



**Quiver Development Kenya Limited v Tapataiya & 3 others (Environment & Land Case 583 of 2017) [2024] KEELC 439 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 439 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 583 OF 2017  
LC KOMINGOI, J  
FEBRUARY 1, 2024**

**BETWEEN**

**QUIVER DEVELOPMENT KENYA LIMITED ..... PLAINTIFF**

**AND**

**PETER LENGULU TAPATAIYA ..... 1<sup>ST</sup> DEFENDANT**

**DEVKIN ASSOCIATES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR, NAIROBI ..... 3<sup>RD</sup> DEFENDANT**

**HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 23<sup>rd</sup> November 2014, Amended on 4<sup>th</sup> December 2017 and Further Amended Plaint on dated 1<sup>st</sup> September 2017, the Plaintiff claims that on 12<sup>th</sup> October 2011, it purchased Land Parcel Number Kajiado/Kaputiei North/1271 (hereinafter referred to as “suit property”) measuring about 7.870 hectares from the 2<sup>nd</sup> Defendant and it was transferred successfully on 7<sup>th</sup> September 2012. Its case is that the 2<sup>nd</sup> Defendant is yet to give vacant possession.
2. The Plaintiff averred that prior to the purchase, it undertook due diligence and confirmed that the 2<sup>nd</sup> Defendant was the registered owner of the suit property without any encumbrances. However, the 2<sup>nd</sup> Defendant while trying to create an access road connecting the suit property to Kajiado-Namanga road was met with resistance from the 1<sup>st</sup> Defendant who claimed ownership of the suit property although he did not produce documents as proof. Consequently, a search at the Kajiado Lands Registry revealed that the 1<sup>st</sup> Defendant had fraudulently consolidated the suit property with his property and subdivided it to parcels: Kajiado/Kaputiei - North/ 16004 and Kajiado/Kaputiei - North/ 16007-16020.



3. In Paragraph 9 of the Plaint, the Plaintiff outlined the following as particulars of fraud against the 1<sup>st</sup> Defendant as; subdividing Kajiado/Kaputiei North/1271 into three parcels 6646, 6647 and 6648; falsely inserting land reference number 79 to the Plaintiff's land reference; conspiring with land registry officials to combine the false LR No. 79 with his portion of land being LR No. 16003 of approximately 516.2 hectares and later subdividing it into fourteen (14) parcels.
4. The 2<sup>nd</sup> Defendant was sued for misrepresentation and breaching conditions of the sale agreement on grounds that it failed to deliver vacant possession of the suit property; failing to complete the access road; misrepresenting that there was no adverse claim/ dispute on the suit property and misrepresenting that the suit property was not on a public road. As such the Plaintiff had suffered loss and damage as it could not utilise the property as intended.
5. The 3<sup>rd</sup> Defendant was sued for providing the Plaintiff with information which it believed to be true, entered into an agreement on the strength of that information and subsequently issued them with title to the suit property.
6. The Plaintiff thus sought for the following orders against the Defendants jointly and severally:
  - a. An order of permanent injunction do issue prohibiting the 1<sup>st</sup> Defendant by himself, his agents, servants and or employees from alienating, developing, disposing, transferring or in any way interfering with all the parcel of land comprised in LR No. 28390 (IR 123885), Kajiado/ Kaputiei North;
  - b. A declaration that the Plaintiff is the lawful registered owner of the parcel of land known as LR No. 28390 (IR 123885), Kajiado/ Kaputiei North now trespassed and encroached into by the 1<sup>st</sup> Defendant;
  - c. That the 2<sup>nd</sup> Defendant be compelled to grant the Plaintiff vacant possession of the suit property;
  - d. A mandatory injunction do issue compelling the 1<sup>st</sup> Defendant to forthwith surrender and yield vacant possession of that parcel of land known as LR No. 28390 (IR 123885), Kajiado/ Kaputiei North, now trespassed and encroached into by the said Defendant;
  - e. That a survey be done with a view to ascertain the boundaries to the Plaintiff's property;
  - f. That in the alternative, judgement against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant jointly and severally for payment of the full purchase price a sum of the suit property with contractual interest from the completion date of the sale agreement, which is 14<sup>th</sup> September 2012, till payment in full;
  - g. Costs of this suit.
  - h. Any other reliefs that this Hon. Court may deem just and fit to so grant.
7. The 1<sup>st</sup> Defendant in his Statement of Defence and Counterclaim contested the allegation on the grounds that the Letter of Allotment dated 25<sup>th</sup> March 2010 from the Government of Kenya to the 2<sup>nd</sup> Defendant and the acceptance letter dated 9<sup>th</sup> April 2010 was in reference to land LR No. 28390-Mavoko Municipality but the title deed issued was for LR No. 28390 Kaputiei North in Kajiado District. He went on to depone that at the time of the alleged allocation of the suit property to the 2<sup>nd</sup> Defendant, the land had already been subdivided and belonged to one Tapatayia Ole Selelo Lepamoi adding that there was never consolidation of the suit property with his land because they do not share a boundary. He also pointed out that there was no access road to any road network. Further the alleged



