



**Gikera v Mburu (Environment & Land Case 10 of 2019)
[2022] KEELC 4777 (KLR) (15 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 10 OF 2019**

JG KEMEI, J

SEPTEMBER 15, 2022

BETWEEN

AHMED CHEGE GIKERA APPELLANT

AND

JOHN MAINA MBURU RESPONDENT

*(Being an appeal against the Judgment delivered on the 24/1/2019
before the Hon G Omodbo SRM in ELC NO 412 of 2008)*

JUDGMENT

1. The Appellant has urged this appeal on 12 grounds set out in the Memorandum of Appeal filed on the 31/1/2019. In it the Appellant's grounds are that;
 - a. That the Learned Honourable Magistrate erred in law and fact in delivered Judgment on 24th January, 2019 without notice to the Defendant appearance.
 - b. That the Learned Honourable Magistrate erred in law and in fact delivery of Judgment on 24th January 2019, before determining the Defendant's / Applicant's application dated 20th November, 2018.
 - c. That the Learned Honourable Magistrate erred in law and in fact by delivered Judgment before hearing a cardinal witness of the Defendant Francis Kairianja n full in particular no re-examination was allowed on the witness.
 - d. That the Learned Honourable Magistrate erred in law and in fact by stating that "Despite parties being allowed a chance to submit, it's only the Plaintiffs who deemed it necessary to file submissions" while knowing too well that the Defendant/Applicant had not closed his case.



- e. That the Learned Honourable Magistrate erred in law and in fact in regarding the fact that the Plaintiff had moved to Court to cancel the Defendant's title deed.
 - f. That the Learned Honourable Magistrate erred in law and in fact in failing to order that the Plaintiff obtained subdivision of the suit land initially L.R. Ruiru/KIU/Block2/Githunguri3899 to L.R. No. Ruiru/KIU/Block/Githunguri/10082 – 10093, notwithstanding that the Defendant's title deed had not been cancelled.
 - g. That the Learned Honourable Magistrate erred in law and in fact in shifting the burden of proof in Civil matter to the Defendant, "the parties obtained their documents of the land buying company, except of the parties have titles they brought to Court. In my view each party had a duty to demonstrate before this Court how each of them acquired their title since was at the core to establish who rightful owner is."
 - h. That the Learned Honourable Magistrate erred in law and in fact by stating that "the evidence availed by the Plaintiff about the sale transaction, is unchallenged and no evidence has been adduced to show that his title was obtained through fraud. Is analysed and no evidence had been adduced to show that suit title was obtained through friends" notwithstanding that at that time the Plaintiff instituted the suit he had no title deed for the land.
 - i. That the Learned Honourable Magistrate erred in law and in fact in stating that "it's heard to platform how the Defendant owns a title that has no records from the Ministry of Lands" notwithstanding that the Plaintiff produced a caution he had placed on the Defendant's land.
 - j. That the Learned Honourable Magistrate erred in law and in fact in stating that "the evidence availed by the Defendant about acquisition seems to be a case for Certificate of Title that has been acquired illegally, uprocedurally, or through a corrupt scheme whichever the case but definitely one of these" witness demolishing in the Judgment, illegality, uprocedural or corrupt schemes attributes to the Defendant.
 - k. That the Learned Honourable Magistrate erred in law and in fact in finding that after finding that the Defendant title was not obtained through fraud proceeded to issue the following orders against the Defendant.
2. Consequently the Appellant sought orders as that:-
 - a. This Appeal be allowed.
 - b. The Judgment and Decree of the Honourable Magistrate in ELC Civil Suit No. 412 of 2008 and delivered on 24th January, 2019 be set aside and/or wholly/overturned and Judgment and Decree be entered in favour of Appellants.
 - c. Costs of this Appeal be granted to the Appellants.
 - d. Any other orders that this Honourable Court may deems expedient and just to grant.
 3. The parties elected to canvass the appeal by way of written submissions which I have read and considered.
 4. The Appellant submitted that his key witness one Francis Karianja led evidence as DW3 and was cross examined but was however stood down for further cross examination to enable the Respondent file extra documents which were intended to be used to cross examine DW3. On application by the Appellant the Court upheld the objection in its ruling delivered in the absence of the Appellant and his counsel. The matter was fixed for further hearing and on the 10/11/2018 in the absence of the



