



**Bundi v Ouma & 2 others (Environment & Land Case 158 of 2014)  
[2023] KEELC 16203 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16203 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 158 OF 2014**

**M SILA, J**

**MARCH 9, 2023**

**BETWEEN**

**BARUTHI BUNDI ..... PLAINTIFF**

**AND**

**DOMTILA OBALA OUMA ..... 1<sup>ST</sup> DEFENDANT**

**ALADIN INVESTMENT LTD ..... 2<sup>ND</sup> DEFENDANT**

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

*(Plaintiff purchasing the suit land in the year 1993 from a holder of a power of attorney donated by the registered proprietor; plaintiff obtaining transfer in his name and becoming registered proprietor; plaintiff asserting that he never sold the land but fled owing to tribal clashes of 1997 and when he returned in the year 2010 he found his title in name of the 2nd defendant; from the registration of the plaintiff, title transferred to the 1st defendant then to the 2nd defendant; 1st defendant claiming that she purchased the suit land directly from the person who was registered proprietor before the plaintiff acquired title and did not deal with the plaintiff; suit land subsequently sold to 2nd defendant; acquisition of title by the 1st defendant tainted with fraud since she could not obtain proper title without dealing with the plaintiff who was already registered proprietor; documents presented for registration by 1st defendant bearing plaintiff's name but 1st defendant herself acknowledging that she never dealt with the plaintiff and that plaintiff never signed the documents; 1st defendant could not have obtained a good title; whether 2nd defendant is an innocent purchaser for value and liable for protection; no executed sale agreement produced; no proof of any payment of purchase price; in those circumstances, it cannot be said that the 2nd defendant has proved to be a purchaser for value and his title is liable to be cancelled; judgment entered for the plaintiff; title to revert back to his name)*



## JUDGMENT

### a. Introduction And Pleadings

1. The Plaintiff commenced this suit through a plaint filed on 30 November, 2011. He pleaded that he is the sole proprietor of the land parcel Kwale/Funzi Island/12 (the suit land) which he stated was transferred to him on 24 May 1993. He averred that he resided on the suit land until the tribal clashes of 1997, which forced him to vacate the land for his own safety. He pleads that on 25 February 1997 and 16 January 1998, the suit land was fraudulently transferred, respectively in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. In this suit, he seeks the following orders (slightly paraphrased for brevity) :-
  - a. An order for cancellation of all and/or any subsequent titles issued to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  - b. A permanent injunction restraining the 2<sup>nd</sup> defendant either by itself, agents, employees, assigns, proxy and/or otherwise from wasting, transferring or in any way interfering or dealing with the suit land.
  - c. A declaration that the plaintiff is the bona fide registered owner of the suit land and an order directing the Land Registrar, Kwale to register the plaintiff as proprietor.
  - d. An order of eviction against the 2<sup>nd</sup> defendant from the suit land.
  - e. General damages for non-user of the suit property.
  - f. Costs of the suit and interest thereon.
2. The 1<sup>st</sup> defendant entered appearance and filed defence. In her defence she pleaded that she purchased the suit land directly from the proprietor, Hussein Abdalla Mgereza, after she had done a search in the Kwale Land Registry in 1997. She pleaded that she sold her interest to the 2<sup>nd</sup> defendant. She averred that she has no knowledge of the suit land belonging to the plaintiff and thought that the plaintiff ought to have sued Mr Mgereza. She asked that the plaintiff's suit be dismissed with costs.
3. The 2<sup>nd</sup> defendant also entered appearance and filed his defence. She denied that the plaintiff was the proprietor of the suit land. She pleaded that she acquired the property from the 1<sup>st</sup> defendant and that prior to 16 January 1998, the suit land belonged to the 1<sup>st</sup> defendant. The transfer was registered on 24 May 1998. She pleaded that any transfer to the plaintiff was null and void as the property could not have been transferred to the plaintiff by Mr Mgereza as he was not the proprietor of the suit property. She pleaded that if ever there was any such transfer from Mr Mgereza to the plaintiff, then the said transfer was never presented for registration and has no effect in favour of the plaintiff. She denied any fraud in the transfer of the property to herself. She pleaded that if the plaintiff was registered proprietor, his absence from the land for 12 years disentitles him from the land on account of adverse possession on her part.
4. The 3<sup>rd</sup> defendant filed defence denying all the averment made by the plaintiff and put him to strict proof. The 3<sup>rd</sup> defendant particularly denied being involved in any fraudulent transaction.



