will refer to latter in this judgement.

The 1st defendants case

12. DW1 was Fred Ossian Anderson the owner of Kinondo Amani the 1st defendant. It was his testimony that he is a developer as well hotelier and runs a resort Kinondo kwetu partly built on the suit property. That he also runs a hospital on charity basis at Kinondo. He adopted his witness statement dated 19/12/08 as his evidence in chief which he reiterated. According to the witness statement the 1st Defendant alleges to be the registered and beneficial owner of the Suit Property whose title he was issued on 22/04/08. That before purchasing the property, they conducted searches at the Land Registry Kwale which records indicated prior to the transfer of the Suit Property to the 1st Defendant the 2nd Defendant had been the registered and beneficial owner of the Suit Property since 17/10/94. He states that he is a stranger to the various Court proceedings said to concern the suit property namely Mombasa High Court Misc Civil Application No 744 of 2005 *Republic v The Msambweni Land Disputes Tribunal Ex parte Formation House Limited* and Mombasa High Court Misc Civil Application No 438 of 2006 *Republic v Land Registrar (Kwale District Land Registry) & Another ex parte Formation House Limited*. He was aware that the decision of the Msambweni Land Disputes Tribunal was quashed by the High Court in the abovementioned proceedings on 28/02/07. That based on his lawyers advise once the High Court quashed the decision of the Msambweni Land Disputes Tribunal all subsequent decisions that were based on or pegged on that decision became nugatory, null and void and of no consequence whatsoever.
13. In addition to the above it was his oral testimony that there were two villas, tennis court and swimming pool and Galu Kindondo he owned over 60 acres of land comprising 5 different plots and the suit property made 30% of this. That he acquired the suit property from Duncan Ndegwa a partner in Formation Limited and his brother Benjamin Ndegwa who is deceased. He stated that the plaintiff worked in his property and knew the plaintiff since the year 2004 before the proceedings herein. It



was his testimony that he didn't understand how the government could issue an invalid search when the plaintiff had a title. That the search was very clear that they bought the suit property from the 2nd defendant who held its title since 1994. That upon filing of the present suit he sought for the owners of the 2nd defendant without success. That he was satisfied he received a valid title from the 2nd defendant following the search. Referring to the entries in the green card he pointed that the entries corresponded with the information in the official search he was issued by the government including the 1st defendant's title. He told the court no one opposed the transaction culminating into the issuance of the 1st defendant's title. He produced the documents in the 1st defendant's list of documents dated 28/09/12. He confirmed that the documents he requested from the registrar vide his lawyers letter dated 16/5/2016 were never furnished. He reiterated his prayer that the suit is dismissed. The witness was cross examined and reexamined as will be evident later in this judgement.

Submissions

14. The plaintiff filed submissions on 1/03/22 and relied on the title deed dated December 14, 2005.
15. It was submitted that since the 2nd defendant had been served and never responded judgement should be entered against them as prayed in the amended plaint. It is submitted that the 2nd defendant had no title to transfer to the 2nd defendant and could not transact anything during the pendency of the orders in 744 of 2005 which prohibited all dealings relating to the suit property as such any transfer effected in 2008 is a nullity. That the plaintiff's title was the one that was credible since the 1st defendant's title came three years after the plaintiffs. That the defendant's title having been acquired during the pendency of the orders in 744 of 2005 cannot be conclusive evidence of proprietorship for having been acquired in contravention of section 26(1)(b) of the *Land Registration Act*.
16. It was submitted that the 1st defendant's title cannot be sustained the 2nd defendant's having failed to controvert the averments by the plaintiff. That the suit filed by the 2nd defendant challenging the plaintiff's ownership was withdrawn by consent. That the order in 438 of 2006 was incompetent by dint of the prohibitory order registered as entry No 9 in the green card and the magistrates court order of 5/10/05 which was never quashed by the High Court in Misc 438 of 2006. Relying on *Wildlife Lodges Ltd Vs County Council of Narok & Ano* EA 2005 and *Trusted Society of Human Right Alliance Vs Cabinet for Devolution and Planning & 3 Others* (2017) eKLR reiterating that court orders must be respected until they are set aside for illegality.
17. The plaintiff contended that the 1st defendant should not benefit from the principle of bonafide purchaser for value being deemed to have out of due diligence seen the entry on the prohibition order in the green card at the point of registering the transfer on 22/4/2008.

