



**Nairobi Homes Limited v Rengwa & 5 others (Environment & Land
Case 111 of 2021) [2024] KEELC 4187 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 4187 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 111 OF 2021**

AE DENA, J

APRIL 9, 2024

BETWEEN

NAIROBI HOMES LIMITED PLAINTIFF

AND

ABDALLA SWALEH RENGWA 1ST DEFENDANT

HASSAN SWALEH RENGWA 2ND DEFENDANT

YUSUF HASSAN MUBWANA 3RD DEFENDANT

SHEMSA NASSORO HAMDU 4TH DEFENDANT

COOPERATIVE BANK OF KENYA LIMITED 5TH DEFENDANT

THE ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

Pleadings

1. A brief summary of facts leading to the institution of this suit according to the Plaintiff is that it has at all times material to this suit, been the lawful registered owner of Kwale/Funzi Island/40 (hereinafter referred to as the suit property) measuring approximately 15.0Ha. It is alleged that the land was duly registered in the Plaintiffs name on 12/5/1989 upon transfer at a consideration of Kshs 370,000/- from Mwinyi Haji Abdallah and Swaleh Abdallah Anzuwami. The Plaintiff states that sometime on 24/4/2018, it undertook to fence off the property but was informed that the same had been sold to Yusuf Hassan Mubwana and Shemsu Nassoro Hamdu the 3rd and 4th Defendants and charged in favour of Cooperative Bank of Kenya Limited the 5th Defendant.
2. The Plaintiff avers that upon conducting an official search at the Kwale Land Registry, the allegations that the suit had been charged were confirmed, surprisingly, all this took place while the Plaintiff still



held the original title to the suit property. At paragraph 12 of the plaint, the Plaintiff lists the entries made on the green card to the suit property as follows;

- a. October 16, 2014 a transfer in favour of Abdalla Swalehe Rengwa and Hassan Swalehe Rengwa under RL19 being the 1st and 2nd Defendants respectively.
 - b. October 16, 2014 a transfer in favour of Abdalla Swalehe Rengwa and Hassan Swalehe Rengwa under RL7 being the 1st and 2nd Defendants respectively.
 - c. Title deed issued serial no 0xxxx.
 - d. July 22, 2015 a transfer in favour of Yusufu Hassan Mubwana and Shemasa Nassoro Hamdu being the 3rd and 4th Defendants respectively.
 - e. July 22, 2015 entry no C1 contains an agreement in terms of sections 87& 89 of the [RLA](#).
 - f. On July 30, 2015 a charge registered in favour of the Cooperative Bank of Kenya Limited for a sum of Kshs 18,000,000/- having reserved rights under section 82 and 83 being in favour of the 5th defendant.
3. The Plaintiff denies having ever caused to be done any conveyance on the suit property in favour of any person. The entries made at paragraph 12 are termed as fraudulent. The particulars of fraud on the part of the 1st and 2nd Defendants are listed under paragraph 15 of the plaint and echo those of the 3rd and 4th Defendants. The Plaintiff further lists the 5th Defendants particulars of fraud and those of the 6th defendant. It is stated that the 1st and 2nd Defendants did not have valid title over the suit property to transfer to the 3rd and 4th Defendants and which is null and void.
4. The Plaintiff prays for Judgement against the Defendants for;
- a. A declaration that the Plaintiff is the true and lawful registered owner of the suit property.
 - b. An order of rectification against the 4th (sic) defendant to rectify the records in the lands registry to indicate that the Plaintiff is the true and lawful registered owner of the suit property and to remove all other entries bestowing any interest in the suit property to the Defendants.
 - c. Costs of this suit.
 - d. Any other remedies this Honourable court may deem fit and just to grant.
5. It is noted from the proceedings that it is only the Plaintiff, 5th and 6th Defendants that participated fully in the suit having rendered their viva voce evidence and closed both their cases. The court will therefore confine itself to the defence as raised by the 5th and 6th defendants as the 1st and 2nd defendants did not enter appearance following service in the Daily Nation Newspaper on 8/08/2019 pursuant to leave granted on 5/7/2019. The 3rd and 4th defendants entered appearance on 8/08/2019 but failed to file a defence and thereafter never participated in the proceedings.
6. The 5th Defendant's defence is dated 1/3/2019. The contents of paragraph 8 of the plaint are denied and the 5th defendant avers that if the purported sale and transfer of the suit property took place as alleged then the same was null and void *ab initio* for failure to comply with section 6(1) of the [Land Control Act](#) chapter 302 of the Laws of Kenya. It is denied that the Plaintiff ever held any lawful title to the suit property. The particulars of fraud are further denied. It is instead stated that the 5th Defendant carried out due diligence as was expected of any financier creating a charge over any property. That it had no notice of any defect in the 3rd and 4th Defendants title and neither was it part of any fraud in creation of its charge. The 5th Defendant states that in the event the Plaintiff lacks lawful title then its



statutory remedy is a claim for indemnity against the 6th Defendant only. The 5th Defendant prayed that the Plaintiffs suit is dismissed with costs.

