



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC CASE NO. 144 OF 2015

(CONSOLIDATED WITH NAKURU CMCC NO. 395 OF 2014)

JOHN WAWERU MURAGORI.....1ST PLAINTIFF

FRANCIS NJENGA NGURE.....2ND PLAINTIFF

PETER CHEGE GITHAMO.....3RD PLAINTIFF

DUNCAN KABIRU.....4TH PLAINTIFF

JOSEPH KIMANI MBUGUA.....5TH PLAINTIFF

JULIA NJERI KIMANI.....6TH PLAINTIFF

ALICE MUMBI.....7TH PLAINTIFF

SAMUEL KINUTHIA NJENGA.....8TH PLAINTIFF

ELIZABETH WANGECI KIMANI.....9TH PLAINTIFF

LILIAN WANJIRU MUHIA.....10TH PLAINTIFF

JACKSON NJUGUNA KAMAU.....11TH PLAINTIFF

EMILY NJOKI.....12TH PLAINTIFF

VERSUS

BETH YEGON.....1ST DEFENDANT

JAMES MBUGUA WAWERU.....2ND DEFENDANT

SAMUEL KIPKOECH TIROP.....3RD DEFENDANT

J U D G M E N T

1.The instant suit was commenced by way of plaint dated 2nd June 2015. The plaintiffs averred that they are were registered proprietors of land parcel No's Dundori Mugwathi Block 2/2594, 2595, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604 and 2605 (Koelel) (herein after referred to as the "suit property").

2. The plaintiffs averred that on 4th March 2014 they purchased land parcel number Dundori Mugwathi Block 2/38 (Koelel) as a group from James Mbugua Waweru and subsequently subdivided the same into twelve parcels of land. It is the plaintiff's case that the 1st defendant entered into the suit property illegally, uprooted the beacons and destroyed the plaintiff's crops. The plaintiffs vide the plaint sought the following orders against the defendants:

a. A mandatory injunction restraining the defendant by either herself, her servants and or agents from trespassing and or in any way interfering with the suit properties to wit Dundori Mugwathi Block 2/2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604 & 2605 (Koilel) or any portions therefore in any manner whatsoever.

b. An order for eviction

c. General damages for trespass

d. Mesne profits

e. Cost of the suit

f. Interest on (c), (d) and (e) at court rates.

g. Any other relief the Honorable court may deem fit to grant.

2. The 1st defendant filed her defence and counterclaim where she averred that she had been in continuous occupation of the suit property since the 1980's and that if the plaintiffs hold title to the suit property, then the same was procured by way of fraud. In her counterclaim she sought for:

a. A declaration that the defendant (now plaintiff) is the lawful owner of land parcel No. Dundori/Mugwathi Block 2/38 (Koilel)

b. An order revoking the title issued to James Mbugua Waweru over land parcel No. Dundori/Mugwathi Block 2/38 (Koilel) or in alternative an order revoking the title issued to the plaintiffs (now defendants) over land parcel No's Dundori/Mugwathi Block 2/2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604 and 2605(Koilel).

c. A perpetual and mandatory injunction restraining the plaintiffs (now defendants) by either themselves or their servants and or agent from trespassing, utilizing or in any other manner interfering with the defendants (now plaintiff's) peaceful occupation, use and possession of the suit property.

d. An order of eviction against the plaintiffs(now defendants)

e. General damages for trespass.

f. Mesne profits

g. Dismissal of the plaintiffs (now defendants) suit with cost and costs of the counterclaim be borne by the plaintiffs (now defendants) jointly or severally.

h. Interest on e), f and g) at court rates.

i. Any other relief the Honorable Court may deem fit to grant.

3. The suit Nakuru CMCC No. 395 of 2014 was filed in the Chief Magistrate's Court at Nakuru and was between *James Mbugua Waweru versus Samuel Kipkoech Tirop and Beth Yegon* over the same subject matter. The plaintiff in the plaint averred that he was the registered owner of land parcel No. Dundori/Mugwathi Block 2/38 and that the defendants had unlawfully trespassed onto his suit property and sought for the following orders:

a. A mandatory injunction against the defendants their servants and/or agents to vacate land parcel number Dundori/Mugwathi/Block 2/38 (Koilel)

b. General damages for trespass

c. Mesne profits

d. Eviction

e. Costs

f. Any other relief that this Honorable Court may deem fit to grant.