1st Defendants Submissions

18. The 1st defendant's submissions were filed on 4/5/2022 and also relied upon the oral evidence, all the pleadings, documents and affidavits filed in this Suit. The following issues were identified for determination; -
 - i. Who are the necessary parties in these proceedings?
 - ii. Can the Plaintiff sustain his claim for ownership of the land in dispute without joining the first registered owner and the Kwale Land Registrar to the suit?
 - iii. Can the Plaintiff claim ownership of the land based on the Title issued by the Msambweni Land Disputes Tribunal?



- iv. Can the Plaintiff obtain judgement in default against the 2nd Defendant in the suit; and would such a judgement have any legal efficacy?
 - v. Has the Plaintiff proved his claim for ownership of the suit land?
19. It was submitted that the first registered owner being Rosemary Njoki Nyanjui and who the plaintiff had claimed before the Msambweni Tribunal had illegally taken away his land was the most relevant party in these proceedings. That the plaintiff's failure to enjoin her when he had been given an opportunity to do so by Tuiyot J in his ruling dated August 29, 2012 was fatal to his claim over the suit property. That the failure was deliberate since he was aware that he could not sustain a valid claim. That even had the said Rosemary been enjoined the Plaintiff had no capacity to own or claim ownership of the land since he was 12 years old in the year 1974.
 20. Referring to Justice M Odero in the Ruling of November 30, 2011 reiterating justice Maraga's finding quashing the tribunals decision it was submitted on behalf of the 1st defendant that the Plaintiff could not claim ownership of the land based on the Title issued by the Msambweni Land Disputes Tribunal. It was urged that justice Maraga's decision remained good law having been cited as a precedent in *Republic v Kwale Senior Resident Magistrate's Court & another Ex parte Ndurya Said Ndurya* [2015] eKLR. Additionally, it was contended the only way to challenge or overturn the decision made in Misc Civil Application No. 438 of 2006 was through an appeal, which the Plaintiff never preferred or sought. That the Plaintiff cannot claim ownership or title based on a decision that was procedurally and lawfully overturned. That Plaintiff was named interested party in Misc Civil Application No 438 of 2006 and thus deemed to be fully aware of the ruling therein.
 21. It was posited since the court made a finding that the Msambweni Land Disputes Tribunal lacked jurisdiction to determine the question of ownership of the land, the decision transmitted to the Kwale Senior Resident Magistrate's Court in Land Case No 16 of 2005, which produced the Title claimed by the Plaintiff, was invalid, null and void *ab initio*. Various court decisions confirming this position as cited in *Republic v Kwale Senior Resident Magistrate's Court & another Ex parte Ndurya Said Ndurya* were brought to this court's attention.
 22. On the Plaintiff's claim that no transactions could be made in the land register in view of the prohibitory order made in Misc Civil Application No 744 of 2005, citing Mativo, J in the case of *Shadrack Kinyanjui Wambui v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR where the law of mootness was discussed counsel's view was that events subsequent to the filing of Misc Civil Application No 744 of 2005 had eliminated the controversy between the parties. This was based on the fact that the proceedings in Misc Civil Application No 744 of 2005 had elapsed and/or rendered moot, and in light of the decision in Misc Civil Application No 438 of 2006, there was no need for the 2nd Defendant to continue pursuing the former suit. Consequently, there was no disobedience of the orders issued in Misc Civil Application No 744 of 2005; they simply elapsed and were rendered moot. That authorities cited by the Plaintiff in his submissions are misplaced and irrelevant.
 23. Citing the provisions of Order 10 Rules 4 – 9 of the *Civil Procedures Rules, 2010* it was submitted that the judgement entered against the 2nd Defendant was illegal, null and void as no liquidated damages had been sought. The Suit was subject to a full hearing.
 24. Additionally, it was submitted that the Plaintiff has not discharged the burden of proof on his claim for ownership of the suit property as required under the provisions of sections 107, 108 and 109 of the *Evidence Act*. It was incumbent upon the plaintiff to prove that he acquired the land in 1974 before the original owner Rosemary Njoki Nyanjui which he did not. the Plaintiff would fail because the only



