



**Sorathia & another v Chief Land Registrar & 3 others (Environment & Land
Petition 18 of 2020) [2023] KEELC 20620 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20620 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND PETITION 18 OF 2020

EO OBAGA, J

OCTOBER 11, 2023

**IN THE MATTER OF CONSTITUTION OF KENYA (2010) ALLEGED CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40, 47 AND 258**

AND

IN THE MATTER OF THE PROPERTY NUMBER ELDORET MUNICIPALITY BLOCK 4/106

BETWEEN

MANSOORALI GULAMALI JAMAL SORATHIA 1ST PETITIONER

SALIM GULAMALI JAMAL SORATHIA 2ND PETITIONER

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

JAPHET KIPKEMBOI MAGUT 4TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioners filed this petition against the Respondents in which they sought the following reliefs:-
 - a. A declaration that the Petitioners are the registered owners of the leasehold interest over property Eldoret Municipality Block 4/106 having purchased the said property as innocent purchasers for value without notice of any defect on the title and without being a party to any alleged fraud and/or



misrepresentation and are entitled to rights appurtenant to such registration and holds the said title and all rights therefrom.

- b. A declaration that the Petitioners' fundamental right to property has been violated and/or infringed upon in total contravention of Article 40 of *the Constitution* of Kenya, 2010.
- c. A declaration that the Respondents' have unlawfully trespassed, retained, converted, fenced and wrongfully assumed ownership of the Petitioners' property which goes against the Petitioners' right to property.
- d. An order for physical restoration of the property Eldoret Municipality Block 4/106 to the Petitioners and in the alternative the current market value of the property pleaded herein.
- e. An order that the restriction placed against property Eldoret Municipality Block 4/106 be removed forthwith.
- f. Costs of this petition.
- g. Any other orders this honourable court may deem just, fit and expedient to grant.

2. The 1st, 2nd and 3rd Respondents filed a response to the petition and raised a cross-petition in which they sought the following reliefs:-

- i. The petition be dismissed with costs;
- ii. Judgement be entered against petitioners in terms of the cross-petition as follows:
 - a. A declaration that Eldoret Municipality Block 4/106 is Public land and should remain as such.
 - b. A declaration that the Petitioners' acquisition of Eldoret Municipality Block 4/106 is illegal, unlawful and fraudulent and the Petitioners' title documents are null and void ab initio.
 - c. An order cancelling all titles and or all entries made in the registers of Eldoret municipality Block 4/106, the suit parcel of land herein.
 - d. An order cancelling the titles to Eldoret municipality Block 4/106 issued to the petitioners.
 - e. A declaration that 2nd Respondent and by extension the Judiciary is entitled to peaceful and quiet possession and use of all land forming the suit parcel of land herein.
 - f. An order of permanent injunction restraining the petitioners, their servants, agents and or any other person acting under them from ever laying claim to,



interfering with or in any other manner dealing with the suit parcel of land herein.

- iii. Costs of the counter-petition and interest thereon at court rates.

Background;

3. The subject matter of this petition and cross-petition is a property known as LR. No. Eldoret Municipality Block 4/106 which is currently registered in the names of the Petitioners (suit property). On this suit property which is about one acre is a house which is currently occupied by a judicial officer from Eldoret Law Courts. Prior to the registration of the suit property in the names of the petitioners, the suit property was a government house number Eldo/Hou/HG/11. The house had been assigned to the Judiciary for purposes of housing judicial officers.
4. According to the petitioner, the suit property was allotted to Enock Ogeto vide allotment letter Ref. 31710/xxx111 dated 26/8/1994. A lease in favour of Enock Ogeto was signed by Commissioner of Lands on 10/11/1995. The lease was subsequently registered on 24/11/1995 and the same was transferred to the 4th Respondent.
5. On 29/11/1995, the 4th Respondent sold the suit property to the Petitioners at a consideration of Kshs 1,200,000/= and a certificate of lease was processed in favour of the Petitioners on the same day. On 17th June, 2003, the Petitioners entered into a lease with the Judiciary in which it was agreed that Judiciary was to pay Kshs 20,000/= per month to the Petitioners. The Judiciary paid rent for a year and stopped further payment on or about July, 2004.
6. The Petitioners tried to follow up the rent arrears from the Judiciary in vain. On 20.7.2018, the Petitioners applied for an official search from the lands office where they discovered that the 1st Respondent had cause a restriction to be registered against the title on the ground that the suit property was one of the properties which had been listed in the report of the Commission of Inquiry into irregular/illegally acquired land in Kenya popularly known as the Ndung'u report. This is what prompted the Petitioners to file this petition.

