



REPUBLIC OF KENYA



KENYA LAW
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**Binns & another v Baya & 3 others (Environment & Land Case
33 of 2014) [2024] KEELC 542 (KLR) (5 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 542 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 33 OF 2014**

**MAO ODENY, J
FEBRUARY 5, 2024**

BETWEEN

RICHARD MARK BINNS 1ST PLAINTIFF

FELICITY ANN BINNS 2ND PLAINTIFF

AND

SIMEON KAZUNGU BAYA 1ST DEFENDANT

RALPH KALAMA 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

FOUR ISLANDS BAY LIMITED 4TH DEFENDANT

JUDGMENT

1. By the Plaint dated 3rd March, 2014 and amended on 29th September, 2014, the Plaintiffs herein sued the Defendants seeking the following orders;
 - a. General Damages
 - b. Pecuniary Damages
 - c. General Damages for trespass against the 4th Defendant.
 - d. A declaration that the Plaintiffs are the rightful proprietors of the suit property known as Kilifi/Jimba/1146.
 - e. A permanent injunction restraining the 4th defendant or whosoever is claiming from claiming ownership, developing, dealing in or in any way interfering with the suit property known as Kilifi/Jimba/1146.



- f. An order against the 4th defendant to reconstruct the green card and re-issue a consolidated title for Kilifi/Jimba/1146 measuring 3.7 Hectares.
- g. Costs of the suit.

Plaintiff's Case

1. PW1 Richard Mark Binns adopted his Witness Statement dated 28th May 2019 and stated that together with his wife they purchased the suit property measuring 5.1 Hectares from Mama Fatuma Ali Bonaya in 2003. He also stated that Fatuma Ali Bonaya signed the relevant documents and were subsequently issued with a title deed.
2. PW1 produced a list of documents dated 27th May 2019 and a supplementary list of documents dated 27th September 2019 and stated that they had started a trust to help the needy which was to be done vide a resort at the sea front.
3. Upon cross examination by Mr. Mbura, PW1 told the court that he bought the land from Fatuma Bonaya through Mohammed Songoro her son and admitted that he had the agreement in court but did not have a power of attorney from Fatuma Bonaya to Mohammed Songoro.
4. PW1 also stated that the 1st Defendant does not own the land as the Land Registrar Kilifi had transferred the suit property to their names and that the green card was back dated. PW1 further stated that he was not aware that the land was transferred to Kalumass Ltd who later sold it to Four Islands Bay Ltd.
5. It was PW1's evidence that Fatuma had a letter of allotment but no title and that the 4th Defendant built a wall on the suit land in 2006 and yet they were the ones who had constructed on the plots. PW1 also testified that there were two titles of which the first title was issued on 15th July 2000 and the second one on 15th November 2005, a replacement of the 1st title.
6. PW1 was referred to PEX 22, a green card and admitted that entry No. 8 indicated that the suit property was registered in the name of Four Islands Bay Ltd and a title deed issued on 24th August 2007. He further stated that he was not aware of Civil Suit No. 62 of 2006 where Mohammed Songoro had sued Emmanuel Charo Tinga and Kalumass Co. Ltd which suit was dismissed on 30th July 2019.
7. On the sale agreement PEX 24(f), PW1 stated that he was not aware that Fatuma had sold the land to Emmanuel Charo Tinga. On re-examination, he stated that Mr. Songoro facilitated the transfer to his name and that the wall was built long after he had bought the suit property.

Defence Case

8. DW1 Rufus Karima Kalama a Land Registrar Isiolo County adopted his Witness Statement dated 22nd September 2022 and stated that he dealt with the suit property when he was the Land Registrar Kilifi.
9. DW1 testified that he did not have any agreement with the Plaintiffs as his duty is to register documents and that he issued a gazette notice in respect of the suit property for loss/replacement of a title which gazettement he stopped when he realized that there were more than two registers with regard to the same property.
10. It was DW1's testimony that he was transferred to Kwale Land Registry before investigations were complete and handed over to Elizabeth Thoya the Deputy Land Registrar.