record the Court can rely on is the Green Card and the current Title Deed to the suit property that is in the name of the 1st Defendant. Further that under section 116 of the Evidence Act the onus was on the Plaintiff to disprove that the 1st Defendant is not the owner. He failed to present the record in Misc Civil Application No 744 of 2005 where he was named interested party to prove his assertions in the claim yet he was the only one with special knowledge of what transpired in those proceedings. That the burden also shifted to him under section 112 of the evidence Act

25. Lastly this court was invited to invoke section 157(3) of the Evidence Act to draw to draw a negative inference from the Plaintiff's failure to adduce relevant evidence to support its as he made no effort to adduce the proceedings in Misc Civil Application No 744 of 2005 to prove more particularly, the relationship with Misc Civil Application No 438 of 2006; and the facts that ultimately led to the settlement of Misc Civil Application No 744 of 2005. Counsel prayed on behalf of the 1st Defendant that the suit be dismissed with costs to the 1st Defendant.

Analysis and Determination

26. I have carefully perused and considered the pleadings filed in this suit, the oral testimonies of PW1 and DW1 and all the evidence adduced through the respective parties bundle of documents filed and admitted as evidence in this suit. I have also read and considered submissions and authorities placed before this court by learned counsel Ms Mwanzia and Ms Soweto for the plaintiff and 1st defendant respectively. Before I formulate the issues for determination I find it necessary to render myself on the nonappearance of the 2nd defendant in these proceedings at this early stage of this judgement to enable focus on the substantive issue of ownership of the suit property.
27. The plaintiff submitted that the 2nd defendant failed to enter appearance whereupon judgement was entered against it. This court was also urged to enter judgement against the 2nd defendant since the case against it proceeded *ex parte*. It is the 1st defendants' position that the said judgement is inconsequential. From the proceedings I did not come across any request for judgement made in this matter against the 2nd defendant. I also did not see any endorsement by the Deputy Registrar to that effect. I could be wrong but be that is it may, it is not in dispute that the 2nd defendant did not enter appearance after being served twice by advertisement with the summons and by the 1st defendant with the amended defence of November 2017. Order 10 of the Civil Procedures Rules, 2010 provides for consequences of non-appearance, default of defence and failure to serve which provisions I have carefully looked at. In my view there is no provision under Order 10 for interlocutory judgement in a case such as the instant case where there is no claim for liquidated damages. The appropriate procedure is that in default of appearance the suit is fixed for hearing for the Plaintiff to prove his case in the normal way. Therefore, assuming interlocutory judgement was entered the same would be of no consequence *ab initio*. In view of this I would also decline the invitation to enter judgement against the 2nd defendant in default of appearance. The other issue is the non-joinder of the initial owner of the suit property Rosemary Njoki Nyanjui which I will address later in this judgement.
28. I see the following issues commending themselves for determination by this court; -
1. Whether plaintiff is the rightful owner of the suit property and holds a valid title thereof.
 2. Whether the registration of the suit property in the name of the defendant is null and void.
 3. Whether the Plaintiff is entitled to the orders sought
 4. Who is to bear the costs of this suit.
- Whether plaintiff is the rightful owner of the suit property and holds a valid title thereof.