Petitioners' contention;

7. It is the Petitioners contention that they are innocent purchasers for value without notice of any defect in the title. They aver that they purchased the suit property after carrying out due diligence. The Petitioners state that the 1st Respondent acted contrary to the provisions of section 76(1) of the [Land Registration Act](#), 2012 in that they were not given any opportunity to be heard.
8. The Petitioners state that they have severally written to the Lands office seeking explanation on why their property was restricted but have not had any response. They state that before the restriction, they had trice used that title to secure financial facilities from banks. They contend that the Respondent's actions have violated their constitutional rights under Article 40 and 47 of [the Constitution](#).
9. The Petitioners caused the suit property to be valued by Highlands valuers limited who found that the property was valued at Kshs 103,000,000/= as at 9/7/2020.

1st, 2nd and 3rd Respondents contention;

10. The Respondents contend that the suit property was government land whose registration in the names of the Petitioners was procured by fraud, mistake and or misrepresentation since the property had a government quarter Eldo/Hou/HG/11. The Respondents state that the suit property was among the non-strategic government owned house that had initially been put up for validation vide cabinet



memo in 2004 which was later suspended in 2007. The government had never boarded or degazetted the suit property and therefore no good title could flow from it as the Commissioner of Lands had no authority to allocate it to private individuals.

11. The Respondents contend that the issue touching on the suit property requires examination of many documents and the issue herein should not have been brought as a Constitutional petition. The Petitioners all along knew that the suit property was government land which had a government house which was housing Judiciary staff but they went ahead to purchase the same.
12. The Respondents further state that the suit property had never been boarded for disposal as required by the Government Financial Regulations and Procedures, Chapter 19 of 1989 and the Ministry of Works circular No. 2/58 of 1958. The property was therefore not available for alienation. Investigations which were carried out by the Ndung'u Commission found out that the suit property was illegally acquired.

4th Respondent's contention;

13. Though the 4th Respondent entered appearance through the firm of R. M. Mutiso & Co. Advocates, he did not file any response to either the petition or cross-petition.

Analysis and determination;

14. The Petitioners submitted that they are innocent purchasers for value without notice of any defect in the title. They submitted that they engaged on the basis of a willing seller willing buyer and that they carried out due diligence before purchasing the suit property. The Petitioners relied on Black's Law Dictionary 8th Edition which defines a bonafide purchaser as follows:-

“...one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claim or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claim.”

15. The Petitioners further relied on the case of Katende Vs Haridar & Co. Limited (2008) 2 EA 173 as quoted by the Court of Appeal in Nakuru Court of Appeal No. 291 of 2013 –Weston Gitonga & 10 others Vs Peter Rugu Gikanga & another (2017) eKLR where the Court of Appeal of Uganda held as follows:-

“...for the purpose of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase a 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 that;

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



16. The Petitioners submitted that they were not involved in any fraud and in reliance of this submission, they relied on the case of Denis Noel Mukhulo Ochwada & another Vs Elizabeth Murungari Njoroge & another (2018) eKLR where the Court of Appeal held as follows:-

“As regards fraud on the part of the 2nd Appellant, we are not able to find any evidence on record in that regard. He purchased the property after it was advertised in the East African Standard Newspaper of 13th August 2003. He paid to the 1st Appellant valuable consideration of Kshs 650,000.00. Prior to registration as proprietor, he conducted a search, which showed that the property was registered in the name of the 1st Appellant and was free from all encumbrances. He also obtained the necessary consent from the Land Control Board before the suit property was transferred to him. He took possession of the suit property and developed it with moneys raised by a charge over the suit property in favour of Standard Chartered Bank Kenya Ltd, which we were informed he has full repaid and the property discharged...