11. On cross examination by Mr Mbura, DW1 stated that the suit property was part of a Settlement Scheme and he could not tell who was the first allottee of the suit property but from the record, Emmanuel C. Tinga was allotted the suit property. Further that he dealt with the Plaintiffs in the gazette of loss of title and the Plaintiffs being foreigners were not entitled to be registered as owners of the suit property.
12. Upon further cross examination by Ms. Chepkwony, he confirmed that the letter of offer was dated 28th February 2001 and the letter of allotment to Fatuma Ali Bonaya was dated 20th September 2000. Further that the Land Adjudication Officer determines the rightful owner of a parcel of land in a Settlement Scheme.
13. DW1 testified that according to the records, on 22nd December 1986 the land was in the name of Government of Kenya; the second entry dated 29th August 2001 indicated that the suit property was registered in Settlement Fund Trustee's name; third entry dated 29th August 2001 was in favor of Kalumass Co. Ltd and a title deed issued on the same date.
14. He also told the court that he knew Emmanuel Tinga but he was not aware if he was a director of Kalumass Limited. That according to Emmanuel Charo Tinga's affidavit, Fatuma Ali Bonaya was the allottee of the suit property by the Settlement Fund Trustee.
15. DW1 further told the court that they did not lodge any restrictions on the said registers but put the same under lock and key on 26th July 2007 his Assistant put a restriction on the suit property. Further that on 24th August 2007, the suit property was transferred to Kalumass Company Limited with the restriction still in place. He also stated that he neither issued a title to Richard Mark Binns nor made any entries to the register.
16. DW2 Boaz Oketch a Land Registrar Kilifi County testified that the suit property was initially government land before it was transferred to the Settlement Fund Trustee. The Settlement Fund Trustee allocated it to Emmanuel C. Tinga in 2002 who later transferred the suit property to Kalumass Company Limited and that in 2007 a restriction was placed on the suit property that prohibited any transactions.
17. It was DW2's evidence that later the same year, the Chief Land Registrar lifted the restriction and the land was transferred to the 4th Defendant Four Islands Bay Limited who is the current registered owner of the suit property.
18. On cross examination by Mr. Mbura, he told the court that the records do not indicate that Richard Mark Binns was registered as the owner of the suit property at any point and that there was no transfer to Richard Mark Binns.
19. DW2 stated that there was a transfer dated 7th November 2006 and registered on 20th July 2006 transferring the suit property from Emmanuel Tinga to Kalumass Limited. That there was payment of stamp duty and a Land Control Board consent was dated 20th July, 2006.
20. Upon cross-examination by Ms. Metto, he stated that the letter of offer given to Emmanuel Tinga was issued on 28th February, 2001 while the one issued to Ali Bonaya was issued on 20th September 2000. That the Land Adjudication Officer was best person to answer the questions on the letter of offer and that letters of offer do not confer ownership. Further that they did not have any records for Ali Fatuma Bonaya.



21. DW3 Isaac Rodrot adopted his Witness Statement dated 5th April 2019 and stated that he is one of the directors of the 4th Defendant and produced a bundle of documents dated 5th April, 2019 as PEX 1 to 16.
22. He testified that the suit property measures ten acres and that they have developed it and put up a perimeter wall. On cross examination by Ms. Metto, he told the court that Kalumass Ltd had sold the suit property to the 4th Defendant but he did not produce the sale agreement. Further that he did not agree with contents of the affidavit of Emmanuel C. Tinga where he stated that the letter of offer was first given to Fatuma Ali Bonaya.
23. Upon re-examination, he stated that the 4th Defendant bought the suit property from Kalumass and not Emmanuel C. Tinga and that they were not a party in Malindi Case No. 62 of 2006.
24. DW4 Emmanuel Charo Tinga adopted his Witness Statement dated 8th April 2019 and testified that in the year 2001, he made an agreement with a squatter by the name Fatuma Ali Bonaya to sell to him the suit property for 10 million. That after he paid Fatuma the Kshs. 10 million, she gave him her letter of offer for the suit property and vacated the land. That he went to the settlement office where he was given a letter of offer in his name dated 28th February, 2001.
25. DW4 further testified that Civil Suit No. 62 of 2006 was in respect of payment of a balance that was settled through a consent order which was that he pays Kshs. 4,000,000/= before the land was transferred to the 4th Defendant. That he had never seen the Plaintiff Richard Mark Binns and that when the property was transferred to the 4th Defendant it was bushy and had an old house.
26. On cross examination by Ms. Metto he told the court that it was true that Fatuma had a letter of offer but he was not aware that she had sold the suit property to Richard Mark Binns. That he was later issued with a letter of offer and transferred the suit property to Kalumass Limited who sold the suit property to the 4th Defendant.
27. On re-examination, he stated that he was not a party in the present proceedings and that he had not been shown any agreement between Richard Mark Binns and Fatuma Ali Bonaya.