## b. Evidence Of The Parties

5. The plaintiff testified that he lives in Nairobi. He testified that he purchased the suit land from Hussein Abdalla Mgereza for the sum of Kshs 300,000/=. He paid the money and obtained the requisite Land Control Board (LCB) consent to transfer. He produced the LCB consent dated 9 March 1993. He then got title on 24 May 1993. He left the area in 1997 owing to tribal clashes. He came back in the year 2010 only to learn that the land had been transferred to the 1<sup>st</sup> and later the 2<sup>nd</sup> defendants. It also had a charge. He stated that he did not sell the land to them and they could not have followed the legal process to obtain title. Cross-examined by counsel for the 1<sup>st</sup> defendant, he stated that he came to know that the land was being sold from one Mohamed Kassim (also known as Mohamed Kassim Shikeli). Mr Shikeli held a power of attorney from the registered owner of the land who was Mr Mgereza. They entered into an oral agreement with Mr Shikeli and they drew a transfer form which was witnessed by their advocate. He never met the registered owner of the land. He did not do a search as Mr Shikeli had the title document. He stated that he took possession. The land was bushy. He lived on it until 1997 when he left and since then he has not been to the land. In 2010, he did another search which indicated the proprietorship of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Cross-examined by counsel for the 2<sup>nd</sup> defendant, he did not have proof of payment of the purchase price of Kshs 300,000/=. To him, what was key was to appear before the LCB which he did together with Mr Shikeli. He did not obtain a copy of the power of attorney donated to Mr Shikeli.
6. The 1<sup>st</sup> defendant testified that she lives in the United States of America (USA). She was previously working for Kenya Ports Authority (KPA). While working at KPA, she was informed that the suit land was on sale. She met the owner, Hussein Mgereza, who showed her the original title deed. She was introduced to him by one Juma Mchambi. Mr Mchambi did a search which showed Mr Mgereza as the owner. She also visited the land which was overgrown. She agreed to buy the land at Kshs 700,000/=. It was in May 1997. They made a written agreement in a note book which she stated she has misplaced. The title was subsequently registered in her name. In September 1997, she took a loan with Kenya Commercial Bank (KCB) to buy a matatu which did not do well. She then engaged Southern Valuers to sell the land on her behalf. She sold it to the 2<sup>nd</sup> defendant in 1998 through Southern Valuers and executed the transfer. The title was discharged on 12 September 1997. She stated that she had never heard of the plaintiff. Cross-examined by counsel for the plaintiff, she acknowledged that she had not produced the sale agreement between herself and Mr Mgereza. She did not have the search done before she purchased the property. She did not have the LCB consent done before the sale. She had never seen the plaintiff registered as proprietor before she bought the land. She did not know about the power of attorney on the title. Cross-examined by counsel for the 2<sup>nd</sup> defendant, she stated that she sold the land to the 2<sup>nd</sup> defendant for Kshs 2.9 million. She does not know Mr Shikeli. She testified that she got the original title deed from Mr Mgereza which she presented at the land's office for transfer into her name.
7. DW-2 was Hussein Abdala Mgereza (Mr Mgereza). He described himself as a fisherman living in Funzi Island. He testified that he was the original owner of the suit land and that he sold it to the 1<sup>st</sup> defendant for Kshs 700,000/=. He could not however recall the year that he sold the land. He gave her the title documents and she got registered as proprietor. He was introduced to the 1<sup>st</sup> defendant by his uncle, one Mchambi. He testified that he does not know the plaintiff and he never sold the suit land to him. He never received any money from him. He denied giving any power of attorney to Mr Shikeli. He knew Mohamed Shikeli whom he described as a land grabber.
8. DW-3 was Mchambi Juma. He stated that Mr Mgereza is his uncle and he was aware that he owned the suit land. Mr Mgereza asked him to shop for a buyer and he introduced the 1<sup>st</sup> defendant to him. He was not informed about any power of attorney and he described Mr Mgereza to be one who was



in good health. He did a search which confirmed Mr Mgereza to be the owner of the land. He knew Mr Shikeli whom he stated also lived in Funzi Island but is now deceased.

