



REPUBLIC OF KENYA



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**Wachira v Mwalimu Investment Company Limited & 3 others (Environment & Land Case 568 of 2017) [2025] KEELC 192 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 192 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 568 OF 2017**

**JG KEMEI, J  
JANUARY 24, 2025**

**BETWEEN**

**JACQUILINE MUTHOMI WACHIRA ..... PLAINTIFF**

**AND**

**MWALIMU INVESTMENT COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MWALIMU SUKARI COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**ANNE WANJIKU, MWAURA ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR, RUIRU ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction and Pleadings**

1. Vide an amended plaint dated the 16/1/2022 the Plaintiff sued the Defendants and sought the following orders;
  - a. A declaration that the transfer of land in the scheme executed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in favour of the 3<sup>rd</sup> Defendant was illegal irregular null and void.
  - b. A declaration that the Plaintiff is the legal owner of the property known as Ruiru/Ruiru east block3/1715 (suit land) and is entitled to ownership and exclusive use occupation and vacant possession of the property to the exclusion of the 3<sup>rd</sup> Defendant or anyone else claiming under her.
  - c. A permanent injunction restraining the 3<sup>rd</sup> Defendant whether by herself her servants and or agents or otherwise howsoever from entering remaining upon using offering for sale selling transferring assigning charging or in any other manner howsoever interfering with the plaintiff's use occupation and quiet enjoyment of the suit property.



- d. An order that the Land Registrar and the title issued to the 3<sup>rd</sup> Defendant be cancelled/revoked and a fresh title be issued to the Plaintiff.
- e. Damages for trespass.
- f. Costs and interest
  1. The Plaintiff avers that at all material times she was the owner of the suit land having acquired it from the 1<sup>st</sup> defendant. That upon acceptance of her application, she was invited to ballot, shown the land and paid all the requisite charges and was awaiting for the processing of the title in her name by the 1<sup>st</sup> Defendant. In the intervening period she averred that she relocated to Canada between 1990 – 1997 and on her return, she pursued the title from the 1<sup>st</sup> Defendant but in 2014 she discovered through a land search that the suit land had been registered in the name of the 3<sup>rd</sup> Defendant without her consent and knowledge. That the registration was fraudulent illegal and unprocedural. Particulars of fraud, illegality and unprocedurality were cited under para 13 of the Plaintiff on the part of the Defendants. The Plaintiff avers that as a result of the said fraud illegality and unprocedurality, she has been deprived of her land and has suffered loss and damages. The court was urged to find the title of the 3<sup>rd</sup> Defendant illegal and cancel it.
  2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant failed to enter appearance and or file a defence despite service having been effected on them by way of substituted services on the 16/4/2018.
  3. The 3<sup>rd</sup> Defendant denied the Plaintiff's case in her statement of defence dated the 30/11/2021 and contended that she purchased the suit land from the 2<sup>nd</sup> Defendant for the sum of Kshs.280,000/- on 7/7/2004 and was issued with a title on the 12/8/2005. In addition, she denied the particulars of fraud and illegality levelled against her in para 13 and contends that she is an innocent purchaser for value without notice of any defect whatsoever. In the alternative the 3<sup>rd</sup> Defendant pleaded that she is entitled to ownership by way of adverse possession having been in occupation of the suit land for a period of over 12 years uninterrupted exclusively and continuously. Interalia that the Plaintiff's suit is time barred and urged the court to strike it out.
  4. The 4<sup>th</sup> Defendant equally denied the Plaintiff's claim and contended that the suit land is registered in the name of the 3<sup>rd</sup> Defendant pursuant to the documents in their record.

