



**Katana v Ormar & 5 others (Environment & Land Case
192 of 2017) [2023] KEELC 17293 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17293 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 192 OF 2017**

NA MATHEKA, J

MAY 9, 2023

BETWEEN

ALI KITSAO KATANA PLAINTIFF

AND

KASSIM MOHAMED ORMAR 1ST DEFENDANT

MUHSIN MOHAMED OMAR 2ND DEFENDANT

NOOR SAYER BAKAR NOOR 3RD DEFENDANT

JEYLAN MUNYE KOLATENI 4TH DEFENDANT

LAND REGISTRAR MOMBASA 5TH DEFENDANT

THE ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

1. The Plaintiff avers that he was and is the registered proprietor of Plot No. MN/ 1/13135 comprising 0.04 Ha delineated on Land Survey Plan No. 252464. The Plaintiff states that he purchased the suit property in 2005 from one Muhammed Abdala Muhammed. The Plaintiff avers that he has been and is employed in the Republic of South Africa and due to his long absences from the country left the Original Title documents in regard to the suit property with his cousin the 1st Defendant. Further, the Plaintiff avers that in 2013 he began development of a three (3) storey permanent structure on the suit property approved by the Mombasa County and supervised in his absence thereafter by the 1st Defendant. The Plaintiff avers that on or around 15th May 2017 he was alerted by his Caretaker on site that strangers had confronted him at the suit property asking him to vacate the suit property. The Plaintiff states that he had to travel from South Africa arriving on the 21st May, 2017 and after inquiries he got wind of two (2) illegal alleged transfers. First to the 2nd Defendant (a cousin of the 1st Defendant) registered on 3rd November 2016. Second to the 3rd and 4th Defendants (strangers)



registered on 15th February 2017. The Plaintiff avers that these transfers were illegal, unlawful and categorically states that he never signed any Sale Agreement and/or Transfer in regard to the suit property with regard to the Defendants herein.

2. The Plaintiff's claim is for a declaration that he is the rightful owner of Plot No. MN/ 1/13135, a permanent injunction against the 3rd and 4th Defendants and any persons acting in their stead from trespassing, dealing in or acting in any manner whatsoever with Plot No. MN/1/13135 that would prejudice the Plaintiff's rights in the same, an order against the 4th Defendant and its agents to rectify the Title in regard to Plot No. MN/ 1/13135 to reflect the Plaintiff as sole proprietor and costs of the suit. Without prejudice to the above, the Plaintiff also prays for compensation for the value of Plot No. MN/ 1/13135 and the developments thereat. The Plaintiff prays for the following orders;
 - a. A declaration that the Plaintiff is the rightful proprietor of Plot No. MN/1/13135
 - b. A permanent mandatory injunction be issued against the 3rd and 4th Defendants their agents, servants or any other person acting in their capacity from trespassing into, alienating, developing and/or dealing in any manner with Title to Plot No. MN/ 1/13135 as to prejudice the Plaintiff's claim.
 - c. A mandatory injunction be issued against the 4th Defendant their agents, servants to rectify the Register in regard to Plot No. MN/ 1/13135 and issue Title in the Plaintiff's name as sole proprietor.
 - d. In alternative to the above, compensation for the value of Plot No. MN/ 1/13135 and the developments thereat.
 - e. Costs of the suit.
3. The 2nd Defendant states that at the time of sale, he was a bonafide holder of title and passed on a genuine title. He had purchased the land from the Plaintiff having entered into a valid agreement on 13th November 2015 in Gautency Johannesburg and purchasing the land for 950,000.00 Rand, the equivalent of Kshs.6,550,000.00 by 2015 exchange Rate. The 2nd Defendant sold the land to the 3rd and 4th Defendant in February 2017 for Kshs.10,0000.00. The 2nd Defendant sold the house in good faith knowing he had a bonafide Title to convey without any Notice of claim from the Plaintiff. He stands his ground that he had a good title to pass on to any third party. The sale in Johannesburg was done before a Commissioner for oaths and in the presence of witnesses. The Plaintiff has not denied this sale specifically. That Plaintiff has not denied that Ali K.K. Nyuta is also his alias and neither has he denied the photographs and signature on the transfers as his. The allegations of fraud are alien to the 1st and 2nd Defendants. The injunctive orders sought do not in any way bind or affect the interests of the 2nd Defendant which were properly passed on in 2017 February. The 1st and 2nd Defendants pray for the Plaintiff's suit to be dismissed with costs.
4. The 3rd and 4th Defendants deny that the Plaintiff is the registered owner of plot Number MN/I/13135 as alleged or at all. That the 3rd and 4th Defendants purchased the suit property from the 2nd Defendant. Prior to purchasing the suit property, the 3rd and 4th Defendants through their advocates Messrs Hassan Abdi & Company Advocates conducted a search and established that the 2nd Defendant was the registered owner. That the 3rd and 4th Defendants purchased the suit property in good faith for value and without any knowledge of any illegality. That they took possession of the suit property and were only disposed after this Court gave restraining orders. The 3rd and 4th Defendants aver that they are the bonafide purchasers and owners of plot Number MN/I/13135. The 3rd and 4th Defendants aver that by virtue of their defence the Plaintiff is not entitled to the declaration sought and that if the Plaintiff



is entitled to any compensation then the same is not against the 3rd or 4th Defendants. The 3rd and 4th Defendants pray for the Plaintiff's suit to be dismissed with costs.

