



Shah (Suing as the Administrator Ad-Litem of the Estate of Rajnikant Nathoobhai Shah) v Nthuli & 4 others (Environment & Land Case 1196 of 2004) [2024] KEELC 1773 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 1773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1196 OF 2004
CA OCHIENG, J
APRIL 11, 2024**

BETWEEN

ARVINLAL NATHOO SHAH (SUING AS THE ADMINISTRATOR AD-LITEM OF THE ESTATE OF RAJNIKANT NATHOOBHAI SHAH) PLAINTIFF

AND

**EDWARD NTHULI 1ST DEFENDANT
PAUL GITHAIGA NG'ANG'A 2ND DEFENDANT
RAMJI MANJI SHAMJI 3RD DEFENDANT
COMMISSIONER OF LANDS 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT**

JUDGMENT

1. By a Plaint dated the 5th November, 2004 the Plaintiff prays for judgment against the Defendants jointly and severally for: -
 - a. A declaration that the purported grant of the suit property by the Commissioner of Lands was fraudulent and unlawful.
 - b. A declaration that the purported transfer of the suit premises by the 1st Defendant to the 2nd Defendant and subsequently to the 3rd Defendant was fraudulent and unlawful.
 - c. An order directed to the Registrar of Titles that Grant No. I.R. 87551 issued to the 1st Defendant and the transfers made thereunder be cancelled.
 - d. A mandatory injunction against the 3rd Respondent by himself, his servants and/or anyone whomsoever, claiming under or through him, ordering him to vacate and remove all his



property or his equipment brought thereon by himself or by his consent from the plot particularly known as L.R No. 209/4537 within 14 days from the date of the order.

- e. A mandatory injunction against the 3rd Defendant by himself, his servants and/or anyone whomsoever, claiming under or through him, ordering him to demolish all the buildings and structures erected on plot particularly known as L.R. No. 209/4537 within 14 days from the date of the order.
 - f. A permanent injunction restraining the 3rd Defendant by himself, his servants or agents from entering, excavating, digging, building, wasting or in any other manner howsoever interfering with all that piece of land known as L.R No. 209/4537.
 - g. General damages for trespass and waste.
 - h. Costs.
 - i. Any other or further relief that this Honourable Court may deem fit to grant.
2. The 1st Defendant filed his Defence where he denied the averments in the Plaintiff except the descriptive. He denied being owner of the suit land nor transferring it to the 3rd Defendant and insisted that the said transaction was done fraudulently in his name.
 3. The 2nd and 3rd Defendants in their Defence provided the historical background of the suit land, and insisted that the 3rd Defendant was the owner of the said land and had developed it. They denied the averments on the Plaintiff including the allegations of fraud.
 4. The matter proceeded for hearing where the Plaintiff called two witnesses while the Defendants' had one witness.

Evidence of the Plaintiff

5. PW1 Rajni Kant Nathoo testified that he was given a Letter of Allotment for the suit land which he produced as an exhibit. He explained that when he got his Letter of Allotment he paid the requisite fees mentioned on the said allotment letter and produced a receipt dated the 9th September, 1992 to that effect. It was his testimony that he was issued with a Grant on 6th December, 1983 for LR. No. 209/4537 hereafter referred to as the "suit land", and had a Deed Plan dated the 6th September, 1983 which he produced as exhibits. He further testified that he had been paying rates and land rents and produced a bunch of receipts to that effect. He contended that when he was allocated the suit land, he presented a Plan to the Nairobi City Council who approved it, and produced the Plan as an exhibit. Further, that he had a Certificate of Rent Clearance which he also produced as an exhibit.
6. During cross examination he confirmed that, his Letter of Allotment, was issued in the name Rajnikant Nathoo. He clarified that in the Letter from the Registration of Persons, it indicates Rajni Kant Nathoo, which is not in that data base. He contended that even before he came to court, he knew the 3rd Defendant had a title to the suit land. Further, that they had been summoned to the Lands Office to produce their respective titles and they went to the office of one Ngatia Wambugu, who was the then Chief Land Registrar but he carried a photocopy of his title deed instead, as he was scared something could happen to the original one. He was emphatic that he was issued with a title in 1983 in his name and the same was registered in the Land Registry. He insisted that one property could not have two Deed Plans. He further explained that even though he was supposed to build within twenty-four (24) months, he did not do so since the County Council had put a condition that the sewer which was passing underneath the suit plot had to be diverted. Further, he was unable to build since his money was held in Trust Bank which had been put under receivership. He was aware that the 3rd Defendant