### **The evidence of the parties**

6. PW1-Jacquiline Muthoni Wachira testified and relied on her witness statement dated the 15/5/2017 in evidence in chief and produced documents marked as documents marked as PEX NO 1-29 in support of her case.
7. She stated that in 2023 she joined Mwalimu Savings and Credit Cooperative Society (also known as Mwalimu Sacco) in 1982 under membership No 5505. That then she was a teacher who served at the Teachers Service Commission. That the management of the Sacco invited her to purchase plots in a scheme sold by the 1<sup>st</sup> Defendant that owned had about 10,000 acre farm in Ruiru area which was subdivided into plots of 8, 6, 4 and 2 acres each. That her application of 4 acres was approved vide letter of offer dated the MICL/02/193 dated the 18/12/1982. She paid the full charges and balloted for No 888 and thereafter she was showed the land by the 1<sup>st</sup> Defendant and later in 1990 while in Canada



- she received a letter from the 2<sup>nd</sup> Defendant informing her that ballot No 888 had been surveyed and registered as Ruiru/Ruiru east block 3/1715. That the 1<sup>st</sup> Defendant had changed its name to that of the 2<sup>nd</sup> Defendant by 1990s. That upon her return from Canada where she had relocated she followed up the title with the Company without much success as they were evading her.
8. That in 2014 she was shocked to discover through an official land search that the land had been registered in the name of the 3<sup>rd</sup> Defendant without her knowledge and consent. She filed a complaint with the Criminal Investigation Department but got no assistance but later advised her to file a civil suit which she complied. She stated that the 3<sup>rd</sup> Defendant has trespassed into the land.
  9. PW2 – Wilson Wachira Nyaga testified and relied on his witness statement dated the 13/5/2017 and stated that he is the husband of the Plaintiff. He confirmed that he was posted to Canada in 1990 – 1997 and his wife accompanied him for the period. That on their return he and his wife tried unsuccessfully to pursue the title for the land including visiting the Survey of Kenya and tracing the offices of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. That he has visited the suit land severally and confirms that the 3<sup>rd</sup> Defendant is in occupation illegally.
  10. DW1- Ann Wanjiku Mwangi testified and relied on her witness statement dated the 20/4/2022 and produced the documents marked as DEX No 103 in support of her defence.
  11. She stated that she is the registered owner of the suit land having purchased it from the 2<sup>nd</sup> Defendant and without adducing any evidence stated that she paid the consideration in the sum of Kshs 280,000/-. That he dealt with two Directors of the 2<sup>nd</sup> Defendant namely Macharia and Thuita. She stated that she cannot recall executing any transfer but all she states is that she picked the title in 2005 from Mr Macharia and proceeded to settle on the land todate.
  12. DW2 – Robert Mugendi Mbuba the Land Registrar, Ruiru testified, relied on his witness statement dated the 11/3/2019 and gave a rendition on the details of the title as per the records in his custody and produced the parcel file for the suit land. He confirmed that according to his records the land is registered in the name of the 3<sup>rd</sup> Defendant as at 12/8/2005. When shown the RIM sheet No 6 he confirmed that the suit land appears on the said RIM however he stated that a surveyor is the right person to identify the land ground and ascertain whether it is on RIM sheet No 6 or 3 on the ground. In addition he stated that there are no documents to support the creation of the register in the name of the 3<sup>rd</sup> Defendant.
  13. DW3 – Raynard Ngira, the Land Registrar Thika testified and presented a presentation book dated the 12/8/2005 which he informed the court that the entry with respect to the suit land is missing . There is no evidence that the suit land was booked for registration on the 12/8/2005 as alleged by the 3<sup>rd</sup> Defendant. He was categorical that the documents for the suit land were moved to Ruiru Land Registry upon its gazettelement and creation in 2018 although the title indicates that it was issued at the Thika Land Registry. Referring to the green card on record the witness informed the court that the same was opened on the 19/11/2001 in the name of the Government of Kenya which was not an unusual practice in dealing with land buying companies then.
  14. The 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Defendants failed to attend court nor lead any evidence during the hearing of the suit. The parties closed their case and parties elected to file their written submissions which I have read and considered.

### **The written submissions**

15. As to whether the Plaintiff is the lawful owner of the suit land, Counsel for the plaintiff submitted that the Plaintiff was the first allottee of plot No 888 ( later resurveyed and registered as Ruiru/Ruiru



east block 3 /1715) which was part of the subdivision of about 10,000 acres of land belonging to the 1<sup>st</sup> Defendant which later changed its name to the 2<sup>nd</sup> Defendant. That the plot is located in RIM Sheet No 6.