Appellant and his counsel the Appellants case was closed on application of the Defendants counsel and the Court proceeded to give directions on filing of written submissions. The Appellant filed an application on the 20/11/18 seeking the setting aside of the orders of the Court issued on the 19/11/2018. The Appellant submitted that thereafter directions on the delivery of Judgment were issued culminating in the delivery of the same on the 24/1/2019 in the absence of the Appellant and his counsel.

5. The Appellant submitted that following the delivery of the Judgement aforesaid, he filed with to other applications dated the 28/1/2019 and 31/1/2019 seeking orders of stay of execution as well as the decree in the matter. That the Court declined to stay the execution of the Judgement indicating that it was functus officio following the delivery of the Judgement, hence the three applications remain undetermined.
6. The Appellant has impugned the Judgement of the Court saying that the suit was hurriedly closed by the Hon Learned Magistrate. Further that the Judgement is biased, case was not ventilated and the Appellant could not file submissions since he had not closed his case.
7. The appeal is opposed by the written submissions of the Respondent. The Respondent submitted and gave a lengthy history of the suit at hand.
8. The Respondent impugned the Appellants case. With respect to the purchase of shares by the Appellant, the Respondent submitted that the Appellant failed to avail the Share Certificate of one Francis Njenga Gitau whom the Appellant alleges to have bought the shares from; receipts for payment of the survey; no ballot was produced to support balloting by the said Gitau for the land;
9. Maintaining that the Appellant had no title , the Respondent argued that although the Appellant alleges to have been issued with a title deed in 2002, in the year 2006 he could not trace the said records at the Lands Registry leading to the threatening the Land Registrar with a law suit.
10. The Respondent submitted that he acquired the land from the family of Gicheha Kangethe through his son Paul Kanyingi Gicheha and got a Share Certificate, ballot and payment receipts from the vendor. That the Appellant and the Respondent are known to each other and that the Appellant approached him with an offer to sell to him the land but the transaction failed when they could not to agree on the price. That the Appellant then informed the Respondent that he had a title for the land prompting the Respondent to try and register a caution on the land but the same could not be registered because there was no record for the suit land that had been opened at the lands registry. That he lodged a complaint with the Land Registrar which prompted him to write to the Appellant twice summoning him to his office to produce the ownership documents in his custody in support of his alleged ownership of the suit land. He submitted that the Appellant responded that the suit land belonged to a company called Landluck Investment Limited – see letter of the Appellant dated the 5/5/2008
11. The Respondent stated that there having been no other third party records with respect to the suit land, he was cleared for titling, paid government dues and was issued with a title whereupon he subdivide the title into 12 subtitles in the name.
12. Relying on the decision of the Court in the case of Hubert L Martin & 2 Others Vs Margaret J Kamar & 5 Others (2016) eKLR, It was submitted that when a Court is faced with two or more titles of the same parcel of land, the Court must inquire into the root of the titles, the processes and the procedures that birth the titles so as to determine which of the two should be upheld. The title without a broken traceability in its root, and shows a clear path in the legal procedure and processes should be upheld. It is the responsibility of the contestants to demonstrate how they got their titles starting with its foundation.