7. The 6th Defendant's defence is dated 23/03/22 and was filed before court on the same day. The 6th Defendant denies the averments that the Plaintiff is the registered owner of the suit property and holder of the title thereto and invites the Plaintiff to strict proof of the same. The 6th Defendant admits that the suit property is registered in favour of the 3rd and 4th Defendants jointly and charged in favour of the 5th Defendant. It is denied that the Plaintiff is the registered owner of the suit property and stated that according to the 5th Defendant's records, there are no fraudulent dealings on the suit property.
8. At paragraph 7 of the defence, the 6th Defendant outlines the records at the Lands Registry as follows;
 - a. Mwinyihaji Abdallah and Salehe Abdalla Anzuani were the 1st registered owners of the suit parcel of land following an adjudication process.
 - b. On 16th October 2014 the suit parcel was transferred to Abdalla Swalehe Rengwa and Hassan Swalehe Rengwa through a process of Succession in Kwale Kadhis Court Succession Cause No 360 of 2014.
 - c. On 22nd July 2015 a transfer document was received at lands registry and an entry made in the presentation book being entry No. 170/7/2025.
 - d. On 22nd July 2015 the land was transferred from Abdallah Swalehe Rengwa and Hassan Swalehe Rengwa to Yussuf Hassan Mubwana and Shemsa Nassoro Hamdu.
 - e. On July 30, 2015 the property was charged to Cooperative Bank of Kenya Limited for a sum of Kshs 18,000,000/-.
9. It is denied that the said entries are fraudulent. The 6th Defendant prays that the Plaintiffs suit against them ought to be dismissed with costs.

Evidence

10. The matter proceeded for hearing on 4/07/23 and 18/10/23 via the teams virtual platform. The Plaintiffs were presented by Mr. Kaburu Advocate, the 5th Defendant by Mr. Kongere advocate and the 6th Defendant by Mr. Makuto Senior Litigation Counsel.
11. PW1 Solomon Mutungi testified that he is an employee of the Plaintiff though he bought the Plaintiff's branch Nairobi homes (Mombasa) Limited. He adopted his statement dated 14/9/2018 as evidence in court He was informed of the availability of a property for sale in Kwale by one Betty Muli a real estate agent. That they went to Funzi Island together with some friends to see the property. The witness stated that he described it to his boss who agreed to its purchase. It was his testimony that an agreement for purchase was prepared by Sachdeva and Company Advocates. The consideration was Kshs. 370,000/= which was paid to the said firm. They were issued with title after going through the due conveyance process.
12. The court was shown the original title deed virtually. PW1 produced the bundle of documents in the Plaintiff's list of documents dated 14/9/2023 as "PEXB 1-21" in the order listed in the bundle.
13. He testified that they took possession in June 2018 and started paying land rent annually since then to date. That at Kwale registry the records reflect Nairobi Homes Limited. A search conducted on 16/5/89 confirmed registration in the name of Nairobi Homes Limited. That even after he left the Plaintiff's employment he was still in charge of the Plaintiff's property in the coast region and visited the suit property regularly and which was all along vacant. That in the year 2018 the current Managing



Director Trevor Kanja sent him to do a search and to identify the beacons as they had a prospective buyer. The surveyor went and was told by neighbours that the land belonged to Yusuf Hassan Mbwana the 3rd Defendant. Upon calling the 3rd Defendant he stated that he'd purchased the land and charged it to Cooperative Bank for Kshs. 18million.