diverted the sewer line so as to build on the suit land. He averred that when the building was being constructed, he was away in London, where he had been residing for four months in 2004. Further, upon his return, he approached the 3rd Defendant and showed him his Title Deed and Deed Plan. He was not aware if his Title Deed was cancelled and did not know if the 2nd and 3rd Defendants had a title deed. He was emphatic that he was initially given an allotment letter for the suit land and paid for the issuance of a title deed. He denied trying to extort money from the 3rd Defendant but insisted that he only wanted his land as he held a genuine title. He argued that the 3rd Defendant's Grant had a copy of the Deed Plan No. 116658 copied from his. He insisted that one cannot have the same Deed plan for two titles. He stated that he had not substituted the Commissioner of Lands, yet he sought cancellation of the 3rd Defendant's title.

7. On further cross examination, he confirmed he had sued Edward Nthuli because Linah Cheronu had an allotment letter and she sold property to him. He explained that he came to know Edward Nthuli when in court, and was not aware if he had been issued with a title deed. He referred to Edward Nthuli's Defence where he denied owning a property in Nairobi nor applying for land.
8. In re-examination, he clarified that the Deed Plan on the 3rd Defendant's title was copied from his Deed Plan No. 116658. He was emphatic that his title was issued in 1983 while the 3rd Defendant's title was issued in 2001. He explained that he submitted building plans to the Nairobi City Council which were approved but at the same time he was informed that there was a sewer passing through the land which had to be diverted. Further, that the Nairobi City Council did not divert the Sewer yet he had been waiting for them to do so. He denied allowing the 3rd Defendant to build a house on the suit land and when he approached him, they failed to resolve the dispute. He confirmed that the Commissioner of Lands never took his title nor was he informed of any process to take the land back from him. He contended that his title deed was not cancelled and is still genuine. He reiterated that the 3rd Defendant did not acquire a title genuinely because Linah Cheronu applied for a Letter of Allotment which was issued to her, and she then sold land to Edward Nthuli who has denied owning the suit land nor having an interest in it.
9. Pw2 Arvinalal Nathoo Shah adopted his witness statement dated the 16th October, 2018 as his evidence in chief. He explained that the 3rd Defendant had trespassed on their land in October 2014. Further, that they sought to resolve the matter amicably. He testified that Manji showed him his title which had a copy of their Deed Plan. He claimed Manji told him, it is his lawyer Gichuki who sold the suit land to him. He requested him to stop construction. He denied that they ever sold the suit land to anybody. During cross examination, he stated that the suit land 209/4537 was allocated to his brother. He explained that the land was fenced with barbed wire at the front because the other side had a wall. Further, that they had applied to Nairobi City Council to develop it but there was a challenge as there was a sewer line. He confirmed the plans submitted to Nairobi City Council were approved for development. It was his testimony that the 3rd Defendant trespassed on the suit land in 2002 while the instant suit was filed in 2004. He contended that the 3rd Defendant took almost 9 months to one year to develop the suit land. Further, that the suit land was developed in 2004 but not completed. He testified that they went to the Land's office together with the 3rd Defendant's Advocate but did not meet Ngatia Wambugu at Land's office. Further, that they did not bring the original title to the Land's office. He averred that the Court issued an order on 5th November, 2004 but they did not serve it upon the Land Registrar. Further, they had not received a letter from Land Registrar to come with their title. He reiterated that they paid Kshs. 14,050 to the government when getting an allotment over suit land and had been paying land rent and rates.



10. In re-examination, he clarified that they did not develop the suit land because a sewer was passing through the middle of the plot. Further, the Nairobi City Council while giving approval of the plan told them, they would not be able to build until the sewer was diverted. He did not know if someone had occupied the suit land. He was categorical that in 2004 the land was not fully developed. He insisted that they had the original title deed and a title could not have two Deed Plans.