13. The Court was informed that a title should be taken as a prima facie evidence of proprietorship by Courts unless the same is shown to have been acquired by way of fraud misrepresentation or through a corrupt scheme.
14. It was further submitted that since the Appellant did not file a counterclaim, then the title held by the Respondent having been confirmed by the Land Registrar as the valid title should be upheld.
15. It was submitted that an outsider who is not a member of the company cannot get a Share Certificate and titles to the land are processed on issuance of clearance certificates from the land buying company. That the Land Registrar could only clearly process a title against a validly issued clearance certificate issued by the land buying company. See the case of Esther Ndegi Njiru & Another Vs Leonard Gatei (2014) eKLR.
16. The Respondent submitted that the Appellant's title has no documentation at all from the lands registry. That the Appellant authored correspondence stating that he was not the owner of the suit land and that the same was owned by Landluck Investment Limited.
17. As to whether the appeal is merited the Respondent submitted that the Appellant failed to prosecute his applications aforesaid and the trial Court did not err in closing the defence case as the hearing had been taken by consent. Inter alia, the Respondent submitted that failing to re-examine a witness is not a ground for appeal. In conclusion the Respondent submitted that the appeal is unmerited and should be dismissed with costs to the Respondent.
18. This dispute dates back to 2008 when the Respondent filed suit against the Appellant, which suit was amended with the leave of Court in 2015. The Respondent sought the following orders;
 - a. An order for injunction permanently restraining the defendant his servants or agents from alienating selling transferring charging or in any manner interfering with the land parcel No Ruiru/KIU Block 2/Githunguri/10082-10093.
 - b. An order of eviction and demolition of the illegal structures erected on the plaintiff parcel of land
 - c. Mesne profits
 - d. Interest
19. It was the case of the Plaintiff that he purchased the original parcel of land namely Ruiru/Kiu/Block2/Githunguri/3899 from Paul Kanyingi Gicheha took possession and caused the subdivision of the titles in to sub-portions. That the defendant unlawfully encroached the suit land, carrying on acts of waste and damage by putting up buildings and perimeter wall without his permission, consent and authority as the registered owner. He pleaded acts of suspected fraud on the part of the defendant in para 6 of the amended plaint.
20. In a brief rejoinder the defendant denied the claim of the plaintiff and contended that he is the owner of the suit land parcel No 3899 having acquired lawfully from one Francis Njenga Gitau and distanced himself from the allegations of fraud set out in the amended plaint.
21. After several false starts, eventually the hearing kicked off on the 23/7/18.
22. The Plaintiff stated that he purchased the land from the family of Gicheha Kangethe, who was a member of the Githunguri Ranching Company Limited (Githunguri). Upon his death his Share Certificate was transferred to his wife Tabitha Kangethe and on her demise her children inherited the shares. The chief of the area confirmed the beneficiaries to Githunguri. One of the sons Paul Kanyingi