9. With the above evidence, the 1<sup>st</sup> defendant closed her case.
10. The 2<sup>nd</sup> defendant called one Faruk Aladin as her witness. He relied on a witness statement wherein he stated that he is a director of the 2<sup>nd</sup> defendant. He stated that through a sale agreement, the 2<sup>nd</sup> defendant purchased the suit land for Kshs 2,900,000/=. Prior to the sale, an application for LCB consent was made and consent issued on 11 November 1997. A transfer was then registered on 16 January 1998 and they were issued with a title deed. He asserted that transfer was done in accordance with the registration procedures and not fraudulently. He stated that the land was registered in name of the 1<sup>st</sup> defendant at the time of purchase. In court, he added that he met the 1<sup>st</sup> defendant through an estate agent. They did due diligence by obtaining a search and consent from KCB before having the property transferred to the company. He stated that the plaintiff's name was not in the records of the lands office and he does not know him. He asserted that the property belongs to the company. Cross-examined by counsel for the 1<sup>st</sup> defendant, he testified that the land was vacant when they purchased it. They did a search which did not reveal any caveat against the title. He never dealt with any Land Registrar in Kwale. Cross-examined by Mr Maundu for the plaintiff, he testified that the agreement he has produced is undated. He was pointed to the clause indicating payment of purchase price and he agreed that it does not mention whether the purchase price was paid. The copy of agreement he produced was neither signed nor sealed. He did not see the 1<sup>st</sup> defendant sign the transfer as she signed it before her advocate. They did a search which they gave their advocate. Re-examined, he added that the original sale agreement was left with his advocate who has since retired and it has been difficult to get it. The search was also with his then advocate who he stated may have destroyed his files. With that, the 2<sup>nd</sup> defendant closed her case.
11. The 3<sup>rd</sup> defendant called Dick James Safari, the Land Registrar, Kwale. His evidence was that the land was originally owned by Mr Mgereza. A transfer was effected to Dr. Baruthi Bundi (plaintiff) on 24 May 1993. Thereafter, transfer was effected to Domtila Obala Ouma (1<sup>st</sup> defendant) on 16 January 1998, and subsequently to Aladin Investment Limited (2<sup>nd</sup> defendant). From his records, it is the plaintiff who transferred the property to the 1<sup>st</sup> defendant. He had the transfer documents from Dr. Baruthi to Ms. Domtila registered on 25 February 1997. The title deed of the plaintiff was presented and cancelled on transfer to the 1<sup>st</sup> defendant. He produced all the documents in the parcel file. According to him, the property was transferred to the plaintiff by a holder of a power of attorney donated by Mr Mgereza. The plaintiff then transferred the property to the 1<sup>st</sup> defendant who subsequently charged it. He did not have any transfer instrument directly from Mr Mgereza to the 1<sup>st</sup> defendant.
12. Pursuant to his evidence, there followed an application by counsel for the 1<sup>st</sup> defendant to recall the 1<sup>st</sup> defendant. I allowed the application and opened the case to all parties to recall any of their witnesses. Both plaintiff and 1<sup>st</sup> defendant took up the opportunity and testified again, and the 1<sup>st</sup> defendant recalled Mr Mgereza. The plaintiff seized the moment to reiterate that he purchased the land from Mr Shikeli who had a power of attorney and that it was Mr Shikeli who executed the transfer forms on behalf of Mr Mgereza. On transfer to the 1<sup>st</sup> defendant, he denied applying for consent to transfer and also denied appearing before the LCB. On the transfer instrument, from himself to the 1<sup>st</sup> defendant, he described it as fake and denied having signed it. He denied appearing before the advocate named therein, Mr Nyamboye. He denied selling the land to the 1<sup>st</sup> defendant or dealing with her. He elaborated that, on his transaction, he dealt only with Mr Shikeli who held a power of attorney from Mr Mgereza.



