



REPUBLIC OF KENYA



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**Kalsi & another v National Housing Corporation (Environment & Land
Case 15 of 2012) [2023] KEELC 18644 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18644 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 15 OF 2012**

**EO OBAGA, J
JULY 6, 2023**

BETWEEN

BHAGWAN SINGH KALSI 1ST PLAINTIFF

SHAUKAT ALI EBRAHIM LIGHTWALLA 2ND PLAINTIFF

AND

NATIONAL HOUSING CORPORATION DEFENDANT

JUDGMENT

1. The two plaintiffs filed two separate suits against the Defendant in 1998. Shankat Ali Ibrahim Lightwalla filed Eldoret HCCC No. 31 of 1998 while Bhagwan Singh Kalsi filed Eldoret HCCC No. 34 of 1998. On 11/3/2009, the two suits were consolidated whereby Eldoret HCCC No. 31 of 1998 was selected as the lead file. After the Environment and Land Court was operationalized, the consolidated suits were transferred to the court whereby they were assigned Eldoret ELC No 15 of 2012.
2. In Eldoret HCCC No. 31 of 1998, the Plaintiff sought the following reliefs;
 - a. A declaration that he is the bona fide owner of all those parcels known as Eldoret Municipality Block 13/559 and Eldoret Municipality Block 13/560.
 - b. A permanent injunction to restrain the defendant from further encroaching and/or trespassing onto the Plaintiff's said parcels of land.
 - c. The Defendants be compelled to make a provision of an easement to access the plaintiff to his parcels of land.
 - d. Payment of damages for loss and damage occasioned on the plaintiff and costs.



- e. That pending the formalization of a provision for an easement to access the plaintiff to his parcels of land, the defendants and/or their servants and/or agents and/or anybody whatsoever be restrained from and/or erecting a fence constructing and/or dealing with the entire parcel of land fenced by the defendant around the plaintiff's parcel of land and that the plaintiff should be given uninhibited right of ingress and egress onto and out of his parcels.
3. In Eldoret HCCC No. 34 of 1998, the Plaintiff sought the following reliefs:-
 - a. A declaration that he is the bonafide owner of all those parcels known as Eldoret Municipality Block 13/562.
 - b. A permanent injunction to restrain the defendant from further encroaching and/or trespassing onto the Plaintiff's said parcel of land.
 - c. The defendants be compelled to make a provision of an easement to access the plaintiff to his parcel of land.
 - d. Payment of damages for loss and damage occasioned on the plaintiff.
 - e. That pending the formalization of a provision for an easement to access the plaintiff to his parcel of land, the defendant and/or their servants and/or agents and/or anybody whatsoever be restrained from and/or erecting a fence constructing and/or dealing with the entire parcel of land fenced by the defendant around the plaintiff's parcel of land and that the plaintiff should be given uninhibited right of ingress and egress onto and out of his parcel of land.

Plaintiff's case in Eldoret HCCC No. 31 of 1998;

4. The Plaintiff in this case testified that he is a retired accountant. He testified that he purchased Eldoret Municipality Block 13/559 from Musa Kipsang Mibei Vide a sale agreement dated 18/3/1997. He also purchased Eldoret Municipality Block 13/560 from Esther Jepkorir Jonah vide a sale agreement dated 21/3/1997.
5. The plaintiff thereafter processed title documents for the two properties whose certificates of leases were issued on 18/6/1997. He proceeded to fence the two properties and put up a small shade on the same. The Defendant's officials came and pulled down the fence and shade. The Plaintiff testified that he has been unable to develop the suit properties as the Defendant caused registration of restrictions which were registered on 30/4/1998.
6. The Plaintiff testified that he filed this suit after the Defendant trespassed on to his properties and erected a fence which blocked him from accessing his two properties. He stated that he has been paying rates and rent for the two properties. This is what prompted him to file this suit against the Defendant.

Plaintiff's case in Eldoret HCCC No. 34 of 1998;

7. The Plaintiff in this case testified that he is a retired businessman who is now residing with his son in Canada. He stated that he purchased LR No. Eldoret Municipality Block 13/562 from Lason Mayodi Ombisa vide agreement dated 4/9/1997. He proceeded to have transfer registered in his name and a certificate of lease was issued to him on 12/9/1997.
8. The Plaintiff fenced his plot but the fence was pulled down by the officials of the Defendant. He reported the incident to the Police after which he came to court where he obtained an injunction against the Defendant. The Defendant blocked him from accessing his plot. He stated that he is the



one who has been paying rates and rent but he has been prevented from developing the plot. It is on this basis that he is seeking the prayers in his statement of claim.