access road on the deed plan shown by the 2<sup>nd</sup> Defendant would have led to the railway reserve. As such the Title deed had been acquired fraudulently.

8. He thus sought for the following orders in his Counterclaim:
  - a. An order that the District Land Registrar, Kajiado revokes and/or cancels the Title Deed for the parcel of land known as Kajiado/Kaputiei North/ LR No. 28390 (IR 123885);
  - b. General damages;
  - c. Costs of the suit.
  - d. The Hon. Court to issue any other order that it may deem fit to secure the ends of justice.
9. The 2<sup>nd</sup> Defendant in its Statement of Defence dated 29<sup>th</sup> January 2018 admitted that it sold the suit property to the Plaintiff vide a sale agreement dated 12<sup>th</sup> October 2011 and the Plaintiff took possession being aware it did not have an access road. It was agreed that Kshs. 2,023,117 be set aside by the parties to enable construction of the access road. The 2<sup>nd</sup> Defendant's case is that it passed a good title to the Plaintiff and there was no cause of action against it. It prayed that the suit should be dismissed with costs.
10. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants in their Statement of Defence dated 3<sup>rd</sup> December 2021 denied the Plaintiff's claim.
11. The Plaintiff in its response to the above statements of defence and counter claim reiterated its claim and sought for dismissal of the 1<sup>st</sup> Defendant's counterclaim with costs.

### **Evidence of the Plaintiff**

12. PW1, Eshban Githiaka adopted his witness statement as part of his evidence in chief and produced documents in the bundle of documents as exhibits in this case.
13. On Cross examination he stated that he sued the 1<sup>st</sup> Defendant for chasing his surveyor from the suit property claiming that it was his. He confirmed that he had produced documents as evidence of the merger of the suit property with the 1<sup>st</sup> Defendant's as well as the mutation form. He went on to confirm that the allotment letter dated 25<sup>th</sup> March 2010 addressed to the 2<sup>nd</sup> Defendant made reference to LR No. 28390 situated in Mavoko Municipality- Machakos County and the 2<sup>nd</sup> Defendant's acceptance letter dated 9<sup>th</sup> April 2010 also made reference to the same location although he was never given a receipt of payment as evidence of acceptance of the allotment. He pointed out that the boundary between Machakos County and Kajiado County was the railway line and the suit property was in Kajiado as per the letter from the surveyor dated 7<sup>th</sup> February 2013 which made reference to LR No. 28390 Kajiado/Kaputiei - North vide Deed Plan Number 306371 and all other subsequent documents including a letter dated 18<sup>th</sup> February 2014 that was not produced in court. He indicated that when they purchased the suit property, the beacons were in place.
14. He stated that during the transfer of the suit property they paid stamp duty but had not been paying land rates. He also confirmed that they obtained consent for the transfer but did not produce it in court.
15. He went on to indicate that before the purchase he undertook due diligence and there was no caution registered against the title. As such there was no fraud on the part of the 2<sup>nd</sup> Defendant and the claim against them was for delivery of vacant possession of the suit property. He stated that before the purchase, they visited the suit property and noted that there was no access road which the 2<sup>nd</sup> Defendant