29. I think this issue will be best settled if the following questions are answered. Namely whether the Plaintiff can claim ownership of the suit property based on the judgement by the Msambweni Land Disputes Tribunal culminating into the issuance to him of the title dated December 14, 2005 (this is where validity arises) and whether the Plaintiff has proved his claim for ownership of the suit property Plot No Kwale Galu Kinondo/40.
30. It is the plaintiff's case and testimony that he is the rightful registered owner of the suit property. As his proof PW1 produced copies of Court Order in suit No 16 of 2005, Order in Judicial Review in No 744 of 2005; Green Card of Plot No Kwale Galu Kinondo/40, Order in Judicial Review No 438 of 2006, Seif Salim Mwakirimu Title Deed. The copy of the title deed was issued to plaintiff on December 14, 2005 and is confirmed by Certificate of Official Search dated August 28, 2006 and the green card. The search results confirm that according to the register Seif Salim Mwakirimu the plaintiff was registered as proprietor under entry No 7 on December 14, 2005 and title issued the same day. From the proceedings and evidence, this title was issued following the decision of the Msambweni Land Disputes Tribunal No 20 of 2005 which was produced and which was adopted on 5/10/2005 as a judgement of the court by D M Ochenja Senior Resident Magistrate. PW1 also admitted during cross examination that his claim is based on the judgement of the tribunal. The green card in respect of the register for the parcel at entry No 7 & 8 made on December 14, 2005 also confirms the plaintiff as the proprietor and a Land Title Deed was issued. There are also remarks therein showing the court order in Land Case No 16 of 2005. This is further confirmed by Justice Maraga where he points that Mr Okello counsel for the Kwale District Land registry pointed out that the Land Registrar acted on the court order.
31. The order of the tribunal (see SMM 2') reads as follows; -
1. 'that the land Title Deed for Plot No Kwale/Galu Kinondo/40 currently in the name of Formation House Limited be revoked and cancelled.
 2. That a new Title Deed be issued to the original owner Seif Salim Mwakirimu with immediate effect.
32. The 1st defendant's case is that the decision of the tribunal was quashed for want of jurisdiction by Justice Maraga in Mombasa High Court Misc Civil Application No 438 of 2006 *Republic v Land Registrar (Kwale District Land Registry) & Msambweni Land Disputes Tribunal Ex Parte Formation House Limited*. I read the said brief ruling dated February 28, 2007 where the learned judge made a finding that the decision of the tribunal was given without jurisdiction and could not therefore form the basis of any lawful act. The learned judge consequently issued an order of certiorari as prayed, that is to bring into the High Court and to quash the claim, proceedings and/or consequential award of the Msambweni Land Disputes Tribunal Case No 20 of 2005, Seif Salim Mwakirimu –Vs-, Rose Nyanjui Njoki Central Investments Ltd and Formation House Ltd. I need not belabor this point for this is the correct position in law. The jurisdiction of the tribunal is conferred by the [Land Disputes Tribunals Act](#) (repealed) as hereunder; -
3. Subject to this Act, all cases of a civil nature involving a dispute as to— (a) the division of, or the determination of boundaries to land, including land held in common; (b) a claim to occupy or work land; or (c) trespass to land, shall be heard and determined by a Tribunal established under this section'
33. In any event this court is not sitting on appeal of Justice Maraga's ruling, it is a court of concurrent jurisdiction with this court. No evidence has been tendered before this court to show that any of the parties and specifically the plaintiff appealed the said decision having been named as the Interested Party therein. No evidence was tendered to show that the orders were set aside at his instance or otherwise. It



is also of no consequence that the magistrates court order of 5/10/05 was never quashed by the High Court in Misc 438 of 2006 as urged by the plaintiff. To me the plaintiff's title having been anchored on a decision which was a nullity cannot survive since a nullity is a nullity. The same cannot be salvaged even under the provisions of section 26(1) of the *Land Registration Act* as to indefeasibility of title as counsel for the plaintiff would want this court to find. See the position taken by Lord Denning in *Macfoy Vs United Africa Limited* (1961) All FR 1169 and which has been adopted in many instances in our courts. On this basis the Plaintiff cannot be held to be the rightful owner of Plot No Kwale Galu Kinondo/40.

34. The plaintiff also testified in his evidence in chief that the suit property belonged to his grandfather who never held title because there were no titles then. He reiterated during cross examination that the suit property was family land and he had brought these proceedings on behalf of the family but on being asked for proof of authority to act he confirmed he did not have it before court. I thus hear the plaintiff saying that even before the tribunal case the land belonged to his family and therefore not to himself alone yet he pleads that he is the lawful registered owner of the plot. While he testified during his evidence in chief that his predecessor grandfather who owned the land did not have title he did not call any of the family members he purported to represent to corroborate his evidence. Even the letter of allocation which he informed the tribunal he was issued with at adjudication he did not produce. Upon cross examination he admitted that he has never lived in the suit property and lives in another land which he also inherited from the said grandfather. He agreed in cross examination that for over 21 years the suit property was owned by third parties and that the name of his grandfather does not feature in the green card. This is supported by the entries in the green card which are self-explanatory and specifically initial entries 1- 6 in the register/green card;-

