



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO 801 OF 2014**

**JAMES BRESS MUTHEE.....PETITIONER**

**VERSUS**

**RICHARD KIPCHIRCHIR TOO .....1 ST RESPONDENT**

**SHADY ACRES LIMITED.....2 ND RESPONDENT**

**CAROLINE W KOINANGE.....3 RD RESPONDENT**

**SAMUEL M MUNENE.....4 TH RESPONDENT**

**MAHMOUD ALI MOHAMED..... 5 TH RESPONDENT**

**MAHMOUND MOHAMED HAMOUD.....6 TH RESPONDENT**

**NAJIB MOHAMED BALALA .....7 TH RESPONDENT**

**HARRIET WANJIRU KAGURU..... 8 TH RESPONDENT**

**HASSCONSULT LIMITED.....9 TH RESPONDENT**

**DOROTHY AKINYI OOKO.....10 TH RESPONDENT**

**CORNELIS BROERE .....11 TH RESPONDENT**

**AMRIK SINGH.....12 TH RESPONDENT**

**DAN HANEL LIMTIED.....13 TH RESPONDENT**

**JONATHAN MARK D'SOUZA.....14 TH RESPONDENT**

**MARTINA OKOKO D'SOUZA.....15TH RESPONDENT**

**DIPAK ASHOK KUMAR MEDIRATTA.....16 TH RESPONDENT**

**RAAKHE MEDIRATTA.....17 TH RESPONDENT**

**OMUREMBE IYADI.....18TH RESPONDENT**

**MIOTONI TERRACES MANAGEMENT LTD.....19TH RESPONDENT**

**THE HON. ATTORNEY GENERAL .....20TH RESPONDENT**

**THE NATIONAL LAND COMMISSION.....21ST RESPONDENT**

JUDGMENT

1. The petitioner, James Bress Muthee, brought this suit on 13/6/2014 through a petition dated 12/6/2014. He sought the following verbatim orders against the Respondents:

- a) *A declaration that the Petitioner's constitutional right to protection of right of property was and is still being violated as enshrined in Article 40 of the Constitution of Kenya, 2010.*
- b) *A declaration that the suit land (LR No 10008/59 Karen Nairobi) is the legal property of the Petitioner by virtue of transmission.*
- c) *A declaration that the purported sale and conveyance on 13th February 2007, of the suit land by the 1st Respondent to the 2nd Respondent was and is still null and void and that the purported long term leases emanating from the said conveyance be nullified and the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th and 18th respondents be evicted; accordingly.*
- d) *A declaration that the purported issuance of long term 99 year leases by the 2nd Respondent to the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th and 18th respondents was and is still invalid ab initio*
- e) *An order that the respondents or any of their successors in title do give vacant possession of the suit land to the petitioner*
- f) *An order that the 21st respondent do restore the Register as it was prior to 8th December 2003 when the 1st respondent with the assistance of the 20th and 21st respondent's officials registered the vesting order aforementioned that had been issued in High Court Civil Case Number 1504 of 2002 Richard Kipchirchir Too Versus Elli Gertz (OS)*
- g) *Loss of rental income at the rate of Kshs 50,000/- per month from the date of eviction of the legal tenant Dr John Aston on 1st March 2007 to date until payment in full.*
- h) *General Damages*
- i) *Costs of this Petition*
- j) *Interest on (j) and (k) above (sic)*

**Petitioners's Case**

2. The Petition was supported by the petitioner's supporting affidavit sworn on 12/6/2014. Annexed to the affidavit were 26 exhibits. Subsequently, the petitioner filed written submissions titled "*The petitioner's Summary/Pleadings*" dated 4/10/2018. Further, the petitioner's counsel made brief oral submissions at the plenary hearing of the petition.