Defendant's case;

9. The Defendant through its surveyor Joshua Odege Sanduk testified that on 13/2/1980 the Commissioner of Lands reserved land measuring 14.65 hectares within Eldoret Municipality for use by the Defendant to erect houses for mortgage. The land was reserved vide Part Development Plan No BRB/17/79/4 – Eldoret Municipality.
10. In pursuit of its mandate for provision of affordable housing to Kenyans, the Defendant carried out cadastral subdivision survey of the land reserved for its use. The cadastral survey was done in phases with effect from September, 1984 until May, 1999. In 1980, the Defendant developed 15 houses under phase I. In 1988, the Defendant completed 60 houses under phase II. The houses in phase I and phase II were sold out to the public.
11. Due to the low uptake of the constructed houses, the Defendant reserved 7.1 hectares for its future housing needs. The reserved 7.1 hectares were registered as Eldoret Municipality Block 13/368, 104, 105, 386, 141, 142, 145 and 149. Each of the plot was measuring 1.45 acres.
12. On 3/3/1995, the Commissioners of Lands requested the Defendant to relinquish one of the plots which had not been constructed to facilitate allocation to other parties. On 10/4/1995, the Defendants wrote to the Commissioner of Lands declining to relinquish its interest in the remaining plots as requested by the Commissioner of Lands.
13. On 25/7/1995, the Commissioner of Lands acknowledged the Defendant's letter of 10/4/1995 and informed the Defendant that there would be no allocation and advised the Defendant to proceed with the planned housing development on the said parcels.
14. The Defendant went on to state that once the land had been reserved for use by it, the same was not available for re-allocation unless there was a surrender which was not the case herein. The Defendant stated that the titles held by the Plaintiffs cannot be protected as the same were obtained through an illegal process.

Analysis and determination;

15. The Plaintiffs filed their submissions on 14/2/2023. The Defendant filed its submissions on 3/4/2023. The Plaintiffs in their submissions contend that they purchased their respective properties from persons who were the registered owners, moved on and took possession only for the Defendant to trespass on the same and proceeded to demolish the walls which they had erected. In support of the submission of trespass, the plaintiffs quoted from *Clerk and Lindsell on Torts, Sweet & Maxwell*, 18th Edition, at page 923 where trespass is defined as follows:-

“Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.”
16. The Plaintiffs further submitted that the Defendant had not adduced any evidence to show that the Plaintiffs acquired their land fraudulently. They contended that there were no particulars of fraud



given by the Defendant. In support of this submission, the Plaintiffs relied on the case of Wilson Muema -Vs- County Government of Machakos (2020) eKLR where the court observed as follows:-

“No evidence was tendered by the Defendant to show that its predecessor, the Municipal Council of Machakos, did not allocate the plaintiff the suit property, or that the plaintiff acquired the said letter of allotment and the lease in respect to the suit property fraudulently or by misrepresentation. Indeed, other than alleging that the suit property was reserved for public purpose, and that the plaintiff acquired the suit property fraudulently, the defendant did not avail any evidence to support those allegations.

It is trite that allegations of fraud have to be pleaded specifically and proved on a standard that is higher than the usual standard of balance of convenience in civil cases. In the case of Bruce Joseph Bockle –Vs- Coquero Limited (2014) eKLR, it was held that a general allegation of fraud was not sufficient to infer liability on the part of those who were said to have committed it.

Other than not adducing any evidence to show that the plaintiffs acquired the suit property fraudulently or by misrepresentation, the Defendant did not explain to this court why it entered the plaintiff's name into its valuation roll, and received land rates in respect of the suit property. The receipt of land rates from the plaintiff is an acknowledgement that the suit property belongs to the plaintiff.”