1. 15 November 1974 registering Rosemary Njoki Nyanjui as the proprietor.
2. On 21 March 1975 a land certificate was issued and this is the second entry in the record.
3. On 26 February 1980 the suit was registered in the name of Central Investments Limited as proprietor.
4. On 26 February 1980 Land Certificate is issued to Central Investments Limited
5. On 17 October 1994 Formation House Limited, the 2nd Defendant was registered as proprietor.
6. On 17 October 1994 a Title Deed was issued to Formation House Limited
7. On 14 December 2005 the Plaintiff is shown in the proprietorship column.
8. A "Land Title Deed" was issued on 14 December 2005 under "Court Order Land Case No 16 of 2005."
9. On March 16, 2006, there is "Prohibitory Order dated March 14, 2006. Prohibiting all transaction until Civil Case No 744 of 2005 in the High Court Mombasa is determined.
10. On 13 June 2006 there is a "Prohibitory Order dated May 15, 2006 prohibiting all transactions until Civil Case No 438 of 2006 pending in the High Court Mombasa is determined.
11. On 16 April 2007 is "Court Order dated February 28, 2007 restricting all dealings with suit land pending hearing of application in HCC No 438 of 2006 in Mombasa.
12. On 30 May 2007 Entry No 5 above is reinstated vide Court Order dated February 28, 2007 in Civil Suit No 438 of 2006;



13. On 22 April 2008 Kinondo Amani Limited buys for the consideration of 25,000,000/=.
 14. Title Deed to Kinondo Amani issued on 22 April 2008
 15. on 16 September 2011 and it records “in Charge No C1 contains an agreement in terms of Sec 70”.
35. A look at the register as well as the plaintiffs title reveals that the register in respect of the suit property was opened in November 15, 1974. The plaintiff during cross examination admitted that in 1975 he was 13 years old, that he was young and lacked capacity to sell. In any case he could not legally own land though it could be held in trust but by his own admission affirmed that his claim is based on the judgement of the tribunal which is also replicated in his affidavit of October 27, 2009. He further admitted that the 2nd defendants title preceded his registration by about 11 years and that for over 21 years the suit property was owned by third parties. It was incumbent upon the plaintiff and his witnesses to produce documentary evidence to prove his case that the land belonged to him ab-initio. It is trite that the burden of proof as stipulated under section 107 and 108 of the Evidence Act Chapter 80 of the laws of Kenya rested with the plaintiff to prove that he owned the suit property before the previous registered proprietors. Indeed, this was an opportunity after the nullification of the tribunals proceedings for the plaintiff to put his best foot forward and marshal witnesses to prove his case but he failed miserably in this regard.
 36. Contradictions were noted when PW1 denied knowledge and participation of the proceedings filed by Formation Ltd to impugn the tribunals decision but says he was not involved. Upon being shown his own affidavit of 27/10/09 where he refers to the same proceedings he further stated that though he had counsel he was not involved in the proceedings that overturned the tribunals decision. Again on being referred to Chamber summons dated October 12, 2009 and its supporting affidavit (SMM4) where he is interested party and wherein he appointed Oruru Gisemba & Co advocates, PW1 admitted to all the responses filed in the said proceedings but denied his involvement. The impression I got was that he misrepresented a lot of facts during his appearance before the tribunal which was inconsistent with his evidence before this court. In fact, during cross examination he denies what he stated before the tribunal and attributed confusion on the part of the tribunal. Contradictions were also noted during cross examination about the graves, clearing of bush at adjudication where he didn't see graves then but in his own testimony states there were no graves. The objective I note was to create the impression he cleared the land and was given the same as virgin land at adjudication which is 1974 yet he had earlier admitted he was very young then. Infact he stated during cross examination that he did not see any issue with his contradictory statements. This is not a witness a court should believe and place weight on his evidence which was full of inconsistencies.
 37. In view of the foregoing I'm not able amidst the admissions herein, contradictions/inconsistencies in the plaintiffs evidence , the lack of evidence as to the ownership of the suit property by the plaintiff or even his family before the register was opened in 1974 including the nullification of the tribunals decision, to make a finding that the plaintiff was the rightful owner of the suit property by dint of registration pursuant to the judgement of the tribunal adopted by the magistrates court or even by dint of the alleged inheritance.
 38. I'm aware that the law is extremely protective of title but the same law provides the said protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate



of title has been acquired illegally, unprocedurally or through a corrupt scheme. This is anchored in Section 26 (1) of the [Land Registration Act](#) which provides: -

- "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."

39. The above provisions and their import were well articulated by my brother Justice Munyao and which I concur entirely in the case of [Elijah Makeri Nyangwira vs- Stephen Mungai Njuguna & Another](#) [2013] eKLR thus; -

“First, 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.”

40. The plaintiff set out the particulars of fraud against the 1st and 2nd defendant’s as follows;
- i. Transferring the property to its name without the knowledge of the plaintiff.
 - ii. Transferring a property which at the time of transfer had prohibitory order barring any dealing.
 - iii. Taking possession of the plaintiff property.
 - iv. The 2nd defendant selling and purporting to transfer land which had no title.
 - v. Selling the plaintiff’s land to the 1st defendant.
41. It was incumbent upon the plaintiff to prove on a slightly higher threshold above a balance of probabilities the above said particulars of fraud. See *Ratil Patel Vs Lalji Makanji* EA (1957) and [Virjay Marjaria Vs Nansigh Darbar & Another](#) (2000) eKLR. In his testimony PW1 informed this court that there were two other titles in addition to his title. He admitted during cross examination that presently the 1st defendant is the registered owner of the land as per the register. It was also required of the plaintiff to lead evidence that would impeach the previous titles especially the registration of 15 November 1974 registering Rosemary Njoki Nyanjui as the proprietor. The foundation of all subsequent transactions is the registration in 1974 which if impeached would have nullified the rest of the transaction since the substratum of the said transactions would have collapsed because under Section 26(1) (b) the other owners are not required to have taken part on the fraudulent actions or vitiating factors. As rendered earlier this has not been done and I find no basis upon which to disturb these entries.



42. The 1st defendant testified before this court that upon due diligence he purchased the land from the 2nd defendant and was issued with a title on 22/04/08. The existence of this title is not in dispute, it is in fact admitted by PW1 and is supported by the entries in the green card and searches produced herein as evidence. According to the green card the 2nd defendant has been the registered owner since 17/10/94. DW1 also testified he was in possession and had developments in the suit property and largely invested in land at the south coast/Galu Kinondo. He also gave a history of the involvement of Duncan Ndegwa a partner in Formation Limited and his brother Benjamin Ndegwa who is deceased. That he carried out due diligence and the suit property was handed a clean bill of health and produced the official search given. My review of which shows they corresponded with the entries in the register. Upon cross examination by Ms Mwainzi he informed the court that the 2nd defendant did not disclose to him about the proceedings at the tribunal and that he started having problems when he commenced construction when the plaintiff and his brother claimed that they owned the land. While he didn't appear to recollect clearly when he started this construction he did clarify in reexamination that the same started in July 2008 after he obtained the title in 28/4/2008.
43. The only gap which emerged during cross examination is DW1 admission that he had not presented the sale agreement for the purchase of the property. I'm inclined to consider this against the fact that the register presented the 1st defendant as the holder of the title, the title was before the plaintiff's title for which the plaintiff has not been able to prove was obtained irregularly including the fact that the title of the 1st holder has not been impugned. I will further look at this in reference to the fact that the 1st defendant has been in actual possession all along, also emboldened by the charge registered on 16 September 2011 in the encumbrance section as against the plaintiff's own admission that he has never lived in the suit property. I find credence in the Court of Appeal decision in *Pankajkumar Hemraj Shah & another v Abbas Lali Ahmed & 5 others* [2019] eKLR where the court rendered itself as hereunder; -
- "[29] We reiterate what this Court stated in *Benja Properties Limited vs Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, that:
- "It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in *Ghana of Wuta-Ofei -v-Danquah* [1961] All ER 596 at 600, the slightest amount of possession would be sufficient."
- [30] In addition section 116 of the *Evidence Act* states that:
- "When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."
44. No evidence was produced by the plaintiff to show that the title of the 2nd defendant was tainted which would have rendered the title of the 1st defendant nugatory as it would have no substratum. Even the title of 1st defendant who were in possession of the suit property was not proved to have been tainted. Looking at the totality of the facts of this case and evidence adduced clearly, I see no basis for impeaching the 1st defendant's title.
45. I find it necessary to briefly render myself on fraud attributed to the 2nd defendant transferring a property which at the time of transfer had prohibitory order barring any dealing. It was submitted the