Evidence of the Defendants

11. DW1 Harish Ramji Patel explained that they used to live on 4th Parklands Avenue behind the suit land since 1991. It was his testimony that there was no activity on the suit land but a fence was put up much later. He explained that he learnt that the suit land belonged to the 2nd Defendant through his lawyer Gichuki King'ara. He testified that before purchasing the suit land, they undertook an official search which confirmed the title was clear. He confirmed that he has the original title and obtained all relevant documents and property was transferred to his father's name. Further, that upon transfer, they applied to direct the sewer line and took possession of the said land. Further, they paid relevant fees to the authorities and started developing it. He was categorical that they obtained all relevant approvals from Nairobi City Council, relocated the sewer at their own cost of Kshs. 1.5 million. He averred that from 2002 to 2003 no one laid a claim on the suit land. He claimed that they started construction in the end of 2002 or beginning of 2003 which continued upto November, 2004. Further, during construction, they put up two masonnettes, a pool, gym and perimeter wall. He contended that once they obtained approvals they first built the perimeter walls. He reiterated that the plot was vacant and they are the ones who got the beacon certificate. Further, after construction, they obtained an occupation certificate. He reaffirmed that on 4th November, 2004, after completion, they took occupation of the suit land before this suit was filed. He only came to learn of the interest of the Plaintiff during house warming ceremony when PW2 informed him that the plot belonged to them and they had the original title. He further explained that he suggested to PW2 that they take their titles to the Land's office for verification but he informed him that there was no big issue as they could settle the matter. Further, they proceeded to Ardhi House, together with PW2 and Mr. Kingara and met an officer who checked their documents and confirmed that everything was in order but the Plaintiff only had a copy of his title deed. He was emphatic that the registered owners as at 13th November, 2018 is Bharat Ramji Manji and Harish Ramji. He produced various documents as exhibits.
12. During cross examination he stated that he is a son to the 3rd Defendant. Further, that he is a businessman running the family business which had been ongoing for many years. He explained that the decision to purchase the suit land and registered in their father's name, was a joint decision. It was his testimony that they purchased the suit land from the 2nd Defendant. He contended that the funds used to develop and maintain the suit land was from the family business. To demonstrate the process of purchase of suit land including payment of stamp duty, DW1 produced a Rates Clearance Certificate, Rates Statement and Certificate of stamp duty. He also made reference to and produced a letter dated the 20th November, 2001 addressed to Linah Chepkorir which was written by P.N. Mutwiwa for Commissioner of Lands. He confirmed that they were not buying suit land from Linah Chepkorir. He did not know if the Sale Agreement was signed between his father and the 2nd Defendant. He further testified that they used Mr. King'ara to facilitate the transaction between the 2nd Defendant and their father. Further, they paid Kshs. 700,000 to the lawyer as purchase price for the land through a cheque and legal fees of Kshs. 100,000, but could not recall the mode of payment. He did not have a copy of the transfer from 2nd Defendant to 3rd Defendant who is their father and could not recall the amount of stamp duty paid as he did not have the stamp duty receipt but had the title as proof of transaction between them. He contended that there was an entry No. 2 on his title, to the 2nd Defendant, while 3rd



entry is to 3rd Defendant. Further, that the Land Registrar had signed both entries. It was his further testimony that the Transfer to the 2nd Defendant was for Kshs. 700,000 while to 3rd Defendant was for Kshs. 800,000. When referred to the copy of their title, he explained that they were different. He stated that there was a transfer from 1st Defendant to the 2nd Defendant, which was signed by Edward Nthuli; Paul Githaiga Ng'ang'a, Catherine Kungu and Sammy Mwaita. Further, that there was a Letter of Allotment over the suit land given to Linah Chepkorir but he saw a disclaimer on page 2 of the said Letter of Allotment to Linah Chepkorir. He was emphatic that together with his brother Bharat, they were the owners of the suit land which their father transferred to them.