...for land, which was registered under the Registered *Land Act*, the applicable provisions was section 143(2) which prohibits rectification of the register where the proprietor is in possession and acquired the land for valuable consideration without knowledge of, or having cause by his act neglect or default, the omission, fraud or mistake on the basis of which rectification of the register is sought. This protection, as we have already noted, is informed by the guarantee in the Torrens land registration system that the entries in the register are correct and members of the public can freely and securely rely on them...”

17. The Petitioners also submitted that their rights under Article 47 of *the Constitution* were violated in that they were not given a hearing before a restriction was registered on the title. They relied on the provisions of section 76(1) of the *Land Registration Act* which provides as follows:-

“For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.”

18. The Petitioners contend that they were not aware of the restriction until they carried out a search on 23/7/2018.

19. In the alternative, the Petitioners submitted that in the event the court holds that the property cannot be restored to them, they should be compensated. They submitted that they should be awarded Kshs. 103,000,000/= as per the valuation by Highlands Valuers Limited. In support of this submissions, they relied on the case of Charles Karathe Kiarie & 2 others vs Administrators of the Estate of John Wallace Muthara (deceased) & 5 others (2013) eKLR where the Court of Appeal stated as follows:-

“...the Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interest that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and



interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation...”

20. The 1st, 2nd and 3rd Respondents submitted that the petitioners had not met the threshold set out in the case of *Amarita Karimi Njeru vs. Republic* 1976-1980 KLR where the Judges stated as follows:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

21. Still on the threshold, the Respondents submitted that the Petitioners had not proved how their fundamental rights were violated. In support thereof, they cited the case of *Ostenah Ogero Taracha – Vs Ethics and Anti-corruption Commission & Attorney General* (2017) eKLR where the court stated as follows:-

“It is however, enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be proved. Section 107(1) of the *Evidence Act* Cap. 80 Laws of Kenya is clear in this regard and provides as follows;

Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.”

22. The Respondents also submitted that the Petitioners did not acquire a valid title. They cited a number of faults to demonstrate that the title of the Petitioners was not valid. The transfer of lease was not signed by all parties; it was not registered in the presentation book register; rates were never paid and the identities of the parties involved was not authenticated by either the Land Registrar or the Advocate certifying.

23. The Respondents relied on the case of *Richard Kipkemei Limo Vs- Hassan Kipkemboi Ngeny & 4 others* (2019) eKLR where the Court of Appeal stated as follows:-

“This court has often times stated that when a certificate of title is under challenge, the root of title must be proved. The lawfulness of the acquisition of title must be demonstrated to oust the provisions of Article 40 (6) of *the Constitution*. In the instant matter, the Appellant never led convincing evidence to establish the root of his title. We thus find that the trial court did not err in finding that the certificate of title held by the Appellant was null and void.”

24. The Respondents further relied on the case of *Daudi Kiptugen –Vs- Commissioner of Lands & 4 others* (2015) eKLR where Justice Munyao held as follows:-

“It is not enough that one issues a Lease or a Certificate of Lease and asserts that he has good title by the mere possession of the Lease or certificate of Lease. Where there is contention that a lease or certificate of lease held by the individual was improperly acquired, then the holder thereof must demonstrate, through evidence, that the lease or certificate of lease that he holds was properly acquired. The acquisition of title cannot be constricted only in the end results; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be said to be a good title. If this



were not the position, then all one would need to do is to manufacture a lease or certificate of title at (some) backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

25. The Respondents also relied on the case of Milan Kumar Shah & 2 others –Vs- City Council of Nairobi & another where the Court held as follows:-

“... we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of a such title was in accordance with the applicable law 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 principal has not himself/itself been part of a cartel which schemed to disregard the applicable law and the public interest. The court therefore cannot turn a blind eye to sanitize irregularities and land acquired fraudulently in the name of indefeasibility of titles.”