13. Upon his recall, Mr Mgereza reiterated that he does not know the plaintiff and never dealt with him. He testified that he never gave a power of attorney to Mr Shikeli though he was an acquaintance. He denied signing the power of attorney dated 17 February 1993 nor placing a thumbprint on it. He denied appearing before advocate Metho for attestation of the power of attorney. He insisted that he handed the 1<sup>st</sup> defendant his title deed and was not aware of any change of names in the register when he sold the land to the 1<sup>st</sup> defendant. Cross-examined, he stated that he transacted with the 1<sup>st</sup> defendant in her house. They did not execute any agreement or any other document. They did not go before any advocate. All he did was give her the title deed.
14. During her recall, the 1<sup>st</sup> defendant testified virtually as she lives in the USA. She affirmed seeing the documents produced by the Land Registrar. She reiterated that she purchased the land directly from Mr Mgereza. She saw the title deed which had been kept securely by Mr Mgereza. Her agents presented her with documents for LCB consent and transfer which she signed. Mr Mgereza placed a thumbprint as he did not know how to sign. She gave the documents to brokers who dealt with the paper work after she had signed her part. The brokers were Juma Mchambi and one Daudi both of whom she said were deceased. They went with the documents and she would not know how they proceeded with the transaction. She got her title deed in March 1997 which was brought to her by Mchambi and Daudi. She stated that she cannot explain the mystery of the transfer from the plaintiff to herself. She did not appear before the LCB nor before Advocate Mburu Nyamboye. She asserted that she legally bought the land and sold it to the 2<sup>nd</sup> defendant. She disowned the transfer instruments produced by the Land Registrar though she did not disown her title.
15. With the above evidence, the hearing of the matter closed. I invited counsel to file written submissions which they did and I have taken these into consideration before arriving at my decision

### **c. Analysis and Disposition**

16. I will start by briefly reviewing the positions of the parties herein. The plaintiff's stand is that he is the rightful proprietor of the suit land having purchased it from Mr Shikeli who held a power of attorney donated by the then registered owner of the land, Mr Mgereza. He avers that he obtained registration in the year 1993 and that he took possession until 1997 when he had to flee owing to tribal clashes. He came back in the year 2010 only to find that his title is now in the hands of the 2<sup>nd</sup> defendant. He wishes to have the title of the 2<sup>nd</sup> defendant cancelled and for the same to revert back to him. The case of the 1<sup>st</sup> defendant is that she purchased the suit land directly from Mr Mgereza who then transferred the land to her. She never knew or dealt with the plaintiff. She then charged the property and opted to sell it when she was unable to repay the loan. The case of the 2<sup>nd</sup> defendant is that she is an innocent purchaser for value and contends that her title ought not to be cancelled. The 3<sup>rd</sup> defendant's pleading is that she is unaware of any fraud.
17. Much of the facts reveal themselves from the documentary evidence presented by the Land Registrar. What is disputed, I believe, can also be resolved from an analysis of the documentary evidence and the entries in the register (green card).
18. It is common ground that the land was originally owned by Hussein Abdalla Mgereza. He became the first registered proprietor on 9 December 1988. His registration is entry No. 1 in the register. Entry No. 2, is issue of title deed to him on 27 December 1990. Entry No. 3 is registration of power of attorney No. 705 to Mohamed Bandal Mohamed. Entry No. 4 is registered on 16 February 1993 and is a revocation of the above power of attorney. Entry No. 5, dated 22 February 1993, is another registration of a power of attorney, No. 810, this time the donee being Mohamed Shikeli Kassim. The register has no entry revoking this power of attorney. Entry No. 6 is registration of the plaintiff as



proprietor, which entry was made on 24 May 1993. There is an entry No. 7 which is not dated, stating that title deed is issued. Entry No. 8, dated 25 February 1997, is registration of the 1<sup>st</sup> defendant as proprietor. Entry No. 9 is also dated 25 February 1997 and is issue of title deed to the 1<sup>st</sup> defendant. Entry No. 10, dated 16 January 1998, is registration of the 2<sup>nd</sup> defendant as proprietor, and entry No. 11 made on the same day, is issue of title deed to 2<sup>nd</sup> defendant. In the encumbrance section, there is a charge registered on 22 September 1997 in favour of KCB with the 1<sup>st</sup> defendant as chargor. There is discharge registered on 16 January 1998.