13. During re-examination, he claimed he paid Kshs. 2.8 million stamp duty, but was not aware why figures were not stated in the original title but only on the official search. He insisted that he held a genuine title to the suit land.

Submissions

Plaintiff's Submissions

14. The Plaintiff in his submissions provided a background of the dispute herein and relied on his testimony as well as exhibits produced. He argued that on a balance of probabilities, he had proved that he is the legal registered proprietor of LR No. 209/4537 as it was supported by documents. Further, that he produced a Certificate of Grant dated the 6th December, 1983. He further submitted that the Chief Land Registrar and the 4th Defendant (Commissioner of Lands) vide their reports dated the 10th March, 2016 and 18th April, 2005 asserted his proprietary allotment and Grant issued to him and impeached as forgeries the documents relied on, by the Defendants. He further submitted that the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title. Further, he insisted that it is not enough for the 3rd Defendant to dangle the supposed Grant IR 87551 over the suit land. He averred that he has demonstrated the root of his title. He reiterated that the 3rd Defendant's root of purported title is fraudulent and deprived of any legal entitlement or protection in law. It was his submission that, it is on record that the 1st Defendant disputed the authenticity of all the supposed proprietorship documents which the 2nd and 3rd Defendants anchored their joint Defence on, as additionally stated in his Notice of Non Admission of Documents dated 23rd July, 2010 filed herein. He insisted that the doctrine of indefeasibility of title is not unlimited as the same is qualified in the event of occurrence of the circumstances espoused in section 26 (1) (a) and (b) of the *Land Registration Act*. He averred that since he had established ownership, trespass was actionable per se. To support his averments he relied on section 26(1) of the *Land Registration Act* as well as very many decisions including: *Angela Taiyana Wanjugu v Francis Kimani Ngugi* (2020) eKLR; *EWM (suing in his capacity as the Guardian Ad Litem & Next Friend to EWM) v County Government of Laikipia* (2019) eKLR; *Munyu Maina v Hiram Gathiha Maina* (2013) eKLR; *Wainaina v Kiguru & Another* (Environment & Land Case E 023 of 2021) (2022) KEELC 3261 (KLR) (28 July 2022) (Judgement); *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 Others* (2016) eKLR; *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* (2015) eKLR; *Bandi v Dzomo & 76 Others* (Civil Appeal 16 of 2020) (2022) KECA 584 (KLR) (24 June 2022) (Judgement); *Henry Muthee Kathurima v Commissioner of Lands & Another* (2015) KLR; *Peter Njoroge Nganga v Statutory Manager for United Assurance Company Limited & Another* (2020) eKLR; *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another* (2013) eKLR; *M'Ikiara M'Mukanya & Another v Gilbert Kabere M'Mbijiwe* (1983) eKLR and *Eunice Nkirote Ringera v Kenya Power & Lighting Company* (2020) eKLR.