14. The witness added that a search at Kwale confirmed that the land was transferred to Yusuf Hassan Mbwana and Shamsa Nassoro Hemedi on 22/7/2015 and 7 days later charged to Cooperative Bank on 30/7/2015. The witness stated that he got a green card which indicated at entry dated 16/10/2024 the property was transferred to the Rengwa's (see page 9 and 10 to see history) who got it by succession and who then transferred the property to Yusuf and Shamsa. That the green card with details showing Nairobi Homes Limited was missing from the registry. The 1st register was supposed to start from 1989 when the Plaintiff purchased the property. However from the green card found at the Land Registry, there was a 1980 entry but the 1989 was missing. The witness referred to the certified copy of the green card in his possession which indicated that in 1980 the owners were Mwinyihaji Abdalla and Swalehe who then sold the property to the Plaintiff in 1989 but the next entry was the 2014 entry. The entry for Nairobi Homes limited was missing, also for the title issued in 1989. PW1 sought that the suit property be reinstated in the Plaintiff's names as it is the legal owner and any entry thereafter be declared a fraud.
15. On Cross-Examination by Mr. Kongere the witness conceded he did not have a sale agreement before the court. He further had no document to show the payment of Kshs. 370,000/= and Stamp duty. That he also did not have the consent from the Land Control Board. He acknowledged the green card had no entry reflecting Nairobi Homes Limited the Plaintiff. He confirmed that the property has never been developed since 1989.
16. On Cross-Examination by Mr. Makuto the witness reiterated his testimony as indicated in his cross examination by Mr. Kongere. He added that though he was instructed by the Plaintiff he had no proof of the instructions in writing neither did he have a company resolution authorizing him to testify on behalf of the company. He confirmed he was no longer an employee of the Plaintiff. He conceded there was no record indicating payment of rates from 1985 and 2005 and 2006 in court except for the year 2011. He admitted that at page 9 the green card shows that in 2011 the property was Mwinyihaji Abdalla. From the Attorney General's bundle filed on 23/3/2022 the witness was shown the "RL 19" and which he denied seeing at the Lands Office. He confirmed that as per the records from the Kadhis Kwale court, the suit property was related to the estate of Mwinyingi Abdalla and Abdalla Anzuani who are also reflected in entry No. 1 of the Green Card and was transmitted to the 1st & 2nd Defendant.
17. On re-examination the witness clarified the original title deed shown to the court was issued on 12/5/1989 and has never been surrendered to the land office. On being shown the transfer of land (page 3) he confirmed it bore stamp duty with the original red seal (displayed to the court) showing a payment of 14,500/=. That he had only produced receipt for 2011 because in 1989 the municipal council did not have land rates payable for Funzi.
18. PW2 Trevor Kanja the director of the Plaintiff as well as the Managing Director adopted his statement filed before court as his evidence. He stated that he was aware of the suit property Kwale/Funzi Island 40 as it belonged to the Plaintiff. That PW1 had been managing the property. It was his evidence that sometime in the year 2018 the Plaintiff found a buyer for the property but upon conducting a search at the lands registry they established that the property had been registered in the name of the 3rd Defendant and charged to the cooperative bank for a sum of Kshs 18million. That after a comprehensive search it was established that on 16/10/2014 the property was transferred to Yusuf H. Mbwana and Shemshe Hamdu. That the records for the Plaintiff's ownership could not be traced at the lands office and hence this suit.



19. Cross-examined by Mr. Kongere he stated that he was not personally involved in the transaction in 1989 and had been told everything by PW1.
20. On cross-examination by Mr. Makuto PW2 admitted that he had not produced anything to show his directorship. That the company had never developed the suit property. On re-examination the witness stated that every document relied upon by the Plaintiff had been produced by PW1. The Plaintiffs case was closed at this juncture.
21. DW1 Jackson Oire testified on behalf of the 5th Defendant as its Legal Officer and adopted his statement dated 25/11/2022 as his evidence in chief. He further produced the bundle of documents as per the 5th Defendants list as DExh 1-12 in the order they appeared.
22. On Cross-Examination by Mr. Kaburu he testified that his evidence was based on the records he accessed at the Bank. He was aware the charge was registered within 7 days of the transfer. That before the borrower defaulted he had made some payments though he could not state how much had been received in this regard. The loan was originally Kshs 18,000,000/= but the outstanding balance was Ksh. 28,872,282/= the 3rd Defendant having defaulted. He disagreed that the bank had participated in fraud and testified that the loan wasn't disbursed after the 7 days. The 7 days was the registration and but there were prior processes to review the application. That the loan application was made in December 2014 and referred the court to page 6 & 8 of the Plaintiffs bundle. He conceded the bank gave the loan against an undeveloped property. He stated he was not aware why the borrower was not participating in the proceedings.
23. On cross-examination by Mr. Makuto DW1 testified that before the charge the bank did a due diligence and a search was undertaken on 23/6/2015. The same indicated the owners as Abdalla and Hassan Rengwa the 1st and 2nd Defendants. On being referred to the certificate of official search dated 30/7/2015 he confirmed the 3rd and 4th Defendants as proprietors and stated that the bank only issues security only after one is registered as proprietor. During due diligence he never saw a green card showing the Plaintiff as owner of the suit property. There being no re-examination by Mr. Kongere the 5th Defendant's case was marked as closed.
24. DW2 Steve Mokaya the Land Registrar Kwale adopted his witness statement dated 17/10/2023 as his evidence in chief. He further produced the list of documents dated 23/3/2023 as exhibits "DEX 1-6" as his evidence. It is his evidence that the records at the land office indicate the subsequent registration of the Defendants as outlined in the 6th Defendants defence hereinabove. The witness denied the allegations that the 6th Defendant had caused the disappearance of the green card as alleged by the Plaintiff. He further denied the allegations that a fictitious title deed had been issued in the names of the 1st and 2nd Defendants by the 6th Defendant.
25. On cross examination by Mr. Kaburu Mr. Mokaya testified that Plaintiffs claim that the green card was changed was far-fetched. That as per the records at the land registry, the entries in the green card followed due procedure. That unless the Plaintiff produced the original green card as the registrar he would be merely speculating if he termed the green card in their records forged. He conceded he receives very many complaints on lost green cards which is undesirable but he was in the process of cleaning up the registry. The 6th Defendants case was closed.