3. In summary, the petitioner's case as gleaned from the papers filed by the petitioner was that he was the legal owner, by way of transmission, of all that parcel of land known as Land Reference Number 1008/59 situated along Warai Road, Miotoni, Karen, Nairobi, measuring approximately 2.29 Hectares (**the suit property**). By an indenture of conveyance dated 24/5/197, the suit property and the legal interest in the suit property was registered and vested in one **Elli Gertz** alias **Elli Herta Klara Gertz** ( hereinafter referred to as "**the deceased**") from its previous proprietor, Retired Justice Philip Ransley. On 18/9/2002, the 1st respondent initiated **Nairobi High Court Civil Case No 1504 of 2002 (OS); Richard Kipchirchir Too v Elli Gertz**, in which he obtained an *ex parte* ruling (orders) and vesting orders dated 4/4/2003 and 25/6/2003 respectively, vesting the suit property in the 1st respondent under the doctrine of adverse possession pursuant to Section 38 of the Limitation of Actions Act. Service of summons to enter appearance in the said suit was effected through a notice published in the **Kenya Times** Newspaper. The defendant did not, however, enter appearance in the said suit, hence the *ex parte* orders.

4. The petitioner added that consequent to the said *ex parte* orders, the 1st respondent was registered as proprietor of the suit property on 8/12/2003. Subsequently, on 13/2/2007, the 1st respondent sold the suit property to the 2nd respondent at a consideration of Kshs 36,725,000. The conveyance in favour of the 2nd respondent was registered on 16/2/2007. Sale and conveyance to the 2nd respondent were effected when the deceased's application seeking the setting aside of the *ex parte* orders was still pending hearing and disposal by the court. On 2/8/2007, the High Court (**Aganyanya J**) set aside the *ex parte* orders and ordered that the 1st respondent's originating summons be heard *denovo*.

5. The 2nd respondent subsequently initiated the process of change of user and development of the suit property, culminating in the development of eleven town houses which the 2nd respondent marketed and sold through the 9th respondent. Purchasers of the said villas were the 3rd-18th respondents. The 19th respondent was and remains the management company incorporated to hold the reversionary interest in the suit property and manage the estate.

6. Upon completing the development and sale of the villas to the said purchasers , the 2nd respondent conveyed the villas to the purchasers by way of 99year leases commencing on 1/1/2008. The leases were registered against the title. The reversionary interest was similarly conveyed to the 19th respondent.

7. The petitioner contended that Elli Geitz died on 11/12/2007 and on 10/2/2008 the petitioner filed an application dated 10/7/2018 seeking joinder of the 2nd respondent as a party in Nairobi HCCC No 1504 of 2002. He also sought an interlocutory restraining order. When the application came up for hearing before the High Court (**Kihara Kariuki J** as he then was) on 25/2/2009, the petitioner's counsel informed the court that Elli Gertz had died in December 2007. The Court (Kihara Kariuki J) proceeded to mark the suit as abated.

8. The petitioner added that he subsequently initiated **Nairobi High Court Succession Cause No 688 of 2009; In the matter of the Estate of Elli Herta Klara Gertz aka Elli Herta Clara Gertz** in which he obtained a Grant of Probate dated 9/3/2010 and a Certificate of Confirmation of Probate declaring him as the sole heir to the suit property.

9. The petitioner contended that the orders made by Kihara Kariuki J on 25/2/2009 were a breach of the petitioner's constitutional right to a fair hearing contrary to Article 50(1) of the Constitution of Kenya 2010 and were discriminatory. He faulted the Learned Judge for failing to issue a preservative order in favour of the deceased and the petitioner, pending the filing of a succession cause. Further, the petitioner averred that the 1st, 2nd, 21st and 22nd respondents engaged in fraud. He added that as a result of the actions of the 1st and 2nd respondents, he had incurred massive financial losses in his attempt to recover the suit property from the 1st and 2nd respondents through **Nairobi High Court Civil Case No 1504 of 2002** and he had lost rental income from the suit property since 1/3/2007.

10. Lastly, the petitioner contended that his constitutional right of access to justice under Article 48 of the Constitution; the right to a fair hearing under Article 50(1) of the Constitution; the right to benefit from the principles guiding exercise of judicial authority and administration of justice under Article 159(2); the right to represent the deceased under Article 22 (2); and the right to property under Article 40 were violated. He urged the court to grant the prayers sought in the petition.