19. The first issue that is disputed is whether Mr Mgereza actually donated a power of attorney to Mr Shikeli, and if one was donated, whether it had been revoked when the land was sold to the plaintiff. In as much as Mr Mgereza denied donating a power of attorney to Mr Shikeli, the register indicates that he did donate the same. This, as I have pointed out is noted in entry No. 5 in the register. The instrument that registered the power of attorney to Mr Shikeli was produced by the Land Registrar. I have looked at it. The instrument is dated 17 February 1993 and is registered on 22 February 1993. There is a thumbprint impression on the part of the donor. The power of attorney is attested by M.A Metho Advocate and it shows that the donor was identified by one Hamisi Said holder of an ID card which is indicated. If it is the contention of Mr Mgereza that he never donated this power of attorney, he had all opportunity to present evidence to dispute the same. Since the instrument has a thumbprint impression, he, or the 1<sup>st</sup> defendant, could have had it examined by a forensic document examiner who would have compared the impression with his actual thumbprint. This was never done. In addition, the 1<sup>st</sup> defendant could have called M.A Metho Advocate, or any advocate familiar with his signature, if the contention is that the instrument was never attested by M.A Metho. I am afraid that Mr Mgereza's oral evidence does not override the documentary evidence provided. The Power of Attorney instrument speaks for itself and it demonstrates that Mr Mgereza donated a power of attorney to Mr Shikeli.
20. I have already mentioned that there is no instrument revoking this power of attorney. It was a general power of attorney allowing the donee to do anything and everything regarding the suit land and execute all instruments. Thus, this power of attorney empowered Mr Shikeli to sell the suit land and execute the transfer instruments. This is exactly what the plaintiff states happened, and this must be given considerable weight, for there is corroboration from the application for Land Control Board consent and the consent subsequently issued. The application for consent is dated 4 March 1993 and is signed by Mr Shikeli as holder of power of attorney No. 810. Consent to transfer was given on 9 March 1993. The application for consent, and the consent, have not been disputed nor claimed to have been fraudulently issued. Moreover, you would expect that if Mr Mgereza thought that a person has forged a power of attorney, then he would have reported this to the police but no such report was made. He does not appear to have been disturbed that a person purported to claim that he donated to him a power of attorney.
21. My finding is that Mr Mgereza did donate to Mr Shikeli a power of attorney, and pursuant to that, Mr Shikeli proceeded to sell the suit land to the plaintiff. The plaintiff properly obtained registration into his name based on the power of attorney. There was an issue raised that no money ever reached Mr Mgereza but that is neither here nor there. Whether or not Mr Mgereza received money from Mr Shikeli does not vitiate the sale of the land to the plaintiff. If at all this is what happened, that was an issue for Mr Mgereza to pursue with Mr Shikeli.
22. It follows from my above analysis that the plaintiff did get good title when he became registered as proprietor on 24 May 1993. It is not clear from the register whether he was actually issued with title deed, for entry No. 7, which relates to issue of title deed, is not dated. It is probable that he was never issued with the title deed otherwise the date of issue would have been indicated in the register in the same way that issue of title deeds in subsequent entries is noted.