4. The 2nd defendant, Beth Yegon in Nakuru CMCC No. 395 of 2014 filed a defence and counterclaim where she averred that she was the owner of land parcel No. Dundori/Mugwathi Block 2/38 (Koilel) having acquired it from her late husband, Tirop Arap Yegon, in 1975. She averred further that she had been in occupation of the parcel of land since the 1980's and that if the plaintiff was registered as owner of the suit property, then the registration was procured through fraud. She prayed for the following orders in her counterclaim:

- a. A declaration that the 2nd defendant (now plaintiff) is the lawful owner of land parcel No. Dundori Mugwathi Block 2/38 (Koilel)
- b. An order revoking the title issued to the plaintiff (now defendant) over land parcel No. Dundori/Mugwathi Block 2/38(Koilel)
- c. A perpetual and mandatory injunction restraining the plaintiff (now defendant) from trespassing, utilizing or in any other manner interfering with the 2nd defendant's (now plaintiff's) peaceful occupation, use and possession of the suit property.
- d. An order of eviction against the plaintiff (now defendant)
- e. Dismissal of the plaintiff's (now defendant's) suit with costs and costs of the counterclaim be borne by the plaintiff (now defendant).
- f. Any other or further relief that this court may deem fit and just to grant.

5. On 18th February 2016, by consent of all the parties, the court consolidated Nakuru CMCC No. 395 of 2014 with the present matter.

6. At the hearing, that commenced before Munyao, J the 5th plaintiff (PW1) testified that he was the chairman of Smart Self Help Group which was registered under certificate No. 3299288 in March 2013. He testified that the self-help group comprised of twelve members who bought land parcel No. Dundori Mugwathi Block 2/38 (Koelel) from one James Mbugua Waweru after conducting an appropriate due diligence and affirming he was the registered owner of the property.

7. The witness testified that they entered into a sale agreement to purchase the suit property at a consideration of Ksh.3,200,000/= on 4th March 2014 which sale agreement was produced as "PEX-4" and the receipts to family bank and acknowledgement receipt of the payment of the purchase price were produced as "PEX5a-5d". The suit property was transferred to the name of the Self Help Group before it was subdivided into twelve sub- plots. The title deed in the name of the group was produced as "PEX-6" while the consent and mutation form for subdivision was produced as "PEX-7 and 8" respectively. The new plots were given parcel No's 2594-2605 and copies of the respective titles were exhibited. The members of the self-help group took possession of their respective parcels of land but the witness stated that on 6th March 2015 they found that their beacons had been removed and they reported the matter to the police under OB No. 8/6/3/15 which was produced as "PEX -10".

8. PW1 testified that they found out that it was the 1st defendant who had removed the beacons and that she was the mother to the person who sold the land to James Mbugua the 2nd defendant herein. The 1st defendant claimed that the land belonged to her late husband. However the witness stated that after contacting the Local Chief he informed them the 1st defendant's land parcel was No.28 in the name of Tirop Arap Yego who was her husband. A search of land parcel No.28 produced as " PEX11" affirmed that position.

9. The witness further testified that the land was originally owned by Kalenjin Enterprises and he produced a register of Kalenjin Enterprises as "PEX-12". He also testified that he found out that Fredrick Kitur had paid Kalenjin Enterprises for plot No.38 (Koelel) and No.952. He also produced receipts for Survey fees as "PEX- 13a, b and c" and photos of the destroyed beacons and crops as "PEX- 14 a – e" and the demand letter as "PEX- 15 a and b". On cross examination he confirmed that before subdividing the land, they informed the area chief.

10. Kipkirui Rono testified as PW2. He stated that he was a director of Kalenjin Enterprises. He testified that he came to know Samuel Kipkoech Tirop the 3rd defendant in the year 2009 when he was pursuing a title to the suit property which was in the name of his father Tirop Arap Yego. He claimed to have bought shares from the Mibei family namely Joseph Mibei, Anne Chepkoech and Jane Cheruto Mibei. He testified that Mibei was a member of Kalenjin Enterprises but he had not sold his shares. He affirmed not to have met Tirop Arap Yego but stated that Samuel Kipkoech Tirop had gone to his office with a power of attorney from his father and was pursuing land parcel No.Dundori/Mugwathi Block 2/28.

11. The witness exhibited a register for Dundori/Mugwathi Block 2 which showed the names of its members that included Samuel Kipkoech Tirop as the owner of plot No. 38 while plot number 28 was not registered. He produced a copy of the register as "PEX-16". He explained the entry of plot no.28 was blank because of a dispute that was pending in court between Samuel Tirop who had sued on behalf of his father and one Katya. That the dispute had gone to the Lands Dispute Tribunal where it was held that Samuel Tirop was the proper owner of the suit property. He produced gazette notice No.14380 to that effect as "PEX-17".