Plaintiffs' submissions

28. Counsel gave a brief background to the case, summary of the evidence and identified the following issues for determination;
 - a. Whether once allotment letter was issued to one Fatuma Ali Bonaya the land was available for reallocation.
 - b. Whether the 4th defendants are innocent purchasers for value.
 - c. Whether the plaintiff is entitled to the prayers sought in the amended plaint.
29. On the first issue, counsel submitted that the suit property was unalienated government land that had been allocated to Fatuma Ali Bonaya vide the letter of allotment dated 20th September, 2000 and the property was therefore not available for re-alienation to Emmanuel Charo Thinga.
30. Counsel relied on the case of Rukaya Ali Mohamed v David Gikonyo Nambacha & another Kisumu HCC No. 9 of 2004 and submitted that there was no evidence that the letter of allotment issued to Fatuma Ali Bonaya was cancelled. Counsel therefore submitted that the 4th Defendant's acquisition of the suit property was marred by several irregularities.



31. Counsel relied on the cases of *Mcfory v Clientel Africa Company Ltd* 3 ALL ER 1169, *Munyu Maina v Hiram Gathiha Maina* [2013] Eklr, *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR and submitted that the 4th defendant acquired the suit property illegally and fraudulently.
32. Counsel also cited the equity maxim that where there are equal equities, the first in time prevails and relied on the case of *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, where the Court of Appeal cited with approval the High Court case, *Gitwany Investment Limited v Tajmal Limited & 2 others* [2006] eKLR
33. On the second issue, counsel relied on the Ugandan case of *Katende v Haridar & Company Ltd* [2008] 2EA 173, the Court of Appeal case of *Samuel Kamere vs Lands Registrar, Kajiado* [2015] eKLR and submitted that since the root of the 4th defendant's title is the letter of offer issued to Emmanuel Charo Tinga which was acquired illegally, then the 4th defendant's title cannot be said to have been acquired legally.
34. Ms Chepkwony further relied on the cases of *Republic v Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others* [2006] 1 KLR (E & L) 563 and *Dina Management Limited v County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021)* [2022] KESC 24 (KLR) (Civ) (19 May 2022) (Ruling) and submitted that Emmanuel Charo Tinga never got a good title to the land and thus had nothing to transfer to the 4th Defendant.