16. Citing the case of Athi Highway Developers Limited Vs West End Butchery Limited & 6 others (2015) ECLR counsel submitted that the title in the name of the 3<sup>rd</sup> Defendant was obtained through fraud and illegality in collusion with the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> Defendants. That the title held by the 3<sup>rd</sup> Defendant is not supported by any documents of registration as attested by both Land Registrars from Ruiru and Thika. That in contrast the plaintiff who was a member of Mwalimu Sacco and an employee of the Teachers Service Commission complied with the provisions of section 3 of the Law of Contract as shown by the payment receipts on record. The contract was valid and enforceable. The case of Alton Homes Limited & Anor Vs Davis Nathan Chelogoi & 2 others (2018) ECLR was cited in which the court stated as follows;

“in the sale agreement that superseded all the others, the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Law of Contract”.

17. From the above decision of the court, this court was urged to hold the contract between the Plaintiff and the 1<sup>st</sup> Defendant valid and enforceable. The court was also urged to find the transfer of the suit property to the 3<sup>rd</sup> Defendant irregular and in breach of the law and therefore liable for cancellation.
18. Citing the case of *Caroline Awinja Ochieng & Anor Vs Jane Anne Mbithe Gitau & 2 others ELC No 694 of 2012* the Plaintiff submitted and urged the court to trace the root of the title from its documentary history. In this case it was argued that the letter of offer, payment receipts, ballot, ballot certificate, membership card among other documents demonstrate unchallenged evidence in favour of the Plaintiffs right to the property.
19. On the principle of first in time, Counsel for the plaintiff submitted that the Plaintiff acquired the land in 1983 hence the first in time to lawfully own the land and therefore there was no land for allocation/sale by the 2<sup>nd</sup> Defendant in 2005.
20. It was further submitted that the Plaintiffs parcel is found in RIM sheet No 6 and while that of the 3<sup>rd</sup> Defendant is alleged to be on sheet No 3 is but erroneous and it may explain why the Ruiru District Surveyor ignored the court summons to attend court and present the RIM for sheet No 3 because the said land does not exist on that sheet hence adding to the irregularity of the 3<sup>rd</sup> Defendants title. The Court was urged to hold that the suit land is located in RIM sheet No 6 and that in the principles of survey does not permit one land reference to appear in two RIMs.
21. On the question of damages it was submitted that the 3<sup>rd</sup> Defendant has been in illegal occupation of the suit land as a trespasser and the court was pointed out the case of Park Towers Limited Vs John Mithamo Njika & 7 others ( 2014) eCLR where the court held that;

“..... I agree with the learned Judge that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under duty to assess the damages awardable depending on the unique facts and circumstances of each case.”

22. Borrowing from the above decision, counsel for the Plaintiff submitted that the Plaintiff has proven that the 3<sup>rd</sup> Defendant has been utilizing the suit land for commercial purposes by growing horticultural produce since her illegal and irregular acquisition of the suit land in 2005. It was



submitted that the sum of Kshs 200,000,000/- was reasonable compensation for trespass of the suit land by the 3<sup>rd</sup> Defendant.

23. The 3<sup>rd</sup> Defendant on the other hand while opposing the claim of the Plaintiff framed three issues for determination; whether the suit is statute time barred; whether the 3<sup>rd</sup> Defendant is the lawful owner of the suit property; whether the 3<sup>rd</sup> Defendant is entitled to ownership by way of adverse possession.
24. Is the suit time barred? The 3<sup>rd</sup> Defendant submitted that the Plaintiffs suit is time barred and ought to be struck out on the basis of Section 7 of the Limitations of Actions Act which provides that an action for the recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff. That from 1997 when the Plaintiff returned to Kenya to 2015 when she followed up title, was 18 years which is beyond the statutory limitation of 12 years required to file for recovery of land and that the Plaintiff is guilty of laches since she was aware that the title had been issued with a title number and that the same had been disposed to the 3<sup>rd</sup> Defendant.
25. Counsel submitted that the 3<sup>rd</sup> Defendant is the lawful owner of the suit property as can be demonstrated by the title and the official search. That the 3<sup>rd</sup> Defendant held an indefeasible title being a first registration and that the letter of allotment held by the Plaintiff cannot be used to defeat the title of a registered proprietor.
26. Further, the 3<sup>rd</sup> Defendant submitted that the Plaintiff ought to have discharged the burden of proof under section 107-108 of the *Evidence Act*. It was counsel's submissions that the 3<sup>rd</sup> Defendant was a bonafide purchaser for value and without any knowledge or participation of any fraud.