- undertook to create. He also confirmed that as per the letter dated 12<sup>th</sup> April 2013, the parcels were registered under different land regimes which was not possible for the same piece of land.
16. On re-examination he stated that he carried out due diligence on the land including carrying out a search as well as visiting the suit property. He stated that he saw the physical beacons. He stated that he did not have the 1<sup>st</sup> Defendant's title and could thus not carry out a search to ascertain the veracity of his claim.
  17. PW 2, Daniel Kungu a registered and licensed land surveyor confirmed that he was instructed by the Plaintiff in 2013 to undertake survey on LR No. 28390 in Kajiado - Kaputiei North; Deed Plan Number 306371. They were to undertake a beacon survey and mark the access road to the suit property from the main road and generated a report dated 7<sup>th</sup> February 2013 which he produced as exhibit. Prior to this, they had conducted a search on 25<sup>th</sup> June 2012 and confirmed that the title was legitimate and unencumbered. He indicated that before they could complete the task, a gentleman by the name Peter approached them and asked them to vacate the suit property since they were trespassing. He confirmed that the suit property was in Kajiado County touching the railway from Kitengela to Kajiado and noted that Kenya Railways had some properties on the railway.
  18. On cross examination he confirmed that he was a licensed surveyor and the report done was on behalf of the plaintiff although he had no document to confirm that he received instructions. He indicated that his mandate was to establish the beacons and mark the access road from the main road network. He was given copy of the title to the suit property and a deed plan but he was not given copy of the Letter of Allotment. He confirmed that the Letter of Allotment was from Mavoko Municipality hence one could not be issued with a title in Kajiado. He indicated that according to the title and search conducted, the suit property was in existence. He indicated that having been shown the letter of allotment for Mavoko Municipality in Court he would need to carry out further investigations and it's authenticity could only be explained by the issuing authority. He stated that the Railway line was the boundary mark between Kajiado and Machakos Counties and there was a possibility the land was in Mavoko.
  19. He stated that one Peter and Daniel became hostile and chased them from the suit property and when they asked them to show their ownership documents, they produced none. He indicated that he had copy of the survey plan and cadastral map of the suit property. He did not have a letter from the Director of Survey approving the Deed Plan although it was signed by the Director and he assumed it was genuine. He further stated that he did not see the Part Development Plan for the area. He confirmed that there was a possibility that the initial surveyor did not visit the site because there were no physical beacons on the land.
  20. On re-examination he stated that from the search undertaken, they had a copy of the mutation form and the mutation was done by Geomatics Services. He said that the mutation form showed the two parcels No. 6648 & 6679. The mutation form combined the two and came up with 16003 which created several subtitles. The suit property was mutated on 26<sup>th</sup> May 2004 and 2<sup>nd</sup> January 2009.

### **Evidence of the Defendant's**

21. DW1, John Dominic Obel a licensed land surveyor produced a survey report by Geomatics Services Limited dated 30<sup>th</sup> September 2018 as D. Exhibit 1. He stated that he analysed the documents presented to him and made the report but did not visit the site because that was not part of the instructions.
22. He indicated that once land was allocated, a letter of allotment was issued to an allottee. The process before issuance of the letter of allotment was: A Part Development Plan was to be prepared to show



location of the land, the Part Development Plan must be approved by the County, then the Director of Physical Planning and then the Commissioner of Lands. The Letter of Allotment is then issued to the allottee and the Part Development Plan is attached to it. The allottee is then guided by the surveyor to know where the land is. In the current case the letter of allotment for LR No. 28390 was for Mavoko County, it did not have a Part Development Plan, the name of the County was missing and the plan number was also missing. Further, FR/436/109 survey plan showed the land was in Kajiado County whereas the letter of allotment for the Plaintiff's land was in Mavoko County. He testified that the 1<sup>st</sup> Defendant's documents appeared to be genuine because the process from which the 1<sup>st</sup> Defendant's title originated was land adjudication hence the freehold title issued by the Land Registrar, Kajiado County. The Plaintiff's documents appeared to be irregular because there was no Part Development Plan to show its exact location, the survey plan was not authenticated and the Deed Plan was not signed and sealed by the Director of Survey.