- Kangethe entered into agreement with the Plaintiff for the sale of the land 11/3/2008 whereupon the Plaintiff got a new Share Certificate, ballot No 1192 and payment receipts dating back to 1983 paid previously by Kangethe. That he paid Kshs 9300/- for transfer of the shares at Githunguri and was issued with clearance certificate for the land.
23. He informed the Court that the defendant is known to him personally and sometime in 2008 he approached him with an offer to buy the land. The offer collapsed because they did not agree on the price. He stated that later the defendant informed him that he had a title for the same parcel of land, which information alarmed him. He stated that he made a complaint to the land Registrar who summoned the Defendant to produce documents in support of his ownership in vain. That later the defendant responded to the Land Registrars letter stating that the land was actually registered in the name of Landluck investment Limited. Unyielding with information, the Land Registrar wrote to the CID for further investigation into the matter.
 24. The witness stated that he was forced to file the instant suit in 2008 when he realized that the Defendant had encroached on the land.
 25. The witness informed the Court that due to internal wrangles by the Directors of Githunguri the process of issuance of titles was stopped from around 2004 till 2012. When the process opened up he proceeded to apply for his title, paid the necessary payments and finally was issued with a title in 2012 and got an official search showing that he was the registered owner of the land on the 14/3/2012. That immediately he subdivided the land into 12 parcels in his name.
 26. In cross the witness stated that there was no duplication of titles at all. That the title held by the Defendant was fake on account that it was not anchored on any record or register at the land registry. That the Defendant entered the land based on the illegally acquired title and started constructing structures but was restrained by the Court by way of an injunction.
 27. PW2 - Robert Mugendi Mbuba testified and introduced himself as the Land Registrar at Thika. He produced the register in respect to the suit land parcel 3899 and informed the Court that the title was opened on 13/1/2012 in the name of Government of Kenya and on the 7/3/2012 it became registered in the name of John Maina Mburu and on 30/7/2012 the title for parcel 3899 was closed on subdivision into parcel Nos. 10082-100093.
 28. The witness informed the Court that he had no records in his custody to support the title allegedly held by the defendant. Equally that there were no transfers or any documents to support the same.
 29. DW1 – Ahmed Chege Gikera took the stand as DW1. He stated that he bought the land – 3397 from Francis Njenga Gitau in the sum of Kshs 80,000/- vide an agreement dated the 9/12/1999; paid Kshs 2000/- being transfer fees at the offices of Githunguri; issued with a Share Certificate No B 7834 of even date. That he was given a ballot and a Share Certificate which he left them at the offices of Githunguri. He admitted that he has not produced the said documents in Court.
 30. On the 22/2/2002 was issued with a clearance certificate and got registered as owner of the said parcel on the 5/3/2002. That it was all well until the 9/11/2005 when he received a letter from the area chief calling him to attend a meeting in his office on the 11/11/2005 with respect to a complaint raised by the children of the late Gicheha Kangethe who claimed that Chege had taken their land.
 31. The witness informed the Court that on realizing that the green card for his land was missing at the lands office he caused a letter to be written to the Hon Attorney General with the intention to institute a suit but later was called by one of the Registrars namely a Mr Gitau that the green card had been located whereupon he paid for a certified copy which he was duly issued. That the certified copy of the green card was signed by a Registrar called Akinyi.



32. He stated that later the matter became subject to police investigations. The witness wondered how the Plaintiff was registered as owner of the land whilst he had held title for over 10 years. That the Plaintiff even tried to lodge a caution and carried out a search which indicated that the land was in his name. It was his case that the plaintiff managed to subdivide the land whilst the matter was pending in Court and whilst the land was registered in his name.
33. DW2 – Henry Wainaina Kihoro stated that he was a Director in Githunguri between the years 1996-2013 and that he signed the clearance certificate allowing the defendant to get title at the lands office. He admitted that he did not see the ballot in the name of the previous owner, Francis Njenga Gitau. He stated that he did not know whom the defendant bought the shares/land from. The witness stated that at the time there were upheavals at the company and Directors frequently changed and therefore could not vouch for the receipts and Share Certificates held by the parties.
34. The last witness Mr Francis Karianya Njoroge stated that he was a company Secretary of the Company between the period May 2003 – September 2009 and one of his duties was to sign documents on behalf of the Company. He disowned his signature on the clearance certificate in favour of the Plaintiff. He also disowned the letter dated the 25/3/2008 addressed to the Land Registrar confirming the land belonged to the Plaintiff. He however stated that he has not reported to the police that his signature on the said document was forged.
35. The issues for determination are; who between the parties hold a valid title; whether the Court was functus officio? Whether the Court erred in delivering the Judgement without notice to the Appellant; Whether the applications dated the 20/11/2016, 28/1/2019 and 31/1/2019 are properly before the Court.
36. As a first appellate Court, this Court’s duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the Court in a first appeal such as this one was stated in *Selle & another –vs- Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:
- “I accept counsel for the Respondent’s proposition that this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”
37. The guiding parameters for this Court are therefore, on first appeal; the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; secondly, in reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her; and lastly it is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.
38. Bearing the above principles in mind, I shall now analyse the appeal and arrive at my own conclusions.