12. He further testified that he knew Fredrick Tanui who was a member of Kelenjin Enterprises but had not completed paying for his shares. He stated Tanui had paid Ksh.300 while a full share was Ksh.500 and one share was equivalent to 1 1/2 acres of land. It was his testimony that Fredrick Tanui wanted to give his land to Samuel Tirop but since he had not fully paid for his share he had not been given any land. On cross examination he stated that Kalenjin Enterprises is a Limited Company with 9 directors and that land parcel No.Dundori Mugwathi was originally demarcated in 1985 and Samuel Tirop went to their office in the year 2008 and plot No.38 was assigned to him in 2009. He also confirmed that Samuel is the son of the late Tirop Arap Yego who was allocated plot no.28 through the court.

13. James Mbugua Waweru testified as DW1. He testified that he bought land parcel No.Dundori/Mugwathi Block 2/38 from Samuel Tirop (3rd defendant) for a consideration of Kshs.1,800,000/=. He produced the land sale agreement as "DEX-1", copy of title and search as "DEX-2 & 3" respectively and copy of rates demand as "DEX-4". He testified that he sold the suit property to Smart Self Help Group. He stated he sued Samuel and Beth Yegon because despite them selling the land to him they were disturbing his quiet possession of the same. He produced photographs as "DEX-5" and a letter written by his lawyer dated 31st March 2014 as "DEX-6". On cross examination he stated that when he sold the suit property there was no one in possession.

14. The 3rd defendant, Samuel Kipkoech Tirop testified that he sold the suit property to James Mbugua (2nd defendant) who sold it to the

plaintiffs. He adopted his witness statement dated 24th June 2015 as his evidence. He testified that he had bought the suit property from Fredrick Tanui who was a member of the Kalenjin Enterprises. After he bought the shares from Fredrick Tanui, he became a member of Kalenjin Enterprises and bought more shares from other people which were combined to comprise a share for land allocation.

15. The 3rd defendant stated that after he stated that after he made payments to enable him to be allocated a share, he processed the title deed and used it to secure a bank loan. When he was unable to repay the loan, he approached the 2nd defendant to assist him in repaying the loan. That in regard to land parcel No. **Dundori/Mugwathi Block 2/28**, he bought shares for that parcel of land and registered it under the name of his late father. He stated that his mother stays at parcel No.28 and that his father had bought shares for that parcel of land. He produced receipts serial No.031 and 032 for 19th May 2009 as “**DEX 3 and 4**” and a power of attorney dated 23rd August 2010 which empowered him to follow up on his father’s land that had some issues.

16. The 3rd defendant further testified that Kenya gazette Notice No.14380 of 18th November 2011 authorized the cancellation of title to land parcel No. **Dundori/Mugwathi Block 2/28** that had been issued to Saimo K. Investments.

17. The Land Registrar, Nakuru Land Registry Eric Munene Nyamu testified as DW3. He testified that as per the green card for land parcel No.28, the initial owner was the government of Kenya; on 10th March 2003, it was transferred to Rift Valley Enterprises Limited; on 28th September 2005 the land was transferred to Symore K. Investments Limited; on 26th April 2012, a decree cancelled the previous entries and Gazette Notice No.14380 of 18th November 2011 gave notice of title cancellation and Tirop Arap Yego was issued with a title after cancellation. He produced copies of the documents that related to parcel 28 as “**D-Ex 6**”

18. With regard to parcel No.38, he testified that the lease was registered in favour of the government of Kenya on 19th July 1985 and then on 24th September 1997, the title was issued to Kipala Arap Kamureu. That the title was then surrendered and on 23rd March 2011 a title deed was issued to Samuel Kipkoech Tirop who then charged the land to Equity Bank. He testified further that the charge was discharged on 5th September 2013 and the title transferred to James Mbugua Waweru. He confirmed that he had in his possession a copy of title in the name of Samuel Tirop amongst other documents. The documents that related to parcel No.38 were produced as “**DEX-7**”, certified abstracts of title as “**DEX 8a & b**”.

19. On cross examination he confirmed that on parcel 28, entry number 2 is Rift Valley Enterprises, on parcel 38 entry No. 2 the transfer was directly to the owner.

20. After the Land Registrar completed his testimony DW2, Samuel Kipkoech Tirop who had been stood down continued with his testimony and stated that his mother was in possession of land parcel No. 28 and not parcel No.38.