order in Mombasa High Court Misc Civil Application No 438 of 2006 *Republic v Land Registrar (Kwale District Land Registry) & Another ex parte Formation House Limited* 438 of 2006 was incompetent by dint of the prohibitory order registered as entry No 9 in the green card. Let me state at the earliest opportunity that this argument cannot be entertained under these proceedings. It ought to have been anchored as a ground of appeal against the decision of Justice Maraga yet no appeal has been filed, instead this suit was filed. It is further submitted that the 2nd defendant had no title to transfer to the 1st defendant and could not transact anything during the pendency of the orders in 744 of 2005 which prohibited all dealings relating to the suit property as such any transfer effected in 2008 is a nullity. It is urged that the 2nd defendant was free to Transfer the property following the nullification and voidance of the purported decision of the Land Tribunal. It should be remembered that the 2nd defendant was among the objectors in the matter filed before the tribunal and whose finding was nullified by Maraga J The import of the decision was to reinstate the register to what it contained before the order of the magistrate's court was registered. At the time the order was issued, the previous order in the register was entry no 6 in favor of the 2nd defendant – see paragraph 34 of this judgement. The prohibitory order was made under the auspices of Misc Civil Application No 744 of 2005 which from the parcel file register was entered on March 16, 2006 as the ninth entry, as follows: “Prohibitory Order dated March 14, 2006. Prohibiting all transaction until Civil Case No 744 of 2005 in the High Court Mombasa is determined.” I note that entry No 6 in favor of Formation Limited already existed before this prohibition. Further there already existed Justice Maraga's order that nullified the plaintiffs title which remains unchallenged to date save for the attempt to do so under these proceedings. The 1st defendant urged that they did not disobey the court order since in light of the decision in Misc Civil Application No 438 of 2006, there was no need for the 2nd defendant to continue pursuing the former suit. The same were rendered moot. I find nothing to fault the 2nd defendant act of transferring the title subsequently in 2008 under entry No 13 and 14. On being cross examined on entries 10,11,12 in the green card PW1 agreed that the suit property was reinstated to the 2nd defendant who sold to the 1st defendant but insisted it was wrong which is the reason he had approached this court which in my view ought to have been raised on appeal. He stated further that while he noted the entry in favor of Formation Ltd there was no entry to show how his land was sold. But on the other side he failed to provide proof that the suit property belonged to him. I think the arguments raised by the plaintiff are mere technicalities intended to cloud the fact that he had no evidence to impeach the original title issued in the year 1974 that formed the substratum of this dispute and to prove the family's ownership before this court or even his own ownership as against the 2nd defendant. I choose to uphold substantive justice to ensure the real issues are tackled and justice is rendered based on the facts and evidence presented on merit.

46. The orders craved by the plaintiff have already been laid out at the beginning of this judgement. In view of the foregoing analysis clearly the plaintiff is not entitled to the orders sought in the amended plaint.
47. The upshot of the foregoing is that I find that the plaintiff has failed to prove his case on a balance of probabilities and consequently this suit is hereby dismissed with costs to the 1st defendant.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 14TH DAY OF DECEMBER, 2022.

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Mwainzi for the Plaintiff



Ms. Soweto for the 1st Defendant.

No appearance for the 2nd defendant.

Mr. Denis Mwakina- Court Assistant