### **Analysis and Determination**

27. The issues for determination are;
  - a. Whether the Plaintiff has proven fraud and illegality on the part of the Defendants and if yes who between the Plaintiff and the 3<sup>rd</sup> Defendant is the lawful owner of the suit land.
  - b. Whether the suit is statute barred.
  - c. Whether the 3<sup>rd</sup> Defendant is a bonafide purchaser for title.
  - d. Whether the Plaintiff is entitled to damages for trespass on land.
  - e. Costs of the suit.
28. It is the Plaintiffs suit that at all material times she acquired the suit land from the 1<sup>st</sup> Defendant and paid the purchase price but relocated to Canada with her family before the titles were processed and issued. That on her return she discovered that the suit land had been irregularly and fraudulently registered in the name of the 3<sup>rd</sup> Defendant.
29. The 3<sup>rd</sup> Defendant on the other hand claims that she purchased the suit land from the 2<sup>nd</sup> Defendant, paid the full purchase price and was issued with a title in 2005 and thereafter settled on the suit land to date.
30. The claim of the Plaintiff is anchored in fraud and illegality. Section 26 of the *Land Registration Act* states 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”.

31. It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. The burden of proof is anchored in statute. Sections 107 – 109 of the [Evidence Act](#) provide;

107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

32. From the above provisions clearly the burden of proof lies with the Plaintiff to prove her case to the standard of balance of probabilities.

33. It is settled that the Court cannot infer fraud. Fraud must be pleaded and particularised in the pleadings. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

34. Looking at the Plaint, the court is satisfied that particulars of fraud have not only been pleaded but particularised under para 13 of the Plaint.

35. The standard of proof in matters fraud was settled by the Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR when it expressed itself as follows;-

“... It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying



that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases....”.....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

36. I shall now consider the evidence presented by the parties as follows;

37. The Plaintiff led evidence that she applied for the land from the 1<sup>st</sup> Defendant; vide a letter dated the 18/12/1982; she got allocated 4 acres of land at the initial costs of Kshs 5040/- being the costs of the land, legal fees and stamp duty. Vide receipts dated the 14/1/83 and 31/1/83 she paid the costs in full. Additional payments being survey fees were paid on 10/6/83 all receipted by the 1<sup>st</sup> Defendant. Balloting was eventually carried out and she balloted No 888 as shown by the ballot certificate dated the 10/12/83. She led unchallenged evidence that she was shown the land on the ground and as she awaited for the title to be issued she relocated to Canada in 1990. While there she received a letter from the 2<sup>nd</sup> Defendant informing her that the land plot No 888 was now surveyed as parcel Ruiru/Ruiru east block 3/1715 and that the title processing was at its tail end. The Plaintiff led evidence that she was an employee of the Teachers Service Commission and a member of Mwalimu Cooperative Savings and Credit Society vide membership No 5505 issued in November 1982.

38. She added that upon her return to the country she unsuccessfully followed up the issuance of the title until 2015 when upon carrying out a search discovered that the same had been registered in the name of the 3<sup>rd</sup> Defendant through fraud and illegality.

39. The 3<sup>rd</sup> Defendant led evidence that she acquired the land through purchase from the 2<sup>nd</sup> Defendant for the sum of Kshs 280,000/- on 7/7/2004 and was issued with a title deed on the 12/8/2005. Two receipts for the sum of Kshs 80,000/- and 5,000/- dated the 7/7/2004 and 9/8/2004 were adduced in evidence in support of the 3<sup>rd</sup> Defendants case being part payment of the suit land.