26. The Respondents further submitted that the Petitioners were not innocent purchasers and that they cannot rely on Article 40 of *the Constitution* as Article 40(6) does not protect an innocent purchaser for value where the title is found to have been unlawfully obtained. In support of this, they cited my decision in Regnol Oil (K) Limited vs- National Land Commission & another (2017) eKLR where I stated as follows:-

“Article 40 (6) of *the Constitution* does not afford any protection to land which is found to have been unlawfully acquired. This is so because someone who has acquired land unlawfully has no good title to pass because that title is void ab initio. If it was the intention of *the Constitution* to protect such innocent purchasers of unlawfully acquired land, then there will be chaos because people would unlawfully acquire land and quickly sell the same to innocent purchasers who would the retain it. I therefore find that Regnol is not entitled to compensation for the land.”

27. The Respondent also relied on the decision in the case of Dina Management Limited –Vs- County Government of Mombasa & 5 others (2023) eKLR where the Supreme Court of Kenya held that where a property is unlawfully acquired and is subsequently transferred, the person who unlawfully acquired it has no good title to pass and one cannot shelter under the doctrine of innocent purchaser for value without notice.

28. I have carefully considered the Petitioners’ petition, the opposition to the same by 1st, 2nd and 3rd Respondents, the cross –petition by the 1st, 2nd and 3rd Respondents as well as the opposition to the cross – petition by the petitioners. I have also considered the submissions by the parties herein. The following are the issues which emerge for determination: -

- a. Whether the petition herein meets the threshold set out in the case of Anarita Karimi Njeru –Vs- Republic.
- b. Whether the title which was passed to the Petitioners was validly acquired.
- c. Whether the Petitioners were innocent purchasers for value without notice of any defect in the title.
- d. Whether the Petitioners in the petition and the cross –petition are entitled to their respective reliefs which they claim.



Whether the petition herein meets the threshold set out in the Anarita Karimi Njeru –Vs- Republic case;

29. This petition as presented has scanty details in the manner the Constitutional rights of the Petitioners have been violated. Apart from citing Article 40 and 47 of *the Constitution*, nothing much is said as to bring out how the Constitutional rights were violated. This is a matter which should have been brought as a simple Civil suit.
30. The Petitioners had stated that the suit property was first allotted to Enock Ogeto who sold it to the 4th Respondent. There was no evidence annexed to show how the said Ogeto applied for allotment, how the allotment letter was given and whether the said Ogeto ever complied with the terms of the letter of allotment. The Petitioners only cited the reference number of the allotment letter.
31. There was no sale agreement between Ogeto and the 4th Respondent. The only document which the Petitioners annexed is a copy of a search which shows that the suit property was once in the name of the 4th Respondent. The said search has no features of a proper search as known in practice. To say the least, it is a suspicious document. The petitioners did not offer sufficient evidence to show how the constitutional rights were violated as was held in the case of Ostenah Ogero Taracha (Supra).
32. This petition should not have been filed as a constitutional petition. It should have been filed as an ordinary Civil suit where evidence should have been adduced to show the root of the Petitioners title. In the case of Francis Oyagi –Vs- Samwel Motari Mangare & 2 others (2018) eKLR, the Court held as follows:-

“The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in constitutional petitions.”
33. In the instant case, the petition is wanting in particularity and the manner in which the constitutional rights of the Petitioners have been violated. It should ideally have been brought as an ordinary Civil case.

Whether the title which passed to the Petitioners was validly acquired;

34. As I have said hereinabove, there are no details on how Enock Ogeto obtained his title. There was no evidence of whether he applied for allocation of the suit property or if he complied with conditions in the letter of allotment by payment of stand premium and rates.
35. The suit property which measures one acre had a government house on it which was being held by the then Ministry of Housing and was duly allocated to the Judiciary for purposes of housing Judicial officers and or Judicial staff. At the time of the alleged allocation, the house was occupied by a Judicial officer. When the house was finally transferred to the Petitioners, a Senior Judicial Staff was in occupation. The house is currently occupied by a Senior Judicial Officer.
36. The house was not available for alienation as the same was a public property which was not up for allocation. The Petitioners did not produce any evidence to show that the prescribed procedure for boarding of government premises as prescribed in the Government Financial Regulations and Procedures and the Ministry of Works and Housing Circular No. 2/58 of 1958 was followed. What happened in this case is exactly what happened in the case of Chemey Investment Limited – Vs- Attorney General & 2 others (2018) eKLR. In this case, the Petitioner had been evicted from government property which housed government buildings. The Petitioner moved to court and filed a constitutional petition alleging that its rights to property had been violated. The High Court declined



to order its restoration into the property. The Petitioner appealed to the Court of Appeal. The appeal was dismissed with costs to the Respondents.