The application filed on 20/11/18

39. It is to be noted that the Appellant's application filed on 20/11/18 sought to set aside the orders of the Court issued on the 19/11/18. On this date the matter was coming for further defence hearing. The hearing date was duly served upon the Appellant as shown on the record. However the Appellant and his counsel were absent and on application the defence was deemed closed and directions with respect to the filing of written submissions and Judgement were issued. The Appellant was aggrieved with this order on the ground that his last witness DW3 that had been stepped down on the 6/11/18 was yet to be re-examined. Though the application was filed under certificate of urgency, the record is silent as to whether or not the same was heard on the date of filing. There is evidence on record however that the Respondent filed a Replying affidavit dated the 19/2/18. This means that the application was served upon the Respondent. In the absence of any disclosed action by the Appellant to prosecute the application, the Court is of the view that the same was abandoned as the same became spent on the delivery of Judgment. It has been overtaken by events.

Was the delivery of Judgment without notice fatal?

40. With respect to ground No 1, the Appellant's impugned the delivery of Judgment without notice. A perusal of the record shows that the Court gave directions on 19/11/2018 with respect to the timelines for filing written submissions which was slated for the 26/11/18. Delivery of Judgment was reserved for the 6/12/18. These directions were given in the absence of the Respondent's counsel but in the presence of the Appellant and his counsel. On the 6/12/18 the Judgment was deferred to 13/12/18 in the presence of the Respondents counsel. On the 13/12/18 both parties were absent and Judgment was deferred to 24/12/18 whereupon both parties were again absent and another date was given for the 24/1/19. The Judgment was finally delivered on the 24/1/19 in the absence of the Appellant and his counsel.
41. I have perused the record and there is no evidence that the parties were issued with notice. Since the parties were absent on the previous hearing date when the Judgment was to be delivered, it is expected that the registry should have notified the parties with the new dates. The record is silent. The Appellant has posed a question in his submissions that how did the Respondent know that the Judgment would be delivered on the 24/1/19 since no notice was served on any of the parties. Having found no notice to any of the parties, I find it equally mysterious that the Respondent knew of the date of delivery of Judgment and further that the Appellant also mysteriously became aware of the delivery of that Judgment 3 days later when he sought copies of the said Judgment.
42. Following the delivery of Judgment, the Appellant wrote to the Court on the 28/1/2019 seeking typed copies of the Judgment delivered on the 24/1/2019. On the 29/1/2019 he proceeded to file an application seeking orders for stay of execution of execution.
43. The Civil Procedure Rules is silent on giving notice to the parties before Judgment is delivered. However, taking into consideration substantive justice, the right to be heard and the right to information both rights protected under *the Constitution*, it has been the practice that the Court issues notice to the parties for delivery of Judgment. There is another more fundamental reason why Judgment notice should be given and that is to allow parties to file an appeal or any other post Judgment motions many of which are time bound. The victor will also need to execute the Judgment and partake of the fruits of the same. That notwithstanding the Court is of the view that the Appellant did not suffer any prejudice by the Judgment being issued without notice. I say so because he seemed to have gotten wind of the delivery and that is what prompted him to seek the copies of the said Judgment 4 days later and immediately filed an application seeking stay of execution 5 days later.



44. In the circumstances of this case I find that the failure to issue notice by the Court for the delivery of Judgment was not fatal.

The application dated the 28/1/2019 and 31/1/2019

45. Post Judgment the Appellant filed the above two applications; The application of 28/1/19 sought orders of stay of execution of the Judgment on grounds that the application of 20/11/18 was pending which sought stay of proceedings to allow a key witness to conclude his testimony by way of re-examination. That the delivery of Judgment before the defence case was closed was premature and urged the Court to set aside the said Judgment to allow the key witness to be heard.

46. The application dated the 31/1/2019 sought orders to stay the execution of the decree issued on the 25/1/2019 to allow the Appellant to be heard on his last witness.

47. The Respondent filed his response to the two applications on the 28/1/2019 and when the matter came before the Hon Magistrate on the 20/2/2019 the Appellants counsel informed the Court that there are three applications pending before it; the notice of motion dated the 20/11/18, the 28/1/2019 and the one dated the 31/1/2019. The Court was informed that the execution of the Judgment was complete as the Appellant had been removed and the structures demolished on the suit land.