40. Section 3 of the *Law of Contract Act* provides as follows;

No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

41. In this case the 3<sup>rd</sup> Defendant failed to present any agreement for sale in support of the alleged acquisition of the land. The wording of the law above cited is mandatory. In the absence of any sale agreement the court finds that the alleged acquisition of the suit land was irregular.

42. Further the 3<sup>rd</sup> Defendant failed to demonstrate that the land was duly paid for in full. There is no evidence that the 3<sup>rd</sup> Defendant was a member of the 2<sup>nd</sup> Defendant . Equally the Land Registrars from



both the Ruiru and Thika Registries were in agreement that save for the copy of the title, there were no supporting documents to validate the issuance of the title in the name of 3<sup>rd</sup> Defendant. In the absence of the sale agreement, duly executed and registered transfer, the land control board consent and evidence of the payment of stamp duty, the court is inclined to agree with the Land Registrars that the title is hollow. The Land Registrar Thika led evidence that there was no evidence of a presentation or booking form to evidence registration of the transfer in favour of the 3<sup>rd</sup> Defendant and the question that begs an answer is how the 3<sup>rd</sup> Defendant obtained a title with no accompanying documentation in support.

43. I can do better than to rely on the case [\*Munyu Maina v Hiram Gathiba Maina, Civil Appeal No.239 of 2009\*](#) where 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.”

44. In the case of Daudi Kiptugen Vs Commissioner of Lands & 4 others (2015) EKLK the court stated as follows;

“.. the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a lease or a certificate of title at a backyard or corner of a dingy street and by virtue thereof claim to be the rightful proprietor of the land indicated.”

45. The court finds that the 3<sup>rd</sup> Defendant has not demonstrated that her title was acquired lawfully. The court finds that the same was acquired through deception and irregularity in line with Section 26 (b) of the Act.

46. The 2<sup>nd</sup> issue is whether the suit is statutorily barred. The statutory framework of time bar is provided for under section 4(1) of the LAA which states as follows;

- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
  - (a) actions founded on contract;
  - (b) actions to enforce a recognizance;
  - (c) actions to enforce an award;
  - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
  - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
- (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.



47. The Plaintiffs cause of action is founded on fraud. A cause of action founded on fraud which is a tort ought to be brought within a period of three years unless the Plaintiff satisfies the court that he was prevented from known circumstances from filing the suit within the prescribed time.

48. The law provides for extension of time in Section 26 of LAA as follows;

“Extension of limitation period in case of fraud or mistake”

Where, in the case of an action for which a period of limitation is prescribed, either—

Where, in the case of an action for which a period of limitation is prescribed, either—

- a. the action is based upon the fraud of the defendant or his agent, or
- b. the right of action is concealed by the fraud of any such person as aforesaid; or
- c. the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- ii. in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have the reason to believe that the mistake has been made.

49. This being land the provisions of Section 7 of the LAA apply as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

50. In this case the 3<sup>rd</sup> Defendant led evidence that the Plaintiff having relocated back in the country in 1997 and the suit having been filed in 2017, the same was filed out of time and therefore barred by limitation of time hence a nullity in law.

51. It is not in dispute that Plaintiff relocated back to the country in 1997. She has explained that upon arrival she embarked on pursuing title registration by the 1<sup>st</sup> Defendant to no avail as the Defendants were uncooperative. However on the 6/10/2014 it was brought to her knowledge that the Suitland had been registered in the name of the 3<sup>rd</sup> Defendant and immediately filed suit in 2015, a period of less than 3 years for purposes of the tort of fraud and 12 years for purposes of recovery of land. The court therefore finds that the suit is not time barred.