Defendants' Submissions

15. The 2nd and 3rd Defendants in their submissions highlighted the background of the dispute herein and relied on the evidence which their witness tendered including the exhibits produced. They submitted that there was a riddle on the Plaintiff's name hence the government could not allot land to a person not on its data base or using a different name from that contained in the identification documents. They contended that the Plaintiff produced an unauthenticated Letter of Allotment and a copy of the Certificate of Grant which was denounced by the government. Further, that no official search was produced. They insisted that they produced documents including official searches confirming that their title was authentic. They further submitted that the Plaintiff had not complied with conditions set out in the Letter of Allotment and Grant. They contended that the Plaintiff's suit is defeated by dint of sections 26, 53 and 80 of the [Land Registration Act](#) as he did not submit building plans within six months and complete construction of the same within 24 months, failure of which the Grant would cease. They reiterated that the conditions set in the Letter of Allotment and Grant were time bound and the Grant terminated automatically by effluxion of time. They reaffirmed that their claim over the suit land is protected since they are in possession of the said suit land and developed it. They argued that the Plaintiff does not contain any reasonable cause of action and the Plaintiff's claim lies only in damages and refund for monies spent. They contended that noncompliance by the Plaintiff to the mandatory provisions of section 12 and 13A of the [Government Proceedings Act](#) is fatal to the suit. Further, that there was re amendment of Plaintiff without leave of Court. They further submitted that the suit/claim against the Defendant has been extinguished by the operation of law and overtaken by events since the office of Commissioner of Lands is defunct as now it is the office of the Chief Land Registrar. Further, that the office sued as the 4th Defendant is non-existent and remedies sought against the office jointly with the 2nd and 3rd Defendants are overtaken by events. They reaffirmed that a judgement cannot be entered against a non-existent entity. To support their averments, they relied on many decisions including: *Joseph Mutua Zakayo v County Government of Makeni & 9 Others* (2020) eKLR; *Joseph Arap Ng'ok v Justice Moijo Ole Keiwua* (1997) eKLR; *Joyce Kilonzo v Attorney General & 3 Others* (2022) eKLR; *Paul Victone Otieno v George Asuke & 2 Others* (2022) eKLR; *Bubaki Investment Co. Ltd v National Land Commission & 2 Others* (2015) eKLR; *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* (2015) eKLR; *Mwangi Stephen Muriithi v City Council of Nairobi* (2015) eKLR; *Martha Wambui v Joseph Kangogo & Another* (2021) eKLR; *Wilfred Dickson Katibi v Barclays Bank of Kenya & 2 Others* (2006) eKLR and *George Kamau Kimani & Others v County Government of Trans Nzoia* (2014) eKLR.

Analysis and Determination

16. Upon consideration of the Pleadings herein, testimonies of the witnesses, exhibits and submissions, the following are the issues for determination: Whether there is a riddle in the Plaintiff's name as claimed by the 2nd and 3rd Defendants. Whether this suit contravened the provisions of section 12 and 13A of the [Government Proceedings Act](#). Whether failure to replace the Commissioner of Lands with the Chief Land Registrar makes this suit defective. Who is the legal proprietor of the suit land? Whether the Plaintiff is entitled to orders as sought in the Plaintiff.
17. As to whether there is a riddle in the Plaintiff's name and if this suit contravened the provisions of section 12 and 13A of the [Government Proceedings Act](#). Further, whether failure to replace the Commissioner of Lands with the Chief Land Registrar makes this suit defective.
18. The 2nd and 3rd Defendants' have claimed that there is a riddle in the Plaintiff's name and this suit contravenes the provisions of section 12 and 13 A of the [Government Proceedings Act](#). Further, that



the Plaintiff's failure to replace the Commissioner of Lands with the Chief Land Registrar makes this suit defective. They contend that the Plaintiff produced various documents during the hearing, which bore different names to wit:- RAjni Kant Nathoo, Ranjni Kant Nathoo Shah, Rajni Kant Nathoo Bhai Shah And R N Shah. On perusal of the Court record, I note the 2nd and 3rd Defendant's had filed an application dated the 4th March, 2016 seeking to strike out the Plaintiff's suit on the ground that this suit contravened the provisions of the Government Proceedings Act, it is defective as the Commissioner of Lands had not been replaced with the Chief Land Registrar and there was a riddle in the Plaintiff's name hence he was a non-entity. Justice Obaga vide his Ruling dated the 20th September, 2018 dismissed the said application and stated that since the Attorney General had entered appearance and filed a Defence, the suit did not contravene the provisions of sections 12 and 13A of the Government Proceedings Act. Further, the Attorney General did not complain that the suit contravened the aforementioned provisions. On the dispute relating to the Plaintiff's names, the Judge found that the Plaintiff's explanation satisfactory on the different names as used and confirmed that he was indeed an existent person. On Suing the Commissioner of Lands instead of the Chief Land Registrar, the Judge found that the same was well taken care of in the transitional provisions of the Land Registration Act and could not be used to defeat the Plaintiff's suit. Since the 2nd and 3rd Defendants' never filed an Appeal against this Ruling, I opine that these findings are still valid as I cannot sit on Appeal on the said issues which have been raised once again but will decline to make a further finding on them.

As to who is the legal proprietor of the suit land?