17. The PlaintiffS further relied on the case of Gladys Wanjiru Ngacha -Vs- Teresia Chepsaat & 4 others (2008) eKLR where The court stated as follows: -

“It is trite law that fraud and particulars thereof must be specifically pleaded and proved at the trial. It is not sufficient to merely band them around without as much as endeavoring to prove them or any of them. This is what has befallen the plaintiff in the circumstances of this case. Commenting on the issue, the Court of Appeal in the case of Dr. C. O Okere vs Esther Nduta Kiiyukia & 2 others HCCC No 20 of 2004 (unreported) stated;

“In short, the title documents do not show any interest claimed by the plaintiff. The plaintiff has specifically alleged that the suit property was unlawfully registered initially in the name of the 2nd Defendant and thereafter in the name of the 1st Defendant due to fraud, collusion and/or negligence on the part of the three defendants. I entirely agree with the submissions made by the counsel for the Defendants that the particulars of those allegations have to be strictly proved and the onus to prove it lies on the party alleging the same (see Koinange & 13 others vs Koinange (1986) KLR 23). The said principles is trite law of evidence and in this case the burden of proof definitely does not shift to the defendants. I respectfully disagree with the plaintiff's contention that there was fraud or collusion or negligence on the part of any of the Defendants, solely because there is no evidence to even suggest the same. The 2nd Defendant derived a lawful title from the 3rd Defendant which is, in any event, indefeasible even on (sic) the face of fraud and the 1st Defendant was a bonafide purchaser for value without notice and thus obtained a lawful title in respect of the suit property.

The interest of the Plaintiff, even if I do believe the same to be in exercise, is an inchoate one and cannot defeat the registered proprietorship of 1st and 2nd Defendants. Even as per the provisions of section 143 of the Registration Land Act both are entitled to the registration of title in their respective names.



I entirely agree with the aforesaid reasoning much as the decision of persuasive authority only having been made by my brethren.”

18. The Plaintiffs also relied on the case of *Shiv Mombasa Limited –Vs- Kenya Revenue Authority* (2005) eKLR where the Court stated as follows: -

“The 1st Defendant Kenya Revenue Authority only holds a letter of reservation/allotment from the very Commissioner of Lands (strange) but as we all know; such letters do not signify having a registrative interest in land. it is no matter that the defendant has been in occupation for a long time by utilizing a section of the fenced larger property.”

19. On indefeasibility of title of a bonafide purchaser, the plaintiff relied on the case of *Zebak Limited –Vs- Nadom Enterprises Limited* (2016) eKLR where the Court held as follows: -

“as is evident from my review of the various cases where the issue sanctity of title has been raised the test is whether the person last registered as proprietor can be said to be a bonafide purchaser for value without any notice of defect in the title. If he was a bonafide purchaser for value and has been registered as proprietor his title is indefeasible and cannot be challenged. The title of the registered proprietor can only be challenged on the ground of fraud or misrepresentation to which he is shown and proved to be a party. Thus even if the registered proprietor purchased the property from a person who had been registered through fraud as long as the registered proprietor was unaware of the fraud and was not party to the fraud his title cannot be impeached. Hence even though a registration may have been obtained through fraud such registration may nonetheless be a good root of title to a bonafide purchaser for value. This is what judges in Uganda in the case of *Lwanga –Vs- Registrar of Titles Misc. Cause No. 7A of 1977 (1980) HCB 24* termed the paradox of registered conveyancing where though registration obtained by fraud was void it was yet capable of becoming a good root of title to a bonafide purchaser for value.

There is considerable argument as to whether article 40 (6) of *the Constitution* which provides thus:-

“The rights under this article do not extend to any property that has been found to have been unlawfully acquired”.

Does in effect do, away with the doctrine of sanctity of title conferred by registration under the Torrens System. My position is that it does not and that this constitutional provision has to be read in the context of other legal provisions such as the repealed Registration of Titles Act and the *Land Registration Act, 2012* relating to indefeasibility of title of a bonafide purchaser. This in my view the most appropriate interpretation of article 40 (6) of *the Constitution* and in the same vein section 26(1) (b) of the *Land Registration Act, 2012* would be that they would apply to a defrauder and/or fraudster who is registered as owner and that there could have been no intention to deprive an innocent buyer of his property or compensation.”

20. The Defendant submitted that in the past, courts have upheld titles which were obtained illegally but subsequently transferred to third parties. The Defendant however went on to submit that this trend has since changed and courts are holding that even where there is a purchaser of title held by a purchaser who claims to be innocent of the fraud, such title can, be cancelled. In support of this submission, the



Defendant relied on the case of Mureithi & 2 others –Vs- Attorney General & 2 others (2006) eKLR where the court stated as follows: -

“How are the courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principles of indefeasibility of title.”