Submissions

Plaintiff's Submissions

26. The Plaintiff's submissions were filed before court on 16/11/2023. It is submitted that in the absence of evidence on how the 1st and 2nd Defendants obtained the suit property by transmission, the Plaintiff's suit remains uncontroverted. The Plaintiff states that the 1st and 2nd Defendants jointly committed fraud by removing the names of the Plaintiff from the green card and causing their name to be entered in the lands record as registered owners. That the 1st and 2nd Defendants further transferred the suit property to the 3rd and 4th Defendants in the full knowledge that they were not the valid owners of the same.
27. The Plaintiff submits that no copy of title in the names of the original owners Mwinyi Haji Abdallah and Swalehe Abdallah has been produced before court. That the evidence of the 6th Defendant does not bear a copy of this title which ought to have been cancelled upon the subsequent transfers. That there is no reason why there is no copy of the title deed issued in the year 1980 which is purported to have been transferred by transmission to the 3rd and 4th Defendants. Further that the documents filed by the 5th Defendant did not have copies of the National Identity cards of the 1st and 2nd Defendants or their Pin Certificates. That for this reason, the 1st and 2nd Defendants did not have a good title to pass to the 3rd and 4th Defendants as was held in *Alberta Mae Gacii v AG & 4 others* [2006] eKLR.
28. The Plaintiff also submits that according to the documents presented to court by the 6th Defendant, there is no receipt for stamp duty to indicate how much was paid for transfer from the 1st and 2nd Defendants to the 3rd and 4th Defendants. The Plaintiff states that there being two separate titles, each party must prove the root of his title as was held in *Munyu Maina v Hiram Gathiba Maina* Civil Appeal No 239 of 2009. That the Plaintiff has on the other hand demonstrated how they acquired their title to the land since 1989 and the said evidence remains uncontroverted.
29. The Plaintiff stated that even though the 6th Defendant counsel had tried to explain to court that the 4th and 5th Defendants were bona fide innocent purchasers for value, no evidence was given to meet the ingredients of the same. The court is urged not to sanitize the fraud that emanated from the 1st and 2nd Defendants to the 3rd and 4th Defendants and who caused loss to the 5th Defendant by procuring a loan using the suit property as security. The Plaintiff refers to the Supreme Court decision in *Dina Management Ltd v Mombasa County Government & 5 others* where the court held that bonafide purchasers have responsibilities to substantiate validity and legality of their acquired titles. The Plaintiff prays that the plaint be allowed as prayed with costs.

5th Defendant's Submissions

30. The 5th Defendant submitted on whether the Plaintiff has shown that he is the lawful owner of the suit property. It is submitted that the burden of proof on the allegations of fraud rests on the Plaintiff even when the defendants have not defended the suit as was held in *Mary Gathoni Weru v Mt Kenya Bottlers Limited* [2021] eKLR. The 5th Defendant states that no evidence has been discharged to prove that the 1st and 2nd Defendants are responsible for the disappearance of the original card.
31. The 5th Defendant's submission is that it cannot be stated that the 3rd and 4th Defendants accepted a fraudulent transfer when the said fraud has not been proved in the first place. Further that the 5th Defendant has demonstrated that it carried out due diligence before approving the loan and established that the records at the registry indicated the 3rd and 4th Defendants as the owners of the suit property.