2ND And 3Rd Defendants' submissions

35. Counsel identified the following issues for determination:
 - a. Whether the plaintiff's title is valid and lawful.
 - b. Whether the 4th defendant's title was fraudulently issued.
 - c. Whether the plaintiffs are entitled to the reliefs sought.
36. On the first issue, counsel relied on the cases of *Munyu Maina vs Hiram Gathiha Maina Civil Appeal No. 239 of 2009*, *John Gitau Mungai v Stephen Thuku Kabebe & 3 Others* [2020]eKLR and submitted that the plaintiffs produced a copy of a green card that indicated that they were registered as the owners of the suit property but on the encumbrances section, there was no discharge of charge.
37. Counsel submitted that a discharge of charge was the clearest evidence that the Settlement Fund Trustee had paid all its dues and, in its absence, the suit property could not be legally transferred to the Plaintiffs.
38. On whether the 4th Defendant's title was fraudulently issued, counsel relied on Section 26 of the [Land Registration Act](#), the case of *Kimanthi Kilonzo v Susan Wangari Kiiru & another* [2019] eKLR and submitted that DW2 produced the green card which showed that the suit property was initially registered in the name of the Settlement Fund Trustee before it was transferred to Emmanuel Charo Tinga who later sold to Kalumass Company Limited who later sold to the 4th Defendant.
39. On whether the Plaintiffs are entitled to the reliefs sought, counsel relied on Section 3(1) of the [Trespass Act](#) and submitted that the evidence adduced showed that the 4th Defendant was in possession of the suit property having lawfully acquired it and therefore the claim of trespass must fail. Counsel also submitted that the Plaintiff sought for special damages which were not proved and therefore their case should be dismissed with costs.



4TH Defendant's Submissions

40. Counsel identified the following issues for determination;
 - a. Whether the Plaintiffs have proved their claim on a balance of probabilities to be entitled to the orders sought.
 - b. Whether the 4th defendant is an innocent purchaser for value
 - c. Who should bear costs of the suit.
41. On the first issue, counsel relied on Sections 107, 108 and 109 of the *Evidence Act* and submitted that the Plaintiffs have not proved the claim that they purchased the suit property from Mohammed Songoro the son to Fatuma Ali Bonaya as no authority was produced to show that Mohamed Songoro had the authority of Fatuma Ali Bonaya to sell the suit property hence it offended Section 3 of the *Law of Contract Act*.
42. It was counsel's submission that the said Fatuma Ali Bonaya has never been the registered owner of the suit property and no evidence was provided to show that she fulfilled the conditions in the letter of offer that was issued to her thus she did not have a title to pass to the Plaintiffs. Counsel relied on the case of *Lagat v Kebut* (Environment and Land Appeal E021 of 2022) [2023] KEELC 18432 (KLR) (26 June 2023) (Judgment)
43. Counsel submitted that the Land Registrar in his evidence confirmed that the 4th Defendant was the registered owner of the suit property and that the Plaintiffs did not demonstrate the root of their title and relied on the case of *Kahia vs Nganga* [2004] 1EA 75 (CAK) on the issue of lack of a Land Control Board consent.
44. It was counsel's submissions that even though the Plaintiffs alleged fraud in the transfer of the suit property from Kalumass Company Limited to the 4th Defendant, no evidence of any such fraud was produced and relied on the case of *Kinyanjui v George Kamau Njoroge* [2015] eKLR.

Analysis And Determination

45. The issues for determination are as to whether the Plaintiff is entitled to the orders sought for damages for trespass, reconstruction of the green card to the suit land and an order of permanent injunction against the 4th Defendant.
46. It was the Plaintiffs' case that they purchased land parcel No. Kilifi/Jimba/1146 from Fatuma Ali Bonaya through her son Mohammed Songoro. It was also the Plaintiffs' case that after they purchased the suit property, they took possession and were issued with a title deed but later discovered that the 4th Defendant had been issued with a title deed to the suit property.
47. From the evidence on record, by the Land Registrar Kilifi, Fatuma Ali Bonaya was never registered as the owner of the suit property and that the suit property had multiple registers some of which had the name of the 1st Plaintiff.
48. During the hearing, the 2nd and 3rd Defendants called two Land Registrars to give evidence in their defence. DW1 was the Land Registrar Kilifi in the year 2002. He admitted to have interacted with the Plaintiffs and assisted them with the gazettment of the loss of their title, and in the course of the transaction, he realized that there were several land registers with respect to the suit property and stopped the gazettment of loss of title. He also told the court that he was transferred to Kwale before the investigations were complete.