48. The Court stated that it had considered the applications on record seeking stay of execution however as it had already delivered Judgment the Court was *functus officio*.

49. Section 34 of the *Civil Procedure Act* provides as follows;

“Questions to be determined by Court executing decree

- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.”

50. Having heard the suit for which it delivered Judgment and consequent upon a decree was issued, the Court had jurisdiction to hear all other questions arising between the parties to the suit relating to execution, discharge or satisfaction of the decree. These are post Judgment motions which are made in the same suit to avoid filing separate suits. The Learned Hon Magistrate therefore fell in error by declining to entertain the applications while she had the full authority and mandate to do so.

51. The Respondents counsel informed the Court that by the 20/2/19 when the applications came before the Court the execution of the Judgment and decree had been concluded. That the Appellant had been removed and the structures demolished on the ground. The Appellant has not disputed these set of affairs on the ground. Be that be the case, then it is probable that there was nothing to stay even if the Hon Learned Magistrate had heard the applications.

52. Pursuant to order 42 rule 6 this Court on application has the power to entertain an application for stay of execution of Judgment and decree. The lower Court having declined to hear the said application, it was open for the Appellant to move this Court on the same application under Order 42 rule 6 of the *Civil Procedure Rules*. The Appellant failed to exhaust the legal mechanism available to him and in my considered view took the liberty to file the instant appeal before this Court. He cannot therefore be heard to cry foul as he is the author of his destiny.



53. Having said that what is before this Court is the appeal filed on the 31/1/2019. The preamble of the said appeal, clearly shows that the Appellant is appealing against the Judgement of the Hon Learned Magistrate delivered on the 24/1/2019.
54. From the forgoing I find that grounds Nos 1-4 fail for the reasons given above. The applications in the lower Court stand spent.

The main appeal

55. On the 25/4/2022 the Appellant and the Respondent elected to canvass the appeal by way of written submissions which I have already captured in the preceding paras in this Judgement. The Appellants submissions focused on grounds 1-4 and nothing was said about the main appeal. The Judgement of the lower Court therefore remains largely unassailed by the Appellant.
56. That said I shall proceed to evaluate the record and the Judgement of the Court in line with my duty as an appellate Court notwithstanding Appellants failure to agitate his appeal as set out in the grounds and make the following findings;
57. It is not in dispute that there are two titles held by the parties and for which each holds the position that theirs is the valid title for which it should be allowed to stand.
58. In the case of *Hubert L Martin & 2 others Vs Margaret Kamar & 5 Others* (2016) eKLR the Court stated as follows;

“A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

59. The Court of Appeal in the case of *Charles Karathe Kiarie & 2 Others –vs- Administrators of Estate of John Wallance Muthare (Deceased) & 5 Others*, restated that the Torrens System was applicable in Kenya and acknowledged that under the system the title of a bonafide purchaser for value without notice of fraud could not be impeached. The judges in the case observed thus: -

“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 he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests 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. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens



System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved.”

60. In Kenya land registration has been simplified with the enactment of the [Land Registration Act](#) of 2012. In line with the Torrens System, title to land registered under the Act is protected as can be seen in the preceding provisions of the said law.
61. Section 24 the [Land Registration Act](#) No. 3 of 2012 provides;
- (a) 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; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
62. Section 25 provides:-
- “(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
63. Section 26 provides:-
- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”
64. Section 26 of the [Land Registration Act](#) excludes from protection of the law titles to property obtained fraudulently or through misrepresentation, to which a person is proved to be a party and where the



certificate of title has been acquired illegally unprocedurally or through a corrupt scheme. This is in line with the Constitutional safeguards and protections found in article 40 with the exceptions stated in article 40 (6) which provides that the Constitutional protection does not extend to any property that has been found to have been unlawfully acquired.