21. The defendant also relied on the case of Chemel Investments Limited –Vs- The Attorney General & others where Justice Sichale JA stated as follows:-

“the constitution protects a higher value, that of integrity and the rule of law. These values cannot be side- stepped by imposing legal blinders based on indefeasibility. I adopt the sentiments of the Court in the case of Milankumar vs Attorney General (Nairobi HCC No. 1024 of 2005 (OS) where the Court stated as follows:- we hold that the registration of title to land is absolute and indefeasible to the extent, firstly that the creation of such title was in accordance with the applicable laws and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.

22. Still on the issue of indefeasibility of title, the defendant relied on the case of Funzi Development Ltd & others –Vs- County Council of Kwale (2014) eKLR where the court stated as follows:-

“... a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court cannot on the basis of indefeasibility of the title sanction an illegality or give its seal of approval to an illegality or irregularly obtained title.”

23. Finally, on the issue of indefeasibility of title the Defendant relied on the case of Munyu Maina –vs- Hiram Gathiba Maina (2013) eKLR where the Court stated as follows: -

“courts have stated that when a registered proprietor’s certificate of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title.”

24. On the issue of reserved land, the defendant submitted that the same was not available for further alienation or allocation. In support of this, the Defendant relied on the case of Norbixin Kenya Limited –Vs- The Attorney General (2014) eKLR where it was held as follows: -

“once a suit property was designated as a Police station, it ceased to be un-alienated government land as it was set aside for a public utility for the general public.

....the suit property having been set aside and planned as police station for public use... was not therefore available for further alienation or allocation.”

25. I have carefully considered the evidence adduced by the Plaintiffs and that of the Defendant. I have also considered the submissions by the parties. The issues which emerge for determination are as follows: -

i. Whether land comprised in Eldoret Municipality/Block 13/559, 560 and 562 were available for alienation.



- ii. Whether the vendors of Eldoret Municipality/Block 13/559, 560 and 562 had valid titles to pass to the Plaintiffs.
- iii. Are the Plaintiffs bone fide purchasers for value without notice.
- iv. Should the Defendant provide an easement to the suit properties.
- v. Is the Defendant a trespasser on the suit properties.
- vi. Are the Plaintiffs entitled to the reliefs in the plaint.
- vii. Which order should be made on costs.

i. Whether land comprised in Eldoret Municipality / Block 13/559, 560 and 562 were available for alienation.

- 26. The documents which were produced by the Defendant show that on 13/2/1980, the Commissioner of Lands reserved 14.65 hectares for use by the Defendant to erect houses for mortgage. This being the case, the land ceased to be unalienated government land and was therefore not available for any further alienation or allocation unless the same was surrendered back.
- 27. In the instant case, there is evidence that the Commissioner of Lands wrote to the Defendant asking it to surrender part of the reserved land for allocation to other persons. The Defendant declined this request in writing. The Commissioner of Lands then wrote back and informed the Defendant that the Defendant was at liberty to go ahead to construct houses on the land. In other words, the Commissioner of Lands gave up his quest for surrender of part of the reserved land for the Defendant.
- 28. The request by the Commissioner of Lands to the Defendant to relinquish part of its land was written on 3/3/1995. The Defendant's letter declining the request to relinquish part of its land was written on 10/4/1995. On 25/7/1995, the Commissioner of Lands acknowledged the Defendants letter of 3/3/1995 and proceeded to give the Defendant a go ahead to continue with building houses on its land.
- 29. The Commissioner of Lands having accepted the decline by the Defendant to surrender their land, he could not again turn around and allocate the same land to Esther Jepkorir Jonah, Musa Kipsang Mibei and Lason Mayodi Ombisa. As was held in the case of Norbixin Kenya Limited Case (Supra), the suit having been set aside for use by the Defendant which is a public entity, the same was not available for alienation to Esther Jepkorir Jonah, Musa Kipsang Mibei and Lason Mayodi Ombisa.

ii. Whether the vendors of Eldoret Municipality/Block 13/559, 560 and 562 had valid titles to pass to the Plaintiffs.