23. The contention of the 1<sup>st</sup> defendant is that she purchased the land directly from Mr Mgereza and that at the time of purchase, Mr Mgereza showed her his original title deed. I do not believe this bit of evidence. I am persuaded that when transfer was effected to the plaintiff, Mr Mgereza's title was deposited in the Land Registry and duly cancelled. I am buttressed in that belief because the cancelled title in the parcel file has the three entries related to the power of attorney. It has entries 1 to 5 just as in the green card produced. If it is the case of Mr Mgereza, and the 1<sup>st</sup> defendant, that there was never an entry related to the power of attorney, then you would expect that Mr Mgereza's cancelled title in the parcel file not to have entries related to the power of attorney. But what is in the parcel file has these entries which means that they were the last entries before issue of title to the plaintiff. After the cancellation of the title of Mr Mgereza, the sole remaining title was that of the plaintiff.
24. In fact, the contention by the 1<sup>st</sup> defendant and Mr Mgereza that what was given to the 1<sup>st</sup> defendant was a title deed in name of Mr Mgereza, and that there was a transfer directly from Mr Mgereza to the 1<sup>st</sup> defendant, is not supported by any documentary evidence. The register shows that transfer to the 1<sup>st</sup> defendant was not effected from the title of Mr Mgereza but was effected from the title held by the plaintiff. The transfer instruments also support this position. The Land Control Board consent avers that consent to sell is given to Dr. Baruthi Bundi to sell to Domtila Obala Ouma. The transfer instrument dated 25 February 1997 bears the names of Dr. Baruthi Bundi as transferor and Domtila Obala Ouma as transferee. The title deed that is cancelled upon transfer is the title deed of Dr. Baruthi Bundi. There is absolutely no instrument registered indicating flow of title from Mr Mgereza to Domtila Obala Ouma. Domtila, cannot be heard to purport that she got title directly from Mr Mgereza. Where is a single document to demonstrate this position? There is none. All the documents, as I have indicated, aver that the movement of title to Domtila was from the plaintiff.
25. Interestingly however, Domtila herself acknowledges that she does not know the plaintiff and she never dealt with him. The plaintiff has also never dealt with Domtila. If Domtila never dealt with the plaintiff, then she cannot purport to have received title from the plaintiff. Any transaction purporting to be one between herself and the plaintiff is fraudulent and any document purporting to have been prepared in order to transfer title from Dr. Bundi to Domtila is a forgery. That is the only reasonable conclusion any person can come up with. In as much as Domtila attempted to distance herself from the documentation I am afraid that she cannot extricate herself from the same. To get title, she must have signed a transfer form. If she signed a transfer form that did not have the name of Dr. Bundi in it, then she could not get good title to the land as the land was under the proprietorship of Dr. Bundi. If she signed a transfer form with the name of Dr. Bundi, then she must have known that she needs to deal with Dr. Bundi and nobody else, yet she never transacted with him. She cannot say that she never saw the documents that transferred the land to her and never saw that they bore the name of Dr. Bundi.
26. There was no LCB consent bearing the name of Mr Mgereza giving Mr Mgereza consent to transfer title to her. The consent bore the name of Dr. Bundi. There was no transfer bearing the name of Mr Mgereza transferring title to the 1<sup>st</sup> defendant. The transfer bore the name of Dr. Bundi. If she had done a search, it would have indicated the name of Dr. Bundi as proprietor. The 1<sup>st</sup> defendant knew or ought to have known that she must deal with Dr. Bundi in order to get title. She never dealt with him and I am not persuaded as to her innocence.
27. Even assuming that the 1<sup>st</sup> defendant was innocent, if we are to believe her, she delegated the task of getting title in her name to agents that were answerable to her. Their mistakes of omission or commission are attached to her given the agency relationship. My own view is that she was party to the fraud that transferred the land from the name of Dr. Bundi to herself. I am emboldened in this finding by the rather quick manner in which Domtila disposed of the land soon after getting title. It will be



observed that she got title in her name on 25 February 1997. Within seven months, the title had been charged to KCB, which charge was registered on 22 September 1997. It is common knowledge that it takes some time before a bank approves a loan and agrees to charge a particular property. It means that immediately Domtila got title, she went looking for a bank to charge the property. She did testify that she got a loan to buy a matatu but she did not provide any letter of offer to demonstrate this. She also claimed that it is because the matatu business was not doing well that she decided to sell the land. I don't believe her. Let me get back to the date of registration of the charge which was 22 September 1997. Just about a month and a half later, on 10 November 1997, she lodged another application for consent, this time being consent to transfer the land to the 2<sup>nd</sup> defendant. Does it mean that even before she could pay the loan for two months, she had already decided that it was not worth it? That is quite unusual. Be that as it may, the transfer instrument to the 2<sup>nd</sup> defendant was executed on 3 December 1997, which is not even three months after the registration of the charge to KCB.