19. Both the Plaintiff and the 3rd Defendant claim ownership of the suit land and produced their respective titles to that effect. The Plaintiff as PW1 testified that he had been issued with a Letter of Allotment dated the 6th July, 1982 over the suit land and later a Grant on 2nd November, 1983 after complying with the requirements set out in the said Letter of Allotment. He explained that he paid the requisite fees and produced a copy of the Letter of Allotment, the Grant, Deed Plan and receipts to that effect. He was categorical that he had been paying land rent and rates and produced various receipts to that effect. It was his testimony that in 1990 he applied for approval of his building plans from the Nairobi County Council which were approved on 19th September, 1990 but he was directed to move the sewer line that ran underneath the suit land, at his expense, before building. It was his further testimony that he was unable to build immediately due to lack of resources. PW2 confirmed they had fenced the suit land with barbed wire as one side had a wall. Further, that he informed the 3rd Defendant that the suit land belonged to them and requested him to stop construction but he declined. DW1 in his testimony explained that his father purchased the suit land from the 2nd Defendant and they paid the purchase price and stamp duty. Further, that they moved the sewer line and built on the suit land. He claimed the suit land had been undeveloped for a long time and the Plaintiff only approached them after they had constructed thereon in 2004 claiming ownership. He was categorical that they legally acquired the suit land which was initially registered in their father's name but it was later transferred to his brother and himself. He produced a Grant showing that the suit land was transferred to Ramji Manji Shamji on 11th July, 2002 from Paul Githaiga Nganga who had been registered as an owner on 28th May, 2002. DW1 insisted that they were hence bona fide purchasers of the suit land.
20. Which brings me to the question that if both parties are claiming the suit land and waving their respective titles, could one parcel have two titles, and if so, what is the root of each title.



21. As per a letter dated the 18th April, 2005 which was written to the Attorney General's Office by the Chief Land Registrar, he stated that:

‘The above parcel of land is in the name of RAJNI KANT NATHOO vide IR 38119/1. He was allocated the land on 6th July, 1982 vide letter of allotment. The Grant for the lease was prepared in 1983.

He is the original owner as per our records, which is self explanatory. However, another party RAMJI MANJI SHAMJI has claimed ownership of the same parcel of land vide a transfer from EDWARD NTHULI of box 15231 Nairobi, who in turn purportedly bought it from Linah Cheronu of P.O. Box 453 Nairobi. LINAH Cheronu claims to be an allottee vide letter of allotment dated 4th March, 1999, the said letter had a disclaimer to the effect that the government will not accept any liability in event of prior commitment of the land, which is the case in this matter.

22. In view of the foregoing, mr. rajni kant nathoo's title being the 1st allottee and first title holder is the rightful owner of the land.’

23. On sanctity of title, Sections 26 (1) (b) of the [Land Registration Act](#) stipulates that:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.” Emphasis mine

24. In the case of Arthi Highway Developers Limited V West End Butchery Limited & 6 others (2015) eKLR the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular.

25. On root of title, the Court of Appeal in the case of Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009, 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.” Emphasis Mine

26. Further, in the case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR, the Learned Judge held that:

‘It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt



scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum.....Having considered all arguments I frankly do not see how the title of the 1st respondent, the star fraudster, can be upheld, and having nothing to charge, I do not see how the charge in favour of the bank can be upheld. It was argued that a decision to cancel the charge would be injurious to the economy. But it is no less, and in fact, it may probably be more injurious, if I am to deny the applicant and the heirs of the estate of the deceased their rightful inheritance, which comprises of the suit property. The charge has to be cancelled and I am afraid that in this instance, the bank will have to pursue the 1st respondent personally to recover its money.”