- 30. It has been held in numerous cases that where the title held by a proprietor is being challenged the title holder has to prove that the title was lawfully acquired. One cannot wave a title and say that the same is indefeasible. The indefeasibility of title can only come to place where it is shown that it was procedurally obtained. This was the holding in the cases of Funzi Development Ltd & others (Supra) and Munyu Maina (Supra).
- 31. The Plaintiff in Eldoret HCCC No. 31 of 1991 purchased LR. No. Eldoret Municipality/Block 13/559 from Musa Kipsang Mibei. He also bought LR. No. Eldoret Municipality/Block 13/560 from Esther Jepkorir Jonah. The Plaintiff in Eldoret HCCC No. 34 of 1998 purchased Eldoret Municipality/Block 13/562 from Lason Mayodi Ombisa. As I have already demonstrated herein above, the three vendors were allotted land which was not available for alienation. The three therefore did not obtain good titles which were capable of being passed on to the Plaintiffs.



32. In a recent decision by the Supreme Court of Kenya in Petition No. 8 of 2021 Dina management Limited –Vs- County Government of Mombasa & 5 others, delivered on 21/4/2023, the Supreme Court Judges held that a person who obtained title or interest illegally is not capable of passing a good title or interest to another person. The judges stated as follows: -

“(110) indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E Daniel Arap Moi had no valid interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the Appellant.”

33. The land reserved for the Defendant was not available for alienation to Musa Kipsang Mibei and Esther Jepkorir Jonah. The two therefore had no valid interest to pass to Shaukat Ali Ibrahim Lightwalla the Plaintiff in HCCC No. 31 of 1998. Equally Lason Mayodi Ombisa did not have a valid title to pass to Bhagwan Singh Kalsi.

iii. Are the Plaintiffs bone fide purchasers for value without notice;

34. When the Plaintiffs purchased their respective properties, the Defendant had already built up estates in phase I and phase II. The Plaintiffs’ plots were surrounded by houses built by the Defendant. The plots had no roads of access to the same. This is why the Plaintiffs are seeking an easement over the land owned by the Defendant.

35. The Plaintiffs cannot claim to be bonafide purchasers without notice. Lack of access road would have aroused the curiosity for the Plaintiffs to carry out due diligence. The presence of houses by the Defendant which surrounded the suit properties would have been a pointer that all was not well.

36. A bonafide purchaser was defined in the case of Katende – Vs- Haridar & Company Ltd (2008) 2 EA 173 as follows:-

“For the purposes of this appeal, it suffices to describe a bonafide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchase to successfully rely on the bonafide doctrine he must prove that:-

1. He holds a certificate of title,
2. He purchased property in good faith,
3. He had no knowledge of the fraud,
4. He purchased for valuable consideration,
5. The vendors had apparent valid title,
6. He purchased without notice of any fraud and;
7. He was not party to the fraud.

37. In Samuel Kamere –Vs- Lands Registrar Kajiado (2015) eKLR, the Court of Appeal stated as follows: -

“... in order to be considered as a bonafide purchaser for value, they must prove; that they acquired VALID and LEGAL title; secondly, they carried out the necessary due diligence



to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

38. In the instant case, I have already stated that there were all signs that the three vendors had no apparent valid titles or interests which they could pass. The mere fact that the vendors had certificate of leases was not enough to purchase properties which were surrounded by the houses put up by the Defendant and which had no access road to the same. The Plaintiffs were therefore not innocent purchasers for value without notice.

iv. Should the Defendant provide an easement over its land;

39. By the Plaintiffs seeking an easement over the Defendant’s land, they are conceding that the properties which they purchased had no access. These properties have been found to have been irregularly created. The Defendant cannot therefore be compelled to grant an easement in respect of properties which were irregularly acquired by the vendors who sold them to the plaintiffs.

iv. Is the Defendant a trespasser on the suit properties;

40. The term trespass was clearly captured in the extract from Clerk & Lindsell on Torts (Supra). It has been found that the suit properties were irregularly hived off land reserved for the Defendant. One cannot be a trespasser on his /her own land. I therefore find that the Defendant is not a trespasser on the suit properties.

iv. Are the Plaintiffs entitled to the reliefs in their respective claims;

41. From the above analysis, it is clear that the Plaintiffs are not entitled to any of the reliefs in their respective claims.

Disposition;

42. It is patently clear that the Plaintiffs’ claims are unfounded. The Defendant has taken the trouble of defending these suits for close to a quarter of a century. The Defendant is entitled to costs. I proceed to dismiss the consolidated suits with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 6TH DAY OF JULY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Kemboi for Ms. Odwa for Plaintiffs.

Court Assistant –Laban

E. O. OBAGA

JUDGE

6TH JULY, 2023