28. In this suit, the 2<sup>nd</sup> defendant alleges to be an innocent purchaser for value. I am not persuaded. In as much as it is claimed that the 2<sup>nd</sup> defendant purchased the suit land for the sum of Kshs 2,900,000/= no evidence of any payment of any money was given. The agreement that was produced does not show any date. It is not even executed. It doesn't indicate any payment of any deposit or any money paid towards the purchase price. All it provides are just the parties and a purchase price. Mr Farouk Alladin who testified for the 2<sup>nd</sup> defendant did not say much regarding the due diligence done. All he said was that they did a search which showed that the 1<sup>st</sup> defendant was registered proprietor. The search was not produced as an exhibit. He said that he came to know the 1<sup>st</sup> defendant through an estate agent. Mr Farouk did not give the name of the estate agent. Mr Farouk never provided in his statement, nor in his evidence in court, how the company managed to purchase the property since it was charged. Did he deal with the bank or did he just pay the 1<sup>st</sup> defendant for the 1<sup>st</sup> defendant to sort out her debt with the bank. This is important evidence for anyone wishing to demonstrate that he is an innocent purchaser for value and that the purchase is above board.
29. Whatever the case, I think that a discerning buyer would have noticed the rather unusual sale being undertaken by the 1<sup>st</sup> defendant. Here is a party who has just purchased a property and who has just charged it. Wouldn't one be alerted by this to proceed and inquire as to why the property was being disposed of so fast? There were red flags to the sale and the evidence of Mr Farouk does not help do demonstrate that he did what a diligent person is expected to do to clear these flags.
30. What reveals itself in this case is that the 1<sup>st</sup> defendant fraudulently obtained title in her name. I am aware that in her submissions, Ms. Ombat, learned counsel for the 1<sup>st</sup> defendant, submitted on the standard of proof on fraud and referred me to the case of *Kuria Kiarie & 2 Others vs Sammy Magera (2018) eKLR*. She thought that fraud had not been proved. I think the facts here are obvious that the 1<sup>st</sup> defendant acquired the land by fraud and my view is that fraud has been proved to the required standard. She never dealt with the plaintiff meaning that she could not have obtained transfer from the plaintiff to herself. That is proof enough of fraud.
31. The next question that arises is whether the 1<sup>st</sup> defendant could be able to transfer a good title to the 2<sup>nd</sup> defendant. Tied to that is whether the title of the 2<sup>nd</sup> defendant is impeachable.
32. In his submissions, Mr Maundu, learned counsel for the plaintiff, referred me to the provisions of Section 24, 25, 26, 27 and 28 of the [Land Registration Act, 2012](#), to argue that since title of the 1<sup>st</sup> defendant was fraudulent, it ought to be cancelled and so too the title of the 2<sup>nd</sup> defendant, as the 1<sup>st</sup> defendant had nothing to pass. Counsel also cited to me various authorities interpreting the [Land Registration Act](#) in this respect. Ms. Ombat also cited to me various authorities all interpreting the [Land Registration Act](#). Ms. Kerubo for the 2<sup>nd</sup> defendant cited the case of [Abdalla Nginyanga Juma vs](#)



*Zamal Noor Mohamed Yunis & 2 Others* (2016) eKLR and *Joseph Ngok vs Moiyo Ole Keiwua* (1997) eKLR which dealt with Section 23 of the *Registration of Titles Act*, Cap 281, (Repealed).

33. The transactions herein, and even this suit, were filed before the *Land Registration Act, 2012*, came into effect. The *Land Registration Act* therefore does not apply to this suit. Neither does the *Registration of Titles Act*, as the land was registered under the *Registered Land Act*, (Cap 300) (repealed). It is the Registered Land Act which is therefore the applicable law. The operative section in my view is Section 143 of the said *Act*, which provides as follows :-

143.

- (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.