23. On the issue of subdivision of LR No. 16003 he stated that it was normal to combine two parcels of land belonging to the same person and be sub-divided. The mutation was registered in 2004 and he noted that another title could not be issued on top of another title.
24. On cross examination he stated that he was not a forensic expert but he analysed the documents given to him and noted that the Survey Plan was not certified by the Director of Survey. He also indicated that he did not conduct a search to ascertain that the land belonged to Tapataiya Ole Selelo Lepamoi neither could he confirm whether the Plaintiff's land was allocated from the Railway Reserve land. He confirmed that in his report he recommended cancellation of the Plaintiff's title.
25. On re-examination he confirmed that he did not carry out a search of the land owned by Tapataiya Ole Selelo Lepamoi but referred to the documents given to him such as the mutation forms and ascertained that the Plaintiff's documents were not genuine.
26. DW2, Peter Lengulu Tapataiya adopted his witness statement as part of his evidence in chief. He stated that PW2 together with another person went to his father's (Tapataiya Ole Selelo) land and he and his brother David confronted them. This is because the land belonged to their father who subdivided it and they have continuously resided thereon since birth. He stated that the documents showed to them by PW2 were for Mavoko, Machakos County and the suit ought to be dismissed.
27. On Cross examination he stated that he and his brothers were summoned by the County Commissioner although he attended the meeting alone. He stated that in the meeting he was asked the boundary between Kajiado and Machakos County. He stated that there was no boundary dispute between him and the Plaintiff because the Plaintiff's land was in Mavoko and not in Kajiado. He stated that he did not know the registration number of Moses' (his brother) land, he did not have a deed plan and he did not have a green card to show that the land was subdivided. He also added that there was no railway reserve in that area.
28. On re-examination he stated that he did not subdivide the land. It was his father who did and after sub-division the parcels were transferred to them.
29. At the close of the oral testimonies parties tendered final written submissions.

### **The Plaintiff's Submissions**

30. Counsel for the Plaintiff submitted that the Plaintiff purchased the suit property from the 2<sup>nd</sup> Defendant for a consideration of Kshs. 68, 250,000 through a sale agreement dated 7<sup>th</sup> September 2012 and its ownership ascertained through the search conducted on 10<sup>th</sup> March 2022. It was further submitted that, the 1<sup>st</sup> Defendant had not adduced evidence to show that his late father was the owner



of the larger parcel of land; Kajiado/Kaputiei North/4106. The 1<sup>st</sup> Defendant had therefore not proved his case on a balance of probability as stipulated by Section 107 of the [Evidence Act](#) and the case of *Alice Wanjiru Ruhiru v Messiac Assembly of Yahweh* [2021] eKLR and his counterclaim must fail.

31. Counsel submitted that the Plaintiff was a bona fide purchaser for value as was described in *Martha Wangui Thurura & another vs Henry Gitahi Thurura & 3 others* [2021] eKLR based on evidence produced. He further submitted that since the Plaintiff was not privy to the previous allotment or first registration, he was also protected by Section 26(1) of the [Land Registration Act](#).
32. As such, having proved that the plaintiff was the owner of the suit property, he was entitled to the grant of order of permanent injunction. Further he had shown that he would suffer irreparable loss based on the amount spent in purchasing the suit property. It is further submitted that the court finds that there were irregularities in the allotment and registration of the suit property then the Plaintiff ought to be indemnified by the 2<sup>nd</sup> Defendant and the Land Registrar since it was neither aware nor was it part of the irregularities. Reference was made *Re estate of Raphael Ngugi (deceased)* (2022) eKLR where the court made an order for compensation for bona fide purchasers for value without notice.

### **The 1st Defendant's Submissions**

33. Counsel for the 1<sup>st</sup> Defendant submitted that he was wrongly joined in the suit because the mutation forms dated 16<sup>th</sup> and 20<sup>th</sup> April 2004 confirmed that his father Tapataiya Ole Selelo was the registered owner of LR. NO. Kajiado/Kaputiei – North/4106 and the 1<sup>st</sup> Defendant only had beneficial interest over the property by dint of being his son. It is further submitted that the particular property which was the cause of the dispute belonged to his brother Moses Mukari Tapatayia. Therefore the person who should be sued was Tapataiya Ole Selelo and the suit against the 1<sup>st</sup> Defendant should be dismissed. He put forward the case of *Prime Steel Mills Ltd & 2 others v Blue Nile (EA) Ltd & another* [2018] eKLR.
34. On whether the Plaintiff had fraudulently acquired ownership of the suit property, counsel submitted that the Plaintiff did not produce evidence of payment of the alleged purchase price, rates clearance certificate, stamp duty, consent to transfer, payment of land rent or Part Development Plan showing physical location of the land. This could only mean the land was acquired illegally and un-procedurally. Further, that there was discrepancy in the documents produced since the letter of allotment was for land in Mavoko Municipality but the title produced was for land in Kajiado. Section 26 of the [Land Registration Act](#) cannot come to his aid as was held by Munyao J. in *Elijah Makori Nyang'wara vs Stephen Mungai Njuguna & another* [2013] eKLR and Oundo J. in *Joseph Kiprotich Bor v Tabutany Chepkoech Chebusit* [2021] eKLR. He further submitted that the Plaintiff had not proved root of his title or that the process was procedural as spelt out in *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR, *Daudi Kiptugen vs Commissioner of Lands Nairobi & 4 others* [2015] eKLR as well as the Supreme Court's case of *Dina Management Ltd vs County Government of Mombasa & 5 others* [2022] KESC 24 (KLR).
35. Having shown that the title was acquired illegally or un-procedurally the court was empowered by Section 80 of the [Land Registration Act](#) to cancel the Plaintiff's title as stated in *Daudi Kiptugen vs Commissioner of Lands Nairobi & 4 others* [2015] eKLR. The Plaintiff was therefore not entitled to the prayers sought and the 1<sup>st</sup> Defendant's counterclaim ought to be allowed with costs.