49. DW2 in his evidence gave a history of the ownership of the suit property and indicated that neither the Plaintiffs nor Fatuma Ali Bonaya were ever registered owners of the suit property and from the records the land was transferred to the 4th Defendant by Kalumas Ltd who were issued with a title.
50. DW2 further confirmed that there was a transfer dated 7th November 2006 and registered on 20th July 2006 transferring the suit property from Emmanuel Tinga to Kalumass Limited.
51. It is trite that he who alleges must prove, the Plaintiffs were under an obligation to prove that they were the legal owners of the suit parcel of land. This is as per Section 107 of the *Evidence Act* and the cases of Reginah Nyambura Waitathu vs Tarcisio Kagunda Waitathu [2016] eKLR and Joseph Karisa Mutsonga vs Johnson Nyati [1984] eKLR .
52. When the Plaintiffs realized that the land had been transferred to the 4th Defendant, what investigative action did they take to ascertain that they were lawfully the owners or that the persons who sold the land to them legally owned the parcel of land. They did not follow up with the land registry or the relevant investigative agencies to unearth where the problem of several registers emanated from.
53. This was lacking and the evidence of the custodian of the land records indicate that the person who sold to the Plaintiffs land Fatuma was never registered as an owner at any time. The only transfer in the land records is from Emanuel Tinga to Kalumass Ltd who sold and transferred the land to the 4th Defendant.
54. Section 24(a) of the *Land Registration Act* provides as follows;
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”
55. Section 26 of the *Land Registration Act* provides as follows;
- (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.”
56. The Court of Appeal in *Munyu Maina Vs. Hiram Gathiha Maina*, (supra) 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.”



57. It is not in dispute that the suit property was initially offered to Fatuma Ali Bonaya on 20th September 2000 and the Plaintiff produced as PEX1 a copy of the letter of offer which indicated that she had been offered parcel No. 1146 of approximately 4.0 Ha at Jimba Squatter Settlement Scheme.
58. The said letter of offer also indicated as follows;
- “This offer is valid for 90 days from the date of this letter. Within this period you should pay deposit for the plot and be documented accordingly. Failure to which will land cancellation of the offer”
59. There is no evidence of whether the deposit of 10% was paid but what was clear was that the offer was valid for a period of ninety days. The 1st Plaintiff, Richard M. Binns testified that he purchased the suit property from Mohammed Songoro who was selling it on behalf of his mother Fatuma Ali Bonaya. During cross examination he confirmed that Mohammed Songoro did not have a power of attorney to sell the suit property to him.
60. In the case of *Ocra Realtors Ltd v Abdulghani Kipkemboi Komen & 2 others* [2019] eKLR held as follows;
- “The agent has no capacity to purport to enter into a sale agreement with a purchaser unless such agent holds a power of attorney that allows him to deal with the seller’s land. It was completely wrong for the plaintiff to purport to execute sale agreements on behalf of the defendants without holding any power of attorney.”
61. It follows that Mohammed Songoro lacked the capacity to sell the suit property to Richard M. Binns because he did not have a power of attorney from Fatuma Ali Bonaya to enable him to do so.
62. The Plaintiff produced a copy of the green card of the suit property as PEX 2 which indicated that the suit property was initially registered to the government of Kenya on 22nd December 1986 before it was registered in the name of the Settlement Fund Trustees on 15th July 2002. On the same date, the Plaintiffs were registered as the owners of the suit property and were issued with a title deed.
63. Asa earlier stated DW2, the current Kilifi Land Registrar in his evidence confirmed that from the parcel file of the suit property, neither Fatuma Ali Bonaya nor the Plaintiffs were ever registered as the owners of the suit property.
64. It is important to note that the root of a title is very key in establishing the real owner of a suit property where there are several claims to the same property. The Plaintiff claimed that the 4th Defendant’s title was fraudulently obtained but they did not lead any evidence to prove fraud.
65. I have considered the pleadings, the evidence on record, the submissions by counsel and the relevant judicial decisions and find that the Plaintiffs have failed to prove their case on a balance of probabilities and the same is dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF FEBRUARY 2024.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of



Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