21. The 1st defendant testified as DW4. She stated that she resides on land parcel No’s 28 and 38. She stated Mibei sold parcel 28 to her late husband in the year 1975. She testified further that parcel 38 belonged to Fredrick Tanui and that her husband had a plot at Kampi ya Moto that measured 11/2 acres which he exchanged with Tanui’s plot No.Dundori Mugwathi2/38. She stated she had been in occupation of parcel 38 until when her husband fell ill. She slated her son, the 2nd defendant transferred the land to his name and sold it without her authority. That her husband later died in 2011. She produced the death certificate, search for plot 38 and the Chief’s letter as “**DEX 9, 10 and 11**”.

22. Fredrick Tanui testified as DW5. He stated that he was a member of Kalenjin Enterprises and that he decided to exchange his plot Dundori/Mugwathi 2/38 with Wilson Tirop Yegon around the year 1980. That his plot was about 2 1/2 acres and he gave his brother Wilson Tirop Yegon the documentation in relation to the plot No.38. Later Samuel Kipkoech Tirop went to ask for the documents that related to the suit property and that he accompanied him to the Kalenjin Enterprises Limited office where he informed the officials that he had given Samuel Kipkoech Tirop’s father the documents. On cross examination he confirmed that he did not know how the 3rd defendant got the land that he had exchanged with his father. He stated he joined Kalenjin Enterprises and bought shares for Ksh.1,200/= and was issued with receipts that he gave to Wilson Tirop.

Submissions analysis and determination.

23. The parties filed and exchanged their written submissions. The plaintiffs in their submissions reiterated the evidence given during the trial and submitted that the 1st defendant, Beth Yegon did not provide any evidence to prove that she had sought for and obtained the requisite letters of administration to enable her defend the suit and pursue her counterclaim and therefore she lacks *locus standi*. In support of their submissions, the plaintiffs relied on the case of **Hawo Shanko vs Mohamed Uta Shanko [2018] eKLR** where Chitebwe, J held that a party lacks *locus standi* to file a suit in regard to a deceased estate before obtaining a grant limited for that purpose.

24. The Plaintiffs submitted further that they are innocent purchasers for value without any notice of any defect in the title having conducted due diligence on the ownership of the suit property. They placed reliance on the case of **Lawrence Mukiri vs Attorney General & 4 others [2013] eKLR** where the court defined a *bona fide* purchaser as follows:

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

- a. He holds a certificate of title
- b. He purchased the property in good faith.
- c. He had no knowledge of fraud

d. The vendors had apparent valid title

e. He purchased without notice of any fraud.

25. The plaintiffs further submitted that the 1st defendant failed to establish the particulars of fraud as set out in the defence and counterclaim. The plaintiffs asserted that they had proved their case on a balance of probabilities and that they deserved to be granted the reliefs sought.

26. The 1st defendant submitted that one of the questions raised during the trial was how the 3rd defendant Samuel Kipkoech Tirop acquired the title to the suit property. The 1st defendant contended that it was Samuel Kipkoech Tirop's testimony that he had bought the suit property from Fredrick Tanui who testified as DW5. That when Fredrick Tanui testified, he stated that he had exchanged his plot at Dundori Mugwatha with Tirop Arap Yego's land situated at Kampi ya Moto.

27. The 1st defendant further submitted that the newly created parcels of land after the subdivision of the suit property ought to be cancelled as they are end results of fraud. The 1st defendant placed reliance on Section 26 of the Land registration Act and the case of *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others [2015] eKLR* where the court held that a title of an innocent person is impeachable so long as the title was obtained illegally and that the title holder does not need to have contributed to these vitiating factors.

28. The 1st defendant also submitted that there existed prior knowledge of the 1st defendant's claim to the suit property as the 2nd defendant James Mbugua Waweru sold the suit property to the plaintiffs and yet he had filed a suit against the 1st defendant seeking for her eviction. In conclusion, the 1st defendant submitted that Samuel Kipkoech Tirop illegally acquired the suit property from his late father Tirop Arap Yego.

29. The 2nd defendant submitted that he had bought the suit property from the 3rd defendant on 19th June 2013 after the 3rd defendant was unable to repay the loan by Equity Bank Ltd who held a charge over the property as security for Ksh. 600,000/=. The 2nd defendant then relied on Section 26(1) of the Land Registration Act 2012 and submitted that after he was registered as the owner of the suit property, he acquired absolute rights over the land and therefore the sale he made to the plaintiffs on 4th March 2014 was legally binding.