That apart from waving the title, the Plaintiff does not demonstrate how it acquired its title. The court is invited to hold that the Plaintiff has failed to prove its case to the required standard and the same ought to be dismissed with costs.

6th Defendant's Submissions

32. The 6th Defendant's submissions were filed before court on 4/12/2023. It is submitted that the Plaintiff has failed to prove his case as per the required threshold set in the *Evidence Act* as to who alleges must prove. That the Plaintiff did not have any sale agreement to prove purchase of the suit property, had no proof to show the Kshs 370,000/- purchase price had been paid and consequently failed to discharge the burden of proof that he had purchased the suit property.
33. It is contended that the 6th Defendant has on the other hand availed to court the adjudication record showing Mwinyihaji Abdallah and Salehe Abdalla Anzauni as the 1st registered owners of the suit property and equally a court order in Kwale Kadhis Succession Cause No 360 of 2014 issued on 9/10/2014 showing the suit property transferred to the 1st and 2nd Defendants. The Plaintiff has not challenged the said court order and neither has the same been set aside. The 6th Defendant states that the suit property was transferred in the year 2014 in obedience of a valid court order and as such no fraud was perpetrated. The Plaintiff having failed to discharge the burden of proof is not entitled to the suit property. The 6th Defendant prays that the suit against it be dismissed with costs.

Determination

34. I have familiarized myself with the pleadings on record, the evidence by all parties in the suit and the submissions for and against the case. The main issue for determination is whether the Plaintiff has made a case warranting issuance by this court of the orders sought.
35. The Plaintiff's case is that it is the lawful proprietor of the suit parcel Kwale/Funzi Island/40 having purchased the same sometime in the year 1989 from Mwinyi Haji Abdalla and Swaleh Abdallah Anzuwani at a consideration of Kshs 370,000/-. A title was subsequently issued on 12/5/1989. PW1 informed the court that the agreement for purchase of the suit property was prepared by Sachdeva advocate. However the Plaintiff alleged that it later discovered around the year 2014 that the suit property had been transferred to other parties as already stated culminating to a charge to Cooperative Bank. That this was with the help of the land registrar. But the Plaintiff's title is being challenged by the 5th and 6th Defendants and the existence of another title.
36. The burden of proof lay on the Plaintiff to prove that it is the lawfully registered owner of the suit property. Section 107, 108, 109 of the *Evidence Act* provide that: -
- 107.
- (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.
109. 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."



37. PW1 produced as part of his evidence a copy of certificate of title dated 12/5/1989 (PEX1), Transfer of Land dated 10/5/1989 and Search No. 176/89 showing Nairobi Homes Limited registered as absolute proprietor as at 16/5/1989. PW1 on cross examination conceded that he did not have a sale agreement between the Plaintiff and Mwinyi Haji Abdalla and Swaleh Abdallah Anzuwani being the vendors. He also did not have proof of the payment of the Kshs. 370,000/- which PW1 had told the court was paid to Sachdeva & Company Advocates. PW2 who alleged to be the Director of the Plaintiff did not help much either. Interestingly he told the court he was only 19 years old in 1989 when the purchase took place. On cross-examination by Mr. Kongere he stated that he was not personally involved in the transaction in 1989 and all that he stated in court emanated from PW1. PW2 did not produce any bank records to show the movement of the Kshs 370,000/- from the Plaintiff to the said firm of Advocates. No explanation was given why such records were not available. On cross examination by Mr. Makuto PW2 told the court he had no other documents except what was produced in court by PW1. That Mr. Mutungi PW1 herein dealt with everyone and it is PW1 who would know better.
38. From the foregoing clearly there were glaring gaps which have not been explained and made me wonder if Mr. Mutungi was to be trusted if at all. But what is the law? Can purchase of land occur without a contract of sale thereof? The Court of Appeal faced with a similar situation in Civil Appeal Number 22 of 2013, *Peter Mbiru Michuki v Samuel Mugo Michuki* [2014] eKLR, held;

Section 3(3) of the *Law of Contract Act* provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the *Law of Contract Act* excludes the application of section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the *Law of Contract Act*, came into effect on 1st June, 2003. Prior to the amendment of section 3(3) of the *Law of Contract Act* in 2003, the subsection read as follows: -