### **Analysis and Determination**

36. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
  - i. Who is the bona fide owner of property LR No. Kajiado/Kaputiei North/28390;



- ii. Is the Plaintiff is entitled to the reliefs sought?
  - iii. Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in his counterclaim;
  - iv. Who should bear costs of the suit?
37. The Plaintiff claims to have purchased LR No. Kajiado/Kaputiei North/28390 from the 2<sup>nd</sup> Defendant through a sale agreement dated 12<sup>th</sup> October 2011 for a consideration of Kshs. 68,250,000 and the transaction completed culminating in the transfer to the plaintiff. Prior to this due diligence was undertaken and it was confirmed that the suit property belonged to the 2<sup>nd</sup> Defendant without any encumbrances. However, the plaintiff was not given vacant possession. It is the plaintiff's case that when they executed the agreement, the 2<sup>nd</sup> Defendant undertook to create an access road connecting the property to the Namanga- Kajiado road as well as re-establish beacons on the ground. An attempt to do this, was met with resistance from 1<sup>st</sup> Defendant and his brother who own the neighbouring property claiming that the suit property belonged to their father. The same had been sub-divided and given to them. Subsequently, the plaintiff sought to get records from Kajiado Land Registry and the records showed that LR No. 1271 belonged to the late Tapatayia Ole Selelo which was subdivided into three portions (6646, 6647 and 6648 respectively). The suit property (LR No. 28390) was somehow joined together with LR No. 6648 forming LR No. 16003 which was later subdivided to fourteen (14) parcels being 16007 to 16020, respectively through mutation forms dated 20<sup>th</sup> and 28<sup>th</sup> April 2004.
38. The Plaintiff produced a sale agreement dated 12<sup>th</sup> October 2011 for LR No. 28390 Kajiado. The sale agreement is between Devkin Associates Limited as the vendor and Eshban Nduriri Githiaka as the purchaser. However the transfer dated 7<sup>th</sup> September 2012 shows that the property was transferred from Devkin Associates Limited to Quiver Development Kenya Limited. As much as PW1 Eshban Nduriri Githiaka stated that he was the Director of the Plaintiff, it is worth noting that the Plaintiff and PW1 are two separate, different and distinct entities. The sale agreement was between the 2<sup>nd</sup> Defendant and PW1 in his own capacity.
39. Produced as evidence is a letter of allotment dated 25<sup>th</sup> March 2010 to Devkin Associates Limited refers to LR No. 23890 Mavoko Municipality. The acceptance letter dated 9<sup>th</sup> April 2010 also makes reference to the same piece of land. However, the certificate of registration dated 31<sup>st</sup> May 2010 to Devkin Associates Limited makes reference to LR No. 28390 Kaputiei –North in Kajiado.
40. There was not sufficient explanation given as to how the transition of the land parcel in question from its initial location within Mavoko Municipality to its subsequent designation in Kajiado County. There was also absence of conclusive evidence on the procedural manner in which this change occurred. The 2<sup>nd</sup> Defendant whose name was on the said documents did not testify to confirm how this shift happened. Similarly, it failed to furnish the court with a plausible explanation that could substantiate and rationalize this conspicuous change in the suit land's administrative demarcation. Section 107 and 108 of the [Evidence Act](#) behoves the person who claims a particular set of facts to prove them.
- (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. 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.”



41. The Plaintiff also did not produce evidence of payment of the purchase price, stamp duty, payment of land rent/rates or Land Control Board consent to transfer the land. Although it claimed to be a bona fide purchaser for value without notice who was protected by Section 26 of the [Land Registration Act](#). The said Section provides:

- (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.”