30. The 2nd defendant further submitted that the 1st defendant claimed a right over the suit property on account of the same being matrimonial property but as per the evidence of the 3rd defendant, she had not made any contribution towards the acquisition of the land and therefore prayed that the 1st and 3rd defendant's cases against the 2nd defendant be dismissed with costs.

31. After reviewing the pleadings and the evidence, the issues that arise for determination are whether the plaintiffs title to the suit property is valid and if so whether they are entitled to the prayers sought in the plaint and further whether the 1st defendant is the lawful and valid owner of the suit property and hence the title and subtitles issued to the plaintiffs are null and void and that the same ought to be cancelled.

32. As per the evidence adduced by the plaintiffs, they are members of a self-help group known as Smart Self Help Group which was registered under Certificate No.3299288 in March 2013. The Self Help Group purchased land parcel No. **Dundori/Mugwathi Block 2/38 (Koelel)** from James Mbugua Waweru and Joseph Kimani Mbugua, the 5th plaintiff herein, Julia Njeri Kimani the 6th plaintiff herein and Jackson Njuguna Kimani the 11th plaintiff were registered as owners of the suit properties as trustees for the members of Smart Self Help Group and a title deed issued to them.

33. During the hearing, the plaintiffs produced in court a copy of title deed for land parcel No. **Dundori/Mugwathi Block 2/38 (Koelel)** as "PEX-6". The 1st plaintiff testified that they had bought the suit property from James Mbugua Waweru who had been registered as the owner of the suit property on 5th September 2013. James Mbugua Waweru testified as DW1. It was his evidence that he bought land parcel No. **Dundori/Mugwathi Block 2/38 (Koelel)** from Samuel Tirop and he produced a copy of the land sale agreement as "DEX-1" together with a copy of title and search as "DEX-2 and 3". His evidence was corroborated by that of DW3, the Land Registrar who produced a copy of the green card of the suit property as "DEX-7"

34. The green card for land parcel No. **Dundori/Mugwathi Block 2/38 (Koelel)** showed that the land was first registered in the name of the government of Kenya on 19th July 1985 and then it was transferred to Kipala Arap Kamurei on 24th September 1997. On 23rd March 2011, Samuel Kipkoech Tirop was registered as the owner. As per the evidence of PW2 who was a director of Kalenjin Enterprises Ltd, Kipala Arap Kamurei had been irregularly registered as owner of land parcel No. Dundori Mugwatha Block 2/38. PW2 further in his evidence stated that Fredrick Tanui who in 2009 had accompanied DW3 to the office of Kalenjin Enterprises Ltd had not fully paid for his share. It would appear DW3 topped up the payment and that was how he got allocated/assigned plot No.38 in respect of which he got registered and issued with a title. The register of members of Kalenjin Enterprises Ltd tendered in evidence did not show that Fredrick Tanui had been allocated plot No.38 or that Kipala Arap Kamurei had been allocated the same.

35. Samuel Kipkoech Tirop testified that he had bought land parcel No. **Dundori/Mugwathi Block 2/28** and registered it in the name of his father Tirop Arap Yego. He produced as "DEX 3 & 4" receipts dated 19th May 2009. As per the copy of green card for land parcel No. **Dundori/Mugwathi Block 2/28** produced by the Land Registrar as "DEX -6", the land was registered in the name of the government of Kenya on 19th July 1985, then it was registered in the name of Rift Valley Enterprises Limited on 10th March 2003, then on 28th September 2005, it was registered in the name of Saimo K. Investment Limited which registration was cancelled on 25th April 2012 as per the order of Land Dispute Tribunal case No. 45 of 2008 and Tirop Arap Yego was registered as the owner on 25th April 2012.

36. Samuel Kipkoech Tirop's testimony that he bought land parcel No. **Dundori/Mugwathi Block 2/28** in the name of his father does not tally with the evidence adduced that this property was purchased by his father from the family of Mibei. However, what appears to be clear is

that the late Tirop Arap Yego was never registered as an owner of land parcel No. **Dundori/Mugwathi Block 2/38** which is the property the subject of the instant suit.