37. There are no details on how the suit property changed from Enock Ogeto to the 4th Respondent. There was no sale agreement produced or the consideration at which he purchased the suit property from Enock ogeto. The 4th Respondent entered into a sale agreement with the Petitioners on 29/11/1995 and a certificate of lease was processed in favour of the Petitioners on the same day. There is no evidence of payment of any requisite fees such as stamp duty and other required charges.
38. The suit property had been identified as one of those which had been illegally/irregularly obtained by the Commission of Inquiry into irregular/illegally acquired land in Kenya popularly known as “Ndungu Report”. The Petitioners frantically tried to be allowed to validate the illegal acquisition in vain.
39. As was held by the Court of Appeal in the case of Richard Kipkemei Limo (Supra), the Petitioners were under obligation to demonstrate that the title which was passed to hem was lawfully acquired. In that case, the Court of Appeal Judges found no fault in the trial court’s finding that title which had been illegally acquired was null and void. I therefore find that neither Enock Ogeto nor the 4th Respondent had valid titles which would have passed to the Petitioners.

Whether the Petitioners were innocent purchasers for value without notice of any defect in the title;

40. The Petitioners claimed that they were innocent purchasers for value without notice of any defect in the title. The decisions of the Court of Appeal in Katende –Vs- Haridar & Co. Ltd which was quoted the case of Weston Gitonga & 10 others (Supra) set out what a person who claims to be innocent purchaser must prove. One of the conditions to be proved is that the vendor had apparent valid title and the other is that he was not party to any fraud and the other is that he purchase in good faith.
41. In the instant case, the Petitioners entered into a sale agreement on 29/11/1995 and they obtained certificate of lease on the same day. The 4th Respondent had had the suit property registered in his name 5 days prior to the transfer to the Petitioners. The transfer of lease was not dated; it was not entered in the presentation book and no fees was paid for it. The date when it was received for presentation was not given.
42. The suit property had a government house which was occupied by Judiciary officials. In the circumstances, the Petitioners cannot claim to have been innocent purchasers for value without any notice of any defect in the title. There was no evidence of how money exchanged hands. It is only indicated in the sale agreement that a deposit of Kshs 400,000/= was made upon signing of the agreement. There is no evidence whether the balance was cleared though a certificate of lease was issued on 29/11/1995. A party which was in too much hurry to conclude the sale clearly had no apparent good title.
43. In the case of Dina Management Limited (Supra), the Supreme Court was categorical that a person who obtains title illegally has no good title to pass to any other person and a person cannot claim to be an innocent purchaser particularly where he had failed to carry out due diligence to establish the root of the title.
44. The Petitioners in the cross –petition have succeeded in demonstrating that the suit property on which sits House No. Eldo/Hou/HG/11 is government property which was illegally acquired. The property is occupied by a Judicial officer. The lease which the Petitioners purported to enter into with the Judiciary in or around 2004 is in respect of a different property from the suit property.



Disposition;

45. From the above analysis, it is clear that the Petitioners are not entitled to any of the prayers in the petition. They are not even entitled to compensation which they claim in the alternative prayer. The Petitioners petition is hereby dismissed with costs to the 1st, 2nd and 3rd Respondents. On the other hand, I find that the cross-petition succeeds and judgement is entered in favour of the 1st, 2nd and 3rd Respondents in terms of prayers (a), (b), (c), (d), (e) and (f) of the cross-petition dated 25/11/2021. The 1st Respondent is directed to ensure that the title to Eldoret Municipality Block 4/106 is registered in the name of Principal Secretary, Treasury or in any other name of any authorized entity to hold titles to public land in trust for government institutions. The 1st, 2nd and 3rd Respondents shall have the costs of the cross –petition.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 11TH DAY OF OCTOBER, 2023.

E. O. OBAGA

JUDGE