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (1) Has in part performance of the contract taken possession of the property or any part thereof; or
- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

39. The alternative would be the act of possession or continuous possession thereof. The evidence of PW1 and PW2 is that they have never been in use and occupation of the suit property. PW2 could not recall in cross examination by Mr. Makuto if ever there had been a caretaker on the suit property since its purchase. They both admit the land has never been developed since 1989. This is further corroborated by the Valuation Report by Value Line Consulting Limited dated 28/3/2017 produced by the 5th Defendant. The other missing link was the Land Control Board Consent for the transfer which PW1 conceded in cross examination that though he listed the Land Control Board Consent in the Plaintiff List of documents the same had not been annexed and produced before court. While the transfer of



Land dated 10/5/1989 was produced and the ensuing title this court notes they were not supported by the relevant steps or documentation as analyzed.

40. Based on the foregoing it is therefore this court's finding that the Plaintiff failed to prove that he was the lawful registered owner of the suit property.
41. It is submitted on behalf of the Plaintiff that the Plaintiff in producing a copy of the title deed to the suit property has demonstrated proof of ownership of the land and the indefeasibility of the same. Under Section 24, 25 and 26 of the [Land Registration Act](#) 2012 the indefeasibility of title is upheld:

Section 24 stipulates as follows:

Subject to this Act—

- (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; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the Act provides:

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject
 - a. To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

- (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.

42. The court has noted the Plaintiffs submissions that in the absence of the 1st and 2nd Defendant evidence on how they obtained the suit property on transmission, the Plaintiffs averments in the Plaint are uncontroverted. Indeed the 1st and 2nd Defendant did not enter appearance in the suit. It is however trite that whether the suit is defended or not the burden lies on the Plaintiff to prove its case. I'm persuaded by Justice J.V Juma who in the case of *Susan Mumbi v Kefala Grebedhin*; (Nairobi HCC NO. 332 of 1993) stated thus; -

The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial." Emphasis is mine.

43. Also see the Court of Appeal *dictum* in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Ano*. (2014) eKLR where the court emphasized thus; -

"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proceedings are conducted. The claimant lays on the table evidence of fact contended against the defendant and the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

44. Moreover it is noteworthy that the 5th Defendant herein is in possession of a title deed to the suit property registered in the names of the 3rd and 4th Defendant produced in evidence as Dexh 1. The title was issued on 16/10/24 to Abdalla Swalehe Rengwa and Hassan Swalehe Rengwa and who after registration of the same procured a loan of Kshs 18,000,000/- from the 5th Defendant and used the suit property as security. I have further noted that other than the title deed relied upon by the Plaintiff as proof of ownership of the suit property, the history of ownership of the suit property has not been clearly demonstrated by the Plaintiff by way of documentary evidence as required. PW1 only states he was informed of the availability of property for sale by one Betty Muli a Real Estate Agent like himself. No due diligence documents prior to the alleged purchase was presented by the Plaintiff. It is also not clear that they met the said vendors and what documents the said vendors presented to them to prove ownership.

45. It has been held in several authorities that where the court is faced with the predicament of two titles over the same parcel of land, it is imperative upon parties claiming ownership of the said parcel to give



a detailed background on the history of their ownership. In the case of *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 others* [2016] eKLR, Munyao J. held as follows;

A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current”

46. Indeed a title deed is prima facie proof of ownership, but in the instant case, the Plaintiff has failed to clearly demonstrate the process through which they came into possession of the title deed. I have already highlighted herein before the apparent gaps in the process undertaken by the Plaintiff. The Plaintiff has produced copies of receipts indicating payment of land rates at the Kwale County Government and which did not cover all the years. In any event payment of rates is not *prima facie* proof of ownership.
47. I have scrutinized the copy of the title produced by the Plaintiff vis a vis the documents produced by the 5th Defendant and the 6th Defendant. I noted one disparity which arose in cross examination by Mr. Kongere as to size of the suit property where PW1 was led into admitting there were different acreages. The acreage of 14.6 Hactares in the Rengwa's title vis a vis 15.0 Hactares in the Plaintiff's title dated 12/3/89 and which is contradicted by the green card. I have also observed the difference in the mapsheet where for the Plaintiff's title the Registry Map Sheet No. is given as 12 and for the other title it is given as No. 3 referring to the same property. The documents produced by the registrar all tally in terms of this detail except those of the Plaintiff. It made me wonder whether the Plaintiff were referring to the same parcel.
48. The Plaintiff states that the 3rd and 4th Defendants registration as proprietors of the suit property was by way of fraud. It is further alleged that the 5th Defendant was a party in colluding with the fraudulent acts of the said parties who were able to obtain a loan from the 5th Defendant using the allegedly forged title deed to the suit property. Of course these allegations are vehemently denied and opposed by the 5th and 6th Defendants. The 6th Defendant land registrar is accused of enabling the fraud by forgery of the 3rd and 4th Defendant's title and facilitating the registration of the said title.