11. The 1st respondent neither entered appearance nor filed an answer to the petition. The petitioner's submissions were silent on the question of service of summons upon the 1st respondent in terms of the order made by Gitumbi J on 19/6/2014.

### **Cases of the 2nd and 9th Respondents**

12. The 2nd and 9th Respondents were represented by M/s P.C Onduso & Company Advocates. They filed separate answers to the petition, both dated 11/7/2014. They presented joint submissions through their counsel. The 2nd respondent contested the petitioner's claim of ownership of the suit property and his *locus standi* to bring and maintain this petition. The 2nd respondent further contended that they purchased the suit property from the 1st respondent after its advocate had carried out due diligence and had established that the 1st respondent was the registered proprietor of the suit property and there was no encumbrance or impediment against the 1st respondent's title. Upon purchase of the suit property, the 1st respondent delivered the suit property to the 2nd respondent in vacant possession. The 2nd respondent was not a party to **Nairobi HCCC No 1504 of 2002** at the time Justice Aganyanya delivered the ruling of 2/8/2008. They added that the deceased did not comply with the conditions stipulated in Justice Aganyanya's ruling of 2/8/2008. They further contended that the petitioner was guilty of non-disclosure and concealment of material facts in **Nairobi HCCC No 1504 of 2002** and **Nairobi High Court Succession Cause No 688 of 2009**, firstly for initiating and prosecuting an application on the strength of a power of attorney whose donor had long died and, secondly, by asking the court to distribute the suit property while aware that the suit property was not available for distribution as part of the estate of the deceased. The 2nd respondent further contended that all interest in the suit property which hitherto vested in the 2nd respondent upon acquiring good title from the 1st respondent was divested to third parties as eleven separate titles duly registered, hence the substratum of the petition did not exist.

13. The case of the 9th respondent was that between 15/9/2007 and 18/11/2008, the 2nd respondent developed eleven town houses on the suit property at a cost of Kshs 122,000,000. The development took place with the full knowledge of the deceased and the petitioner. The 2nd respondent engaged them to market and sell the eleven town houses. They advertised, marketed and sold the town houses to the 3rd - 8th and 10th -18th respondents without any impediment or notice of any defect in the 2nd respondent's title. The 9th respondent purchased one of the town houses which it subsequently sold to a third party. The 2nd and 9th respondents urged the court to dismiss the petition.

### **Case of the 3rd-8th and 10th-19th Respondents**

14. To avoid multiplicity of documents in the court record, the 3rd – 8th and 10th – 19th Respondents sought leave of the court to have one of them adduce documents relating to their respective cases. They contended that save for the 19th respondents ( Miotoni Terraces Management Limited) they were all home owners in Miotoni Terraces, an estate developed on the suit property. The 19th respondent was a management company holding the reversionary interest in the suit property and managing the estate.

15. They contended that in 2007, they saw an advertisement by the 9th respondent relating to proposed development of eleven town houses on the suit property. Being interested, they approached the 9th respondent and the 9th respondent issued them with letters of offer. They established that the town houses were being sold by the registered proprietor of the suit property, Shady Acres Limited, and the 9th respondent was the contracted developer and selling agent. They undertook searches at the Lands Registry and established that the suit property was registered in the name of the 2nd respondent. They subsequently entered into sale agreements, with the 2nd respondents in which each town house was sold at Kshs 20,750,000. The 19th respondent was subsequently incorporated as the management company for the eleven town houses and the common areas and amenities. They subsequently executed leases which were duly registered at the Lands Registry. They were given vacant possession of the town houses and the entire estate and they have lived in the estate since 2008. The reversionary interest was subsequently transferred to the management company (19th respondent).

16. The case of the 3rd – 8th and 10th – 18th respondents was that they were bona fide purchasers for value of the suit property without notice of any defect in the 2nd respondent's title and they did not violate the petitioner's constitutional rights under Article 40 of the Constitution or at all. They did not commit any fraud. They did not collude with anyone to defraud the petitioner. They bought the town houses at market value upon conducting necessary due diligence and upon confirming that there was no encumbrance on the title. The 2nd respondent had a good and unchallenged title at the point of sale. The 19th respondent was a management company managing the estate and holding the reversionary interest.