42. I have already pointed out the discrepancy I find in the documents produced and their authenticity. When a title is in question, the person claiming ownership should go over and above merely claiming that he has a valid title. This was the holding by the Court of Appeal in the celebrated case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR where it was stated;

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

43. Courts have also categorically stated that the procedure in acquiring title is as good as the title itself. It must be legal and procedural. That land buyers and sellers will no longer be aided by the doctrine of bona fide purchaser for value without notice, or Section 26 of the [Land Registration Act](#) or Article 40 of [the Constitution](#) to sanitise and sanctify bad titles. The Supreme Court of Kenya in the case of *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) held:

“To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.”

44. I have already stated that the change in location of the land in the letter of allotment from Mavoko to Kajiado, raises questions on the root of title. DW1 also questioned the process from the issuance of the letter of allotment to issuance of the title. In the *Dina Management* case above, it outlined:

“97. According to the 1<sup>st</sup> respondent, there were pertinent requirements which ought to have been followed before the allocation of public land, including an application to the Chief Land Registrar for such allocation, thereafter a Letter of Allotment is issued spelling out the conditions to be fulfilled, a Part Development Plan (PDP) of the area is subsequently drawn and approved by the local authority of the area, which PDP is then forwarded to the Director Physical Planning. Once the approvals are made, the approved PDP together with the original Letter of Allotment are handed over to the Director of Surveys who prepares



a Survey Plan. It contended that it is from this Survey Plan that a Deed Plan of the plot is prepared by the Survey Plan showing the dimensions of the plot and it is only after these procedural stages are completed that a grant or title is issued by the Chief Land Registrar. In this instance, they urge that the procedure was not followed.”

45. The procedure having not been followed in the Dina Management case, the Supreme Court thus held:
110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.
111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”
46. I associate myself with the above cited authorities and arrive at the conclusion that the Plaintiff lacks the status of a bona fide purchaser for value without notice. Furthermore, the Plaintiff has failed to substantiate its claim of being the bona fide owner of the suit property and establishing that the title in its possession was acquired through legal and procedural means. It is noteworthy that Section 80 of the *Land Registration Act* confers upon this court the authority to order the cancellation or rectification of titles obtained through fraud or mistake. In exercise of this authority, I hereby find it appropriate to issue an order for the cancellation of title LR No. Kajiado/Kaputiei North/28390 held in the name of the Plaintiff. The Plaintiff having purchased the suit property from the 2<sup>nd</sup> Defendant has a right to seek legal recourse against them.
47. On the issue of general damages, it is in court’s discretion to award damages on a case by case basis. This was the holding of the Court of Appeal in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR:
- “... General damages are awarded if the claimant establishes in principle his legal entitlement to them, and a trial Judge must make his own assessment of the quantum of such general damages...”
48. And the Supreme Court in *Attorney General v Zinj Limited* [2021] KESC 23 (KLR):
- In case of general damages, a court of law exercises discretion guided by the circumstances of each case...”
49. I am not persuaded that the 1<sup>st</sup> Defendant is entitled to any general damages.
50. The 2<sup>nd</sup> Defendant has not denied that it sold the suit property to the plaintiff. I find that the plaintiff is entitled to refund of the purchase price.
51. Section 27 of the CPA provides that costs follow the event. I find that the 1<sup>st</sup> defendant is entitled to costs for having been dragged to court for no reasonable cause.



52. The upshot of the matter is that the plaintiff suit is dismissed except for the alternative prayer for a refund of the purchase price.
53. Accordingly, I make the following orders;
- a. That an order is hereby issued directing the Chief Land Registrar to cancel LR. NO. Kajiado/ Kaputiei North/28390 in the name of the Plaintiff within sixty (60) days from the date of this Judgement.
  - b. That the 2nd Defendant is hereby ordered to refund to the Plaintiff the purchase price together with interest at court rates from the date of filing this suit till payment in full.
  - c. That the 1st defendant shall have costs of the suit to be borne by the Plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 1ST DAY OF FEBRUARY 2024.**

**L. KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

Ms. Mwauki for Mr. Chahenswa for the Plaintiff.

Mr. Sankale for the 1<sup>st</sup> Defendant.

Ms. Owuor for Mr. Malombo

for the 2<sup>nd</sup> Defendant.

N/A for the 3<sup>rd</sup>, 4<sup>th</sup> Defenants.

Court Assistant – Mutisya.