The Black's Law dictionary defines fraud as follows:

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

49. The court in *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows; -

...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v 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.”

50. In the case of *Murungari Njoroge & Another* [2018] eKLR. The court stated that:-

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

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

51. Also in the case of *Urmilla w/o Mahendra Shah vs Barclays Bank International Limited & another* [1979] KLR 76; [1976-80] 1KLR 116B it was held that:

Allegations of fraud must be strictly proven and that although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned”.

52. The Particulars of fraud against the 5th Defendant are listed under paragraph 18 of the Plaint as hereunder; -

- a. Failing to conduct a thorough due diligence on the suit property before allowing the fraudulent charge to be registered against the suit property in their favour.
- b. Continuing to have the property charged in their favour despite notice that the 3rd and 4th Defendants title is fraudulently acquired and therefore invalid.
- c. Continuing to acquire profit in terms of interest from a fraudulent dealing despite notice that the 3rd and 4th Defendants title is fraudulently acquired and therefore null void.

53. The question that arises firstly is whether the 5th Defendant failed to conduct thorough due diligence and whether they participated in the alleged fraud or if it was aware of the same. It is the 5th Defendants case that it was approached by the 3rd and 4th Defendants to finance their intended purchase of the suit property. That the suit property was at that time registered in the names of the 1st and 2nd Defendants as per a copy of the title deed annexed to the 5th Defendants list of documents and produced before court by DW1 its legal Officer. The 5th Defendant was further furnished with a copy of a sale agreement between 1st and 2nd Defendants and the 3rd and 4th Defendants who were the purchasers therein. An application for official search and the attendant official search dated 23/6/2015 conducted on the suit property confirmed that the same was indeed registered in the names of the 1st and 2nd Defendants. The 5th Defendants case and evidence through DW1, is that after carrying out this due diligence that the 5th Defendant advanced the loan to the 3rd and 4th Defendants. The charge document was produced in evidence and is seen to have been duly registered as an encumbrance thereof. That the 3rd and 4th Defendants had also obtained the consent of the Land Control Board for creation of the charge and further paid the requisite stamp duty. The consent by the Msambweni Land Control Board was produced dated 24/06/2015 including the KRA stamp duty declaration form and Pain in slip and the customer transaction receipt dated 30/7/2015.

54. The court has reviewed all the above documents produced as exhibits in support of the 5th Defendants case and have not seen anything peculiar or strange with them and or any gaps that would raise



eyebrows. The Plaintiff's contention is that the loan was processed in a very short time. However, this was explained by DW1 in cross examination by Mr. Kaburu that the loan was applied for in December 2014 and wasn't disbursed after the 7 days and that the 7 days was the registration and but there were prior processes to review the loan application. On the Banks bundle is page 14 which indeed refers to loan application letter dated 18/12/2014. The witness also clarified on cross examination by Mr. Makuto that banks only issue security after one is registered as proprietor. I do not see the nexus between the time taken to process the loan facility and fraud. Maybe the 5th Defendant was simply efficient in its loan approval processes. The 5th Defendant also commissioned a survey by Value Line Consulting Limited was produced as part of its bundle of documents. DW1 clearly testified that during the due diligence he never saw a Green Card showing the Plaintiff as the registered owner of the suit property. The 5th Defendant in my opinion did that which was necessary and lawful in finding out who the proprietors of the suit property were. Having done their due diligence, it would be way beyond any possible human power for the 5th Defendant to find that the title had been acquired fraudulently as alleged.