5. The 1st Defendant states that when the Plaintiff bought the Plot in 2005, the Plaintiff entrusted the him with providing the caretakers of the house. The Plaintiff was to pay the 1st Defendant Kshs. 10,000/= per month for him to disburse to the caretakers. The Plaintiff never sent even one instalment to date. That the Plaintiff also promised the 1st Defendant that he would pay him Kshs. 400,000/= upon completion of the house and sale. The Plaintiff never completed the house but sold the house to the 2nd Defendant in South Africa. That Plaintiff was here in 2013. The Plaintiff had given the 2nd Defendant the original title, Identity card copy and PIN. The Plaintiff informed the 1st Defendant he had sold the house to the 2nd Defendant, the 1st Defendant however has the original NEMA certificate which came out later. The Plaintiff gave the 1st Defendant a copy to the Development Plan as approved by the County of Mombasa.
6. This court has carefully considered the evidence and submissions therein. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, 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.”

Section 26 (1) of the [Land Registration Act](#) states as follows:

The Certificate of Title issued by the Registrar upon registration ... 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.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of [Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another](#) (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the [Land Registration Act](#) rendered himself as follows;

-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is not in dispute that the Plaintiff was the registered proprietor of Plot No. MN/ 1/13135 comprising 0.04 Ha delineated on Land Survey Plan No. 252464. The Plaintiff states that he purchased the suit property in 2005 from one Muhammed Abdala Muhammed. It is also not in dispute that two transfers



were effected on the suit property. One to the 2nd Defendant (a cousin of the 1st Defendant) registered on 3rd November 2016. Second to the 3rd and 4th Defendants registered on 15th February 2017. The Plaintiff testified that these transfers were illegal, unlawful and that he never signed any Sale Agreement and/or Transfer in regard to the suit property with regard to the Defendants herein. PW1 testified that he is employed in the Republic of South Africa and due to his long absences from the country left the Original Title documents in regard to the suit property with his cousin the 1st Defendant. That in 2013 he began development of a three (3) storey permanent structures on the suit property approved by the Mombasa County and supervised in his absence thereafter by the 1st Defendant. The Plaintiff avers that on or around 15th May 2017 he was alerted by his Caretaker on site that strangers had invaded his property.

DW1 the 2nd Defendant gave evidence that he had purchased the land from the Plaintiff having entered into a valid agreement on 13th November 2015 in Gauteng Johannesburg and purchasing the land for 950,000.00 Rand, the equivalent of Kshs.6,550,000.00 by 2015 exchange rate. The 2nd Defendant sold the land to the 3rd and 4th Defendant in February 2017 for Kshs.10,0000.00. The 2nd Defendant sold the house in good faith knowing he had a bonafide title to convey without any Notice of claim from the Plaintiff. DW2 lived in South Africa with the Plaintiff. 1st Defendant was DW1's cousin and left incharge of the property in Kenya. He corroborated DW1's evidence. PW1 maintains that since he is employed in the Republic of South Africa and due to his long absences from the country left the Original Title documents in regard to the suit property with his cousin the 1st Defendant but he denies that he never signed the transfer documents. I find this curious as the transfer documents have all his details including his passport photographs. He who alleges must prove, Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which provides 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.

7. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence as stated in *Isca Adhiambo Okayo v Kenya Women's Finance Trust* KSM CA Civil Appeal No. 19 of 2015 [2016] eKLR. That is captured in Sections 109 and 112 of the *Act* as follows;

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.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

8. In the case of *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* NYR CA Civil Appeal No. 342 of 2010 (2013)eKLR the court held as follows;

“We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof



was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

9. PW1 never called any witness to corroborate his evidence. He never called the caretaker nor a handwriting expert to disprove the signature. All the other details on the transfer form were his and he does not deny the same. I believe the 2nd Defendant’s evidence. The 3rd and 4th Defendants aver that they are the bonafide purchasers and owners of plot Number MN/I/13135 and produced all the relevant transfer documents.

10. The Court notes that a *bona fide* purchaser for value is able to acquire a good title even where the history of the title is checkered with fraud, as long as they were not cognizant of or a party to the fraud. See the case of *Eunice Grace Njambi Kamall and another v The Hon. Attorney General and 5 others* Civil Suit No. 976 of 2012 where the court cited the case of *Fletcher v Peck* 10 US 87 [1810] to illustrate how other jurisdictions have handled the issue of sanctity of title and the plight of innocent third parties. In the said *Fletcher v Peck* case (*supra*) stated that;

“If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.”

11. A bonafide purchaser for value has been described as follows in the case of *Lawrence Mukiri v Attorney General & 4 Others* [2013] eKLR where the court stated that;

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

12. A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

Section 80 of the *Land Registration Act* provides as follows;

80.

- (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.”

13. This section gives the court powers to order for rectification of a 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. Be that as it may, the 3rd and 4th Defendants state that through their advocates Messrs Hassan Abdi & Company Advocates Conducted a search and established that the 2nd Defendant was the registered owner. That the 3rd and 4th Defendants purchased the suit property in good faith for value and without any knowledge of any illegality. They produced the postal search and the transfer documents as DEx1 and DEx2. DW4 the Land Registrar confirmed the registered owners of the suit property were the 3rd and 4th Defendants and that the registration proper. From the evidence before me I find that both transfers, one to the 2nd Defendant (a cousin of the 1st Defendant) registered on 3rd November 2016 and two to the 3rd and 4th Defendants registered on 15th February 2017 were legal and lawful no evidence of fraud has been proved. I find that the Plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs to the Defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9TH DAY OF MAY 2023.

N.A. MATHEKA

JUDGE