34. From the above, it will be seen that under the Registered Land Act, a registration that was not a first registration, which was obtained, made or omitted by fraud or mistake, was subject to cancellation. If the proprietor was party to the said fraud or mistake, then his title would be liable to cancellation; however, where the title was in the hands of a party who did not commit the fraud or mistake, and if such proprietor was in possession and he acquired title through valuable consideration, his title was not subject to cancellation unless he had knowledge of the omission, fraud or mistake, or he caused, such omission, fraud or mistake or substantially contributed to it by his act, neglect, or default.
35. It can be argued that the 2<sup>nd</sup> defendant did not commit fraud or mistake in having title registered in her name. However, has the 2<sup>nd</sup> defendant demonstrated that she got the title for valuable consideration? Can we, to the required standard, conclude that she had no knowledge of the fraud of the 1<sup>st</sup> defendant and did not substantially contribute to her registration by her act, neglect or default? I had earlier stated that the 2<sup>nd</sup> defendant never provided any evidence that she paid any consideration for the suit land. In fact, she never produced any proof of any sale agreement. What was produced as an exhibit was neither signed nor sealed. Even if it was to pass as a sale agreement, the same does not indicate any money paid under the transaction. How can it then be claimed that the 2<sup>nd</sup> defendant has shown that she is a purchaser for valuable consideration? Can it be said that there is a purchase when there is no executed sale agreement and no proof of payment? I do not think so. Moreover, I have also discussed that there were red flags that any reasonable person ought to have cleared before proceeding with the transaction. The 2<sup>nd</sup> defendant has not exhibited any due diligence undertaken so that we can say that her registration was not due to her neglect or default. Not even a search was produced as evidence. No inquiries were made as to why the land was being sold so fast by the 1<sup>st</sup> defendant. No background check on the land was done. This is not the conduct of one that we can say is an innocent purchaser for value. I am persuaded to find that the 2<sup>nd</sup> defendant is not covered under the umbrella of protection provided in Section 143 of the Registered Land Act and her title is liable to cancellation.



36. In her defence, the 2<sup>nd</sup> defendant urged that the plaintiff's case is barred by limitation as 12 years had lapsed. There was also an insinuation that the 2<sup>nd</sup> defendant is entitled to the land through adverse possession. I am not persuaded by these pleadings. The case of the plaintiff is based on fraud. Section 26 of the *Limitation of Actions Act*, extends time in a cause based on fraud so that time starts running on discovery of the fraud. It provides as follows :-

26. Extension of limitation period in case of fraud or mistake

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

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

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

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

37. From the above, it will be seen that Section 26 of the *Limitation of Actions Act*, does give relief, from the running of time, to actions based on fraud. Time does not begin to run until such time that the plaintiff discovers the fraud or mistake, or could, through reasonable diligence, have discovered it. There is of course the proviso which protects an innocent proprietor in possession who acquired the land for valuable consideration unless he had knowledge of the fraud or caused the omission, fraud, or mistake or substantially contributed to it by his act, neglect or default. The plaintiff's action is based on fraud. He discovered the fraud in the year 2010 or thereabouts when he went to check on his title. Time thus started to run at this time. The 2<sup>nd</sup> defendant is not protected by the proviso as she has not demonstrated that she acquired the land for valuable consideration and has not shown that she did not contribute to her registration by neglect or default on her part. The action of the plaintiff is therefore not time



barred. Neither can the 2<sup>nd</sup> defendant try to claim the land by adverse possession as the title prior to the commencement of this suit was in her name. You cannot claim adverse possession against your own title. In adverse possession, there must be a title held in another person's name for which one would claim adverse title to.

38. From the foregoing, it will be seen that I am persuaded that the plaintiff's case must succeed. I proceed to declare the plaintiff as the rightful proprietor of the suit land. I proceed to issue an order cancelling the entries No. 8, 9, 10 and 11 of the register. The register should revert back to entry No. 6 showing the plaintiff as proprietor and I further issue an order that he be issued with a title deed in respect of entry No. 7 and the date of issue of the title deed be indicated once he is issued with one. Since I have declared that the plaintiff is the rightful proprietor, the 2<sup>nd</sup> defendant is hereby ordered to give vacant possession of the suit land to the plaintiff, and to do so within the next 14 days. If he does not do so, he be forcibly evicted from the land.
39. The plaintiff also sought an order for general damages for non-user of the land. He cannot get this, since he was not using the land prior to commencing the suit. He did mention that he had fled the area owing to tribal clashes so he was not using the land.
40. The last issue is costs. I award the plaintiff costs of the suit jointly and/or severally against the defendants.
41. Judgment accordingly.

**DATED AND DELIVERED THIS 9 DAY OF MARCH 2023**

**JUSTICE MUNYAO SILA**

**JUDGE,**

**ENVIRONMENT AND LAND COURT MOMBASA**