65. In this country there is an interface between the purchase of shares and land in land buying companies. It is not in dispute that the suit lands emanated from Githunguri Ranching Co. Limited (Githunguri). For one to acquire land in a land buying company, the interplay between purchase of shares and land is at the centre. The land buying companies aggregated land for purposes of distribution to their members who were largely small holder farm owners. To be a member of the land buying Companies which were basically public companies or Societies, one had to purchase shares, make payment, entered in the member register as a member, pay for survey and other related purposes, whereupon they ballot and issued with a ballot card.
66. After balloting the member is shown the land, and for the title to be issued the usual processes of land registration applies that is the land control board consent, duly executed transfers.
67. In this case the Respondent's case is that he purchased the land from Paul Kanyingi Kangethe, the son of Gicheha Kangethe. The Respondent successfully traced the root of the title to the family of Kangethe through the Share Certificate, ballot card No 1196 issued in 1984, receipts for survey shares water project paid between 1983 – 1991 in the name of Gicheha Kangethe.
68. The Appellant on the other hand failed to produce the ballot and Share Certificate of the previous owner thus failing to establish the root of the title.
69. It is on record that the children of Gicheha Kangethe had registered a complaint about the encroachment of their land by the Appellant as early as 2005. It is not known what the outcome of the summons issued by the chief to the parties bore. The Respondent led unchallenged evidence that the Appellant had offered to purchase the suit land from him but later returned with the claim that he had a title to the said land. The Respondent attempted to lodge a caution on the same unsuccessfully because the register at the lands office was non-existent. This led to the Respondent to file a complaint with the Land Registrar.
70. It is on record that the land Registrar summoned the Appellant twice through letters dated the 31/3/2008, 21/4/08 and when the letters went unheeded the Land Registrar referred the matter to the CID for investigation on the 9/5/2008. The Appellant finally responded on the 5/5/2008 emphasizing that the ownership and the documents of the said land belong to Landluck Investments Limited. The question is if the land truly belonged to the Appellant why not state so. The aim of the summons was for the Appellant to produce the ownership documents before the Land Registrar for inspection. There is no reason why he was disowning the title he allegedly had in his custody from 2002.
71. The contradiction exhibited on the Share Certificate in the name of the Appellant is worth mentioning. The Share Certificate is indicated to have been a transfer of Share Certificate No 1349. The Share Certificate in the name of Francis Njenga Gitau was not produced to create the nexus or the root of the land.
72. The evidence led by the Land Registrar was most telling. He stated that according to the records in his custody the land of the Respondent is registered but not the Appellant. He was categorical that there was no title registered in the name of the Appellant and put the Appellant to task to explain where he got his title. The Appellant stated that he was given the title by a land Registrar called Gitau and that the copy of the green card was given to him by a land Registrar called Akinyi. The Appellant failed to call Gitau and or Akinyi in support of his assertions. The only explanation or presupposition is that



the said witnesses were not called because their testimony would be adverse to that of the Appellant's case or in the worst case scenario, they were nonexistent.

73. In the case of *Munyu Maina vs. Hiram Gathiba Maina* [2013] eKLR, the Court held as follows:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

74. In the instant case the title of the Appellant having not been registered the same is not protected by law and cannot be held to be a valid title. The Respondent pleaded particulars of fraud under para 6 of the plaint. The Black's Law Dictionary defines fraud as follows:

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

75. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (emphasis ours).

76. In this case unchallenged evidence was led that the title held by the Appellant was not registered and or supported by the register held at Thika Land Registry. The Appellant has not successfully explained how he got the title. The act of the Appellant amounted to misrepresentation which is a ground for impeachment of a title under the law.

77. The totality of the evidence that I have analyzed leads me to conclude that the Hon Learned Magistrate cannot be faulted in the decision she reached. I find no grounds to interfere with the Judgement of the trial Court.

78. In the end I find that the appeal is not merited.

79. It is dismissed with costs to the Respondent.

80. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 15TH DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Appellant – Absent but served

Kanyi for Respondent