52. A bonafide purchaser is an innocent party who purchases property without notice of any other party's claim to the title of that property. In the case of Lawrence Mukiri – vs- Attorney General & 4 others (2013) eKLR where the court stated what amounts to “bonafide purchaser for value thus:-



... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

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

53. Having found that the 3<sup>rd</sup> Defendant's title was acquired through fraud and illegality, the court finds that the title in the name of the 3<sup>rd</sup> Defendant lacks bonafides. In the case of Samuel Kamere Vs Land Registrar (2015) EKLRL the Court of Appeal held that;

"in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property." (emphasis is mine).

54. Had the 3<sup>rd</sup> Defendant carried out due diligence on the land in terms of balloting and allocation she could have realized that the suit land had been acquired by the Plaintiff way back in 1982 through a valid contract. Her purported acquisition in 2004 is but a farce given that in 1982 none of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants held any interest and or title capable of being conveyed to the 3<sup>rd</sup> Defendant. The land belonged to the Plaintiff and what was pending was the issuance of title. In any event the 3<sup>rd</sup> Defendant even failed to demonstrate any legality in the acquisition of the land given that the acquisition of land in Kenya is governed by law. The court finds that the 3<sup>rd</sup> Defendant was not a bonafide purchaser for value without notice.

55. Trespass is the unauthorized occupation of another's land without their consent and knowledge. In this case the court having held that the 3<sup>rd</sup> Defendant is in illegal occupation of the suit land, there is no justifiable reason why she should be in occupation of the land other than as a trespasser.

56. Halsbury 4<sup>th</sup> ed, Vol 45 at para 26, 1503 provides as follows on computation of damages in an action of trespass:-

- a. If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- (b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.



- (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.
57. In the case of *Duncan Ndegwa V Kenya Pipeline HCC No. 2577 of 1990 (Nairobi)* where the court held:-
- “The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.”
58. Further in the case of *Phillip Aluchio -vs- Crispinus Ngayo [2014] eKLR* the court held that-
- “... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less.....
59. In this case the Plaintiff failed to lead evidence as to the actual loss that she has suffered as a result of the occupation of the land. It is not disputed that the 3<sup>rd</sup> Defendant is carrying out horticultural farming on the land and the court finds that, the Plaintiff is entitled to damages for trespass. The Plaintiff submitted that it is entitled to damages in the sum of Kshs 200,000,000/- which in the view of the court is highly colossal in the circumstances. Having held that trespass is founded I find that a sum of Kshs 2 million is reasonable damages for trespass given that the length of trespass. I so find.
60. Although costs of an action or proceeding are at the discretion of the court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. In this case the plaintiff has succeeded in her claim and I find no justifiable reason to delay her costs..
61. Final orders for disposal
- a. The Plaintiffs case is merited.
  - b. I enter judgement as follows;
    - a. It is hereby declared that the transfer of land in the scheme executed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in favour of the 3<sup>rd</sup> Defendant was illegal irregular null and void.
    - b. It is further declared that the Plaintiff is the legal owner of the property known as Ruiru/Ruiru east block3/1715 (suit land) and is entitled to ownership and exclusive use occupation and vacant possession of the property to the exclusion of the 3<sup>rd</sup> Defendant or anyone else claiming under her.
    - c. The Land Registrar, Ruiru be and is hereby ordered to cancel the in the name of the 3<sup>rd</sup> Defendant and issue a fresh title in the name of the Plaintiff.



- d. The 3<sup>rd</sup> Defendant be and is hereby ordered to vacate the suit land within a period of 60 days in default eviction orders to ensue as per law provided.
- e. It is hereby ordered that a permanent injunction restraining the 3<sup>rd</sup> Defendant whether by herself her servants and or agents or otherwise howsoever from entering remaining upon using offering for sale selling transferring assigning charging or in any other manner howsoever interfering with the plaintiffs use occupation and quiet enjoyment of the suit property.
- f. The Plaintiff is hereby ordered to pay damages for trespass in the sum of Kshs 2 million to Plaintiff by the 3<sup>rd</sup> Defendant.
- g. The Plaintiff shall have the costs of the suit.

62. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

Delivered Online in the presence of:

Kimemia for Plaintiff

Musesya for 3<sup>rd</sup> Defendant

Judith Adhiambo – Court Assistant