27. Looking at the documents produced by both the Plaintiff and the 3rd Defendant, I note the Plaintiff has demonstrated the root of his title and confirmed he was allotted the suit land after which he paid the requisite fees and obtained the Grant including Deed Plan. There is no demonstration that the Plaintiff's title was ever cancelled by the Commissioner of Lands or Court. The 3rd Defendant produced a Certificate of Title (Grant) but has not demonstrated how the suit land was transferred from the Plaintiff through the 1st and 2nd Defendants to him. Further, the 1st Defendant denied in his Defence that he ever had any proprietary interest on the suit land.
28. Based on the evidence before me including the exhibits produced while associating myself with the decisions cited, I opine that section 26(2) of the *Land Registration Act* does not offer the 3rd Defendant protection over his title. Further, the 3rd Defendant cannot claim indefeasibility of title where the root is challenged. Insofar as I sympathize with his plight as they have constructed thereon, he did not produce any documents to demonstrate that the root of his title was unfettered since there was no transfer presented from 1st to 2nd Defendants. Further, the 2nd Defendant was never summoned to confirm if the Plaintiff's title was cancelled before Linah Cheronu was issued with a fresh Letter of Allotment, after which she obtained a new title which she transferred to Edward Nthuli. To my mind, the burden of proof was upon him to demonstrate how the Certificate of Title (Grant) which had been issued to the Plaintiff in 1983 was subsequently issued to him in 2002, yet the Plaintiff still held the original title including Deed Plan in his custody. Further, he never explained why he was using a copy of the Deed Plan from the Plaintiff's title. Insofar as he has claimed in his submissions that the Plaintiff never furnished a copy of the latest search, I note the letter from Chief Land Registrar dated the 18th April, 2005 confirmed that it is the Plaintiff who is the owner of the suit land. He has argued that the Plaintiff



failed to develop the land within the requisite period hence he took over the land, but however he has not furnished court with any correspondence from the Commissioner of Lands or Land Registrar cancelling the Plaintiff's title for failure to develop it. I note DW1 had admitted that they had lived near the suit land since 1991, and since the land was vacant, I wonder why they were in a hurry to build thereon, even though the Plaintiff had told him the land belonged to him, and requested him to stop construction. To my mind, it was incumbent upon him to demonstrate these processes which he has failed to do. It is interesting to note that the 1st Defendant in his Defence even denied ever owning the suit land. In the foregoing, I find that the 2nd Defendant did not have a good title to pass to the 3rd Defendant. In the circumstances, I find that the 3rd Defendant cannot be deemed as bona fide purchaser for value without notice.

29. As to whether the Plaintiff is entitled to the orders sought in the Plaint. The Plaintiff sought for various orders as enumerated above, since I have already held that the 3rd Defendant did not acquire a good title, I wish to refer to section 143 of the Registered Land Act (repealed) that was the law in place at the time of registration of 1st Defendant's title which stipulated thus:
1. Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
 2. The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.'
30. These provisions are replicated in section 80 of the Land Registration Act which provides that:
- '(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'
31. Based on my findings above, I find that the Plaintiff is indeed entitled to the orders as sought in the Plaint and I will proceed to direct for rectification of the records to cancel the 3rd Defendant's title and reinstate the records in the Plaintiff's name.
32. As to who should bear the costs of the suit. Since costs generally follow the outcome and the Plaintiff having been the inconvenienced party herein, I find that he is entitled to the same but from only the 2nd and 3rd Defendants.
33. It is against the foregoing that I find that the Plaintiff has established his case on a balance of probability and will proceed to enter judgement in his favour and make the following final orders:
- a. A declaration be and is hereby issued that the purported grant of the suit property by the Commissioner of Lands was fraudulent and unlawful.



- b. A declaration be and is hereby issued that the purported transfer of the suit premises by the 1st Defendant to the 2nd Defendant and subsequently to the 3rd Defendant was fraudulent and unlawful.
- c. An order be and is hereby directed to the Chief Land Registrar that Grant No. I.R 87551 issued to the 1st Defendant and the subsequent transfers made thereunder be cancelled forthwith.
- d. A mandatory injunction be and is hereby issued directed at the 3rd Defendant by himself, his servants and/or anyone whomsoever, claiming under or through him, ordering him to demolish all the buildings and structures erected on plot particularly known as L.R. No. 209/4537 within 120 days from the date hereof.
- e. Costs of the suit is awarded to the Plaintiff to be borne by the 2nd and 3rd Defendants respectively.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 11TH DAY OF APRIL, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Gisemba for Plaintiff

Kingara for 2nd and 3rd Defendants

Court assistant – Simon