17. They added that during the entire period of purchase, neither the petitioner nor any other person raised any objection to the purchase. They contended that the petitioner was using this petition as an appeal to challenge several decisions of the High Court, a jurisdiction which this court did not have. They added that the petitioner did not institute this suit on behalf of the Estate of Elli Gertz hence he did not have *locus standi* to bring the suit. Lastly, they contended that the Certificate of Confirmation of probate issued to the petitioner in Nairobi High Court Succession Cause Number 688 of 2009 was obtained through deceit, fraud and concealment of the fact that the suit property had long been conveyed to third parties and was not available for distribution by the High Court. They urged the court to dismiss the petition.

### **Case of the 20th Respondent**

18. The case of the 20th respondent was that the petitioner's constitutional right to property and the right to fair hearing had not been violated. The 20th respondent contended that the petitioner had not demonstrated that he extracted the order granted by Aganyanya J and executed it as required of him. It was the 20th respondent's position that had the petitioner executed Judge Aganyanya's orders, the Registrar of Titles would have been under an obligation to cancel the registration of the 1st and 2nd respondents and the property would have reverted to Elli Gertz.

19. The 20th respondent added that the order issued by Aganyanya J on 2/8/2007 being in the nature of a judgment, had lapsed in August 2019 by dint of the provisions of Section 4(4) of the Limitation of Actions Act. Further, the 20th respondent contended that the petitioner could not challenge the orders made by Kihara Kariuki J in Nairobi HCCC No 1504 of 2002 in this suit because they were made by a court of equal status. He added that as a matter of law and fact, Nairobi HCCC 1504 of 2002 had abated and the High Court properly marked the suit as abated.

20. The 20th respondent added that the petitioner having failed to execute the order of 2/8/2007 within 12 years, the limitation period had lapsed. He contended that the conveyance registered on 13/2/2007 was valid as at the time of registration, and the petitioner having failed to execute the order of 2/8/2007, the sale and conveyance to the 2nd respondent remain valid. The 20th respondent added that the petitioner had not demonstrated that the 2nd respondent acquired title to the suit property illegally, unprocedurally, fraudulently or through a corrupt scheme. Lastly, the 20th respondent contended that the 2nd respondent properly issued leases to the eleven purchasers because at that time the 2nd respondent was the legally registered owner of the suit property. The 20th respondent urged the court to dismiss the petition.

21. The 21st and 22nd respondents did not file any answer to the petition. The petitioner's submissions are quiet on service of the petition on the two parties.

### **Analysis and Determination**

22. I have considered the petition together with all the responses and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues emerging for determination in this petition. Parties to the petition did not present a common statement of agreed issues. However, having considered the petition, the responses thereto, and the parties' respective submissions, the following are the four key issues falling for determination in the petition: (i) Whether this court has jurisdiction to entertain the petitioner's claim of violation of constitutional right to fair hearing and the right to own property, anchored on the judicial orders made by Kihara Kariuki J (as he then was) in 2009 in Nairobi HCCC No 1504 of 2002; (ii) Whether the 2nd and 3rd-18th respondents were bona fide purchasers for value of the suit property without any notice of defect in the titles conveyed to them; (iii) Whether the petitioner is entitled to judgment against any of the respondents; and (iv) Who should bear costs of this suit?

23. The first issue falling for determination is whether this court has jurisdiction to entertain the petitioner's claim of violation of constitutional right to fair hearing and the right to own property, anchored on the judicial orders made by Kihara Kariuki J (as he then was) in 2009 in Nairobi HCCC No 1504 of 2002. The petitioner solely relied on the Constitution of Kenya 2010 in advancing that particular limb of the claim.

24. To begin with, reliance on the Constitution of Kenya 2010 to ventilate a grievance relating to a purported breach alleged to have been occasioned in 2009 is in my view, misplaced. The framework in the Constitution of Kenya 2010 was not intended to be applied retrospectively. It was not in force in 2009. Its Articles cannot therefore be invoked as a basis upon which to ventilate a pre-2010 claim.