55. Let me add that DW1 produced copies of proceedings filed in the High Court Mombasa Commercial Division Civil Case No. 99 of 2017 filed through the firm of Kamoti Omollo & Company Advocates. The suit is against the Cooperative Bank of Kenya, the 5th Defendant herein. It would to me take a lot of boldness for one to sue the bank on the basis of a loan it has acquired fraudulently.
56. It is my finding that the allegations of fraud against the 5th defendants have not been proved to the required standard. But what about the 6th Defendant?
57. The particulars of fraud against the 6th Defendant are pleaded as follows;-
 - a. Causing the 1st & 2nd Defendants names to be first entered as registered owners of the property by causing the disappearance of the original green card.
 - b. Entering the names of the 1st, 2nd, 3rd and 4th Defendants as registered owners of the of the suit property by creating a new green card in the year 2014.
 - c. Issuing a fictitious Title deed showing the names of the 1st and 2nd defendants as the registered owners of the suit property while there existed another genuine title deed in the names of the Plaintiff thereby starting a chain of fraudulent dealings in the property.
 - d. Jointly and severally causing a fictitious and fraudulent green card to be kept at the Land registry and persisting with it despite being given notice that the entries in the green card are fraudulent.
 - e. Failing to arrest the development of a fraudulent scheme in respect of the suit property and in particular the plaintiffs good title over the property.
 - f. Jointly and severally (with the other defendants) colluding to effect perpetuate and elongate the fraud and corrupt scheme in an attempt to deprive the Plaintiff use, ownership and control of the suit property.
58. The 6th Defendant has distanced itself from the allegation that it facilitated the fraudulent registrations as alleged above. DW2 the Land Registrar gave a detailed narration on the history of registration of the suit property as per the records at the land registry. From the record, it is evident that vide an order of the court issued on 9/10/2014 by the then Kadhi in Kwale Kadhis Court one Said H. Bedzenga, in Succession Cause No 360 of 2014, the suit property's ownership was vested upon the 1st and 2nd Defendants herein. The succession cause is over the estate of the late Mwinyi Haji Abdalla and Salehe Abdalla Anzuani. The court notes that it is the deceased who apparently sold the suit property to the



Plaintiff in a transaction that has not been proved but only alleged. Moving on, after the said succession the land was transferred to the 3rd and 4th Defendants as per the transfer of land forms produced as DExh 6 by DW2. A copy of the cancelled title is further annexed indicating the names of the 1st and 2nd Defendants. The Plaintiff submits that no copy of title in the names of the original owners Mwinyi Haji Abdallah and Swalehe Abdallah has been produced before court. However it is noteworthy a Land Adjudication search was produced showing the history that Mwinyihaji Abdalla and Swalehe Abdalla Anzuani were the 1st registered owners following an adjudication process which is the link that Plaintiffs failed to produce. There was no evidence produced to show how the 6th Defendant removed the original green card and which the Plaintiff never produced. PW2 reiterated in reexamination that he could not explain why the entry showing the Plaintiff as registered proprietor was missing in the Register and he did not want to speculate.

59. It is my finding that the 6th Defendant has produced the requisite documents informing the subsequent transfer of the suit property from the 1st and 2nd Defendants to the 3rd and 4th Defendants. I have already given my analysis of the 5th Defendants case elsewhere in this judgement. It is also my finding that the allegations of fraud against the 6th defendant have not been proved to the required standard. Fraud cannot be inferred.
60. The 3rd and 4th Defendants entered appearance in the matter but did not file a defence, however, that notwithstanding, the process through which the said parties acquired the said title has been explained sufficiently in my opinion by the 6th Defendant in the documents produced before court by the land registrar DW2. The 5th Defendant was able to prove that the purchase price was paid to the 1st and 2nd Defendants an agreement for purchase of the suit property by the 3rd and 4th Defendants entered into. The Plaintiff did not tender any evidence to show that indeed the 3rd and 4th Defendants had any notice of an illegality or fraud and neither was there evidence of the 5th Defendants involvement in the alleged fraud leading to the lending of the Kshs 18,000,000/-. To me the property was duly charged.
61. Based on the foregoing and having made a finding that the Plaintiffs did not prove they were lawfully registered as proprietors of the suit property and having failed to prove fraud on the part of the Defendants, it follows that they have no legal interest to impeach the titles herein.
62. The upshot is that the Plaintiff has failed to prove its case to the required standard for grant of the orders sought. The suit is hereby dismissed with costs to the 5th and 6th Defendants.

It is so ordered.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 9TH DAY OF APRIL 2024.

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A.E DENA

JUDGE

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

Ms. Ngumbao holding brief for Mr. Keburu for the Plaintiffs

No Appearance for 1st and 2nd Defendant

No Appearance for the 3rd and 4th Defendants

No appearance for the 5th Defendant



Waga holding brief for Mr. Makuto for the 6th Defendant
Mr. Daniel Disii - Court Assistant.