25. Second and more important, this petition was lodged in the High Court and subsequently transferred to this court. Jurisdiction and ranking of this court is at par with the pre-2010 High Court save that the scope of the jurisdiction of this court is limited to disputes relating to environment and land. Put differently, this court does not exercise oversight jurisdiction over decisions made by the pre-2010 High Court. If the petitioner felt aggrieved by the orders made by Kihara Kariuki J, he was entitled to seek redress through the mechanism of appeal to the Court of Appeal or invite the same court to review its orders within the then existing legal framework. He did not do that. He went to slumber for a period of five years before bringing afresh suit in a court of the same status, alleging breach of constitutional rights by the pre-2010 High Court Judge. In my view, that is untenable. This court has no jurisdiction to entertain a claim of constitutional breach by a judge of the pre-2010 High Court in exercise of the judge's judicial authority. Without saying much, I do not think I have jurisdiction in that regard. My finding on the first issue is that this court has no jurisdiction to entertain the petitioner's claim of violation of constitutional right to fair hearing and to the right to own property anchored on the judicial order made by Kihara Kariuki J (as he then was) in 2009 in Nairobi HCCC No 1504 of 2002.

26. The second issue is whether the 2nd and 3rd – 18th respondents were *bona fide* purchasers for value of the suit property without any notice of defect in the titles conveyed to them. The doctrine of innocent purchaser for value has been the subject of discussion by our courts and courts of East Africa in a line of cases. In the oft cited case of *Katende -vs- Haridar & Company Limited, [2008] 2 E.A 173* the Court of Appeal of Uganda described a bona fide purchaser as follows:

***For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that: he holds a certificate of title; he purchased the property in good faith; he had no knowledge of the***

**fraud; he purchased for valuable consideration; the vendors had apparent valid title; he purchased without notice of any fraud; and he was not party to any fraud.**

27. Although the doctrine of innocent purchaser for value was developed as a common law principle of equity, it has received both constitutional and statutory recognition in Kenya. Article 60 of the Constitution sets out the principles of land policy in Kenya. Among these principles is the security of land rights. This constitutional framework is the basis upon which statutory frameworks have been enacted to guarantee certain protections to holders of titles to land together with holders of other registrable instruments such as charges and leases. In this regard, Section 24 of the Land Registration Act vests in the registered proprietor of land absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto.

28. Section 80 of the Land Registration Act which empowers courts to rectify entries in the land parcel register where registration is obtained, made or omitted by fraud or mistake, grants an exception in favour of an innocent purchaser for value in the following terms:

***The register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.***

29. In the suit under consideration, the suit property was conveyed to the 1st respondent and vested in him pursuant to orders of the High Court. The 1st respondent subsequently conveyed the suit property to the 2nd respondent. At the time the 1st respondent conveyed the suit property to the 2nd respondent, the court orders which vested the suit property in the 1st respondent were still in force. Although the vesting orders were subsequently set aside by Aganyanya J on 2/8/2007, the deceased (Elli Gertz) did not bother to cause Judge Aganyanya's order to be registered as an entry in the relevant land parcel register. Similarly, she did not bother to seek interim conservatory orders to protect her interest in the suit property. As a consequence of this default, the 2nd respondent developed town houses on the suit property, sold, and conveyed the town houses to the 3rd-18th respondents.

30. Although the petitioner alleges that the 2nd respondent acted fraudulently, there is no evidential material to support that allegation. Firstly, the 2nd respondent purchased the suit property from the 1st respondent at a consideration of Kshs 36,725,000. There is no evidence that the 2nd respondent was aware of any challenge to the 1st respondent's title. The suit property was consequently conveyed to the 2nd respondent. Secondly, at the time the 2nd respondent developed the town houses and sold them, he was not a party to Nairobi HCCC No 1504 of 2002. Thirdly, Judge Aganyanya's order was not presented to the Registrar of Titles for registration in the land parcel register and there was no encumbrance or impediment restraining prospective purchasers against dealing in the suit property. Fourthly, the eleven town houses were developed over a period of time. The deceased did nothing to stop the development. In the circumstances, I find no basis for the petitioner's contention that the 2nd respondent acted fraudulently. I similarly find no basis for doubting the 2nd respondent's contention that it was an innocent purchaser for value.

31. The 3rd-18th respondents placed before court uncontroverted evidence demonstrating that they were innocent purchasers of the eleven town houses which the 2nd defendant developed on the suit property and which the 9th respondent marketed. Each town house was sold to them at Kshs 20,750 at the time of sale. The petitioner did not place any evidential material before this court to discount the contention that the parties who purchased the eleven town houses were innocent purchasers for value without any notice of defect in the titles they were purchasing.

32. Not too long ago the Court of Appeal, faced with a scenario in **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others** where the appellants who were registered proprietors and developers of various parcels of land in Runda, Nairobi, were contesting the 1st respondent's claim to portions of their parcels on the ground that the portions were acquired by the Department of Lands decades earlier for road expansion but the surrender was never formalized through entries in survey records and lands registers, The Court of Appeal upheld their contention that they were purchasers for value whose titles could not be impeached because at the time they purchased their properties, there was nothing in the parcel registers to suggest that the portion had been acquired by the Government for road expression.

33. In the absence of controverting evidence, I find that the 2nd respondent was an innocent purchaser and developer of the suit property. I also find that the 3rd-18th respondents were innocent purchasers of the eleven town houses developed on the suit property. Their lease titles cannot be impeached under Section 26 of the Land Registration Act.

34. The third issue is whether the petitioner is entitled to any of the reliefs sought in the petition. The petitioner's claim is anchored on a Certificate of Confirmation of Grant of Probate dated 17/1/2011. The Succession Cause in which the petitioner obtained the Certificate of Confirmation of Grant of Probate was initiated by the petitioner in 2009. It is evident from the evidential materials placed before this court that at the time of initiating and prosecuting the succession cause, the petitioner was aware that the suit property was no longer registered in the name of Elli Gertz and did not legally form part of the estate of Elli Gertz. The petitioner was also aware that the suit property had been developed and the eleven town houses thereon had been sold to third parties. The petitioner did not bother to initiate timely and appropriate proceedings on behalf of the estate of Elli Gertz to cause the suit property to revert to the estate of Elli Gertz before seeking distribution of the estate. He misled the High Court and obtained a Certificate of Confirmation of Grant of Probate in respect of property which had long been conveyed to the 2nd respondent; had been developed, and had been sold to third parties. The petitioner similarly knew that the leases and the reversionary title in the suit property had been conveyed to third parties. Put differently, the petitioner concealed material facts and misled the High Court into distributing property that was not available for distribution at the time.

35. Elli Gertz's title to the suit property was conveyed to the 2nd respondent during Gertz's lifetime. It was developed during Gertz's lifetime. The conveyance and development of the suit property happened because Elli Gertz failed to present Judge Aganyanya's order for registration by the Registrar of Titles as an instrument against the land parcel register. What the petitioner should have done to mitigate the already bad situation was to promptly initiate succession proceedings. Upon obtaining a Grant of Probate, he should have initiated prompt court proceedings on behalf of the estate of Elli Gertz for recovery of the suit property by the estate of the Elli Gertz. Confirmation of the Grant or distribution of the estate in terms of Elli Gertz's will would have followed only in the event the petitioner recovered the suit property on behalf of the estate of Elli Gertz. The petitioner did not do that. He stayed for over five years and initiated this petition in his own

name as if the property was available for distribution by the succession court.

36. To the extent that the petitioner ignored the legal recourse available to the estate of Elli Gertz and purported to make a personal claim, the petition and the prayers therein are a wild goose chase. None of the prayers is available to the petitioner in the circumstances.

37. The net result is that the petition herein fails wholly. The petitioner shall bear costs of the petition.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MAY 2020.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Charles Madowo for the 3rd -7th and 9th - 19th Respondents

Mr Eredi for the 20th Respondent

Court

Clerk

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June

Nafula