37. It was the evidence of Beth Yegon, the 1st defendant herein, that she resides on both land parcel No's **Dundori/Mugwathi Block 2/28** and **38**. That her husband had bought land parcel No. **Dundori/Mugwathi Block 2/28** from one Mibei which position is not reflected on the green card. It was also her evidence that her husband exchanged plot No.38 with Fredrick Tanui for his parcel of land at Kampi ya Moto but she did not produce any evidence to that effect. She further alleged that her son, Samuel Kipkoech Tirop, fraudulently transferred land parcel No. **Dundori/Mugwathi Block 2/38** to his name from her husband's name and did not produce any evidence in support of that allegation and therefore in essence, Beth Yegon's assertions remain as mere allegations. No proof was availed. Neither Fredrick Tanui produced any evidence to show there was any exchange of land. No particulars of the alleged land the subject of exchange in Kampi ya Moto was availed. One is bound to query why such basic evidence was not produced.

38. In the present matter the 1st defendant and the 3rd defendant who were mother and son are at cross purposes. The mother, the 1st defendant takes the position that land parcel Dundori Mugwatha Block 2/38 was her late husband's property which she has possessed all the time. She contends that the 3rd Defendant, her son caused the same to be fraudulently registered in his name before he once again fraudulently sold and transferred the same to the 2nd defendant who in turn sold and transferred the land to the plaintiffs. The 3rd defendant at the time he dealt with both land parcels Dundori Mugwatha Block 2/38 and 28 possessed a power of Attorney donated to him by his late father to enable him to follow up and pursue the processing of title to the land he had acquired in Kalenjin Enterprises Ltd. The 3rd defendant successfully pursued the regularization of his father's ownership of land parcel Dundori Mugwatha Block 2/28 which was ultimately registered under his father's name. In regard to land parcel Dundori Mugwatha Block 2/38, the 3rd defendant topped up what DW5, Fredrick Tanui had paid and was allocated the plot and eventually issued title for the plot.

39. Although the 1st defendant has pleaded and alleged fraud as against the 2nd and 3rd defendants, and the plaintiffs as well, no evidence of proof of fraud was adduced. It is not enough to allege fraud, there must be evidence and proof of fraud specifically and the standard of proof required to prove fraud is at a higher pedestal than proof on a balance of probabilities. The 2nd defendant in his evidence testified that before he purchased the property from the 3rd defendant, he carried out due diligence by conducting a search at the Lands Registry and having verified the land was registered in the 3rd defendant's name and was charged to the Bank, he agreed to purchase the same for the sum of Kshs.1,800,000/=. A sale agreement was entered into and the transaction was duly completed and a title issued in his name. On the evidence that was adduced, there was no evidence of any fraud on the part of the 3rd defendant in the manner he acquired the title to land parcel No.38. Indeed the transaction between the 3rd and the 2nd defendant appears to have been at arms length. The 2nd defendant paid valuable consideration for the suit land and it cannot be said there was anything that could have put him on notice that there was a defect on the title he was purchasing. He was in my view a bonafide purchaser for value without any notice of any defect on the title. The plaintiffs carried out due diligence that any reasonable purchaser would be expected to do. They inspected the suit property, made inquiries from the neighbours and the local administration and carried out a search both at the Lands office and the municipal offices and the results were all consistent that the 3rd defendant was the owner of the suit property. I do not suppose due diligence would have called for them to do anything beyond what they did.

40. In my view carrying out due diligence cannot be equated to carrying out forensic investigations as the Directorate of Criminal Investigations (CID) would ordinarily do. Private citizens do not have the capacity to do that nature of investigations and besides to require investigations to that standard would curtail and stifle commercial enterprise and dealings. It is for that reason the system of land registration is supposed to afford parties with prima facie evidence of ownership of any registered land. The doctrine of sanctity of title is predicated on the government ability to guarantee every registered title in the absence of any proven fraud in the process of acquiring registration. In my view the 3rd and 2nd defendants acted in good faith and were bonafide in dealing with the suit property. They were innocent purchasers in the true sense of the word.

Lord Denning, in the English case of *Bishopsgate Motor Finance Corporation Ltd V. Transport Brakes Ltd (1949) 1 KB 322, at pp. 336-337* put it succinctly when he stated thus :-

“In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”

41. On my evaluation of the evidence, it is my view that the plaintiffs have proved that they were innocent purchasers for value as they were not aware of any defects in the title transferred to them by the 2nd defendant. They were not shown to have been party to any fraud and neither was there anything that could have put them on notice. Black's Law Dictionary 8th Edition defines “bona fide purchaser” as:

“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, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

42. Having reached the conclusion that the plaintiffs were bonafide and innocent purchasers for value of the suit property, it follows that they acquired a good title. Upon registration and issue of a title to them they were vested with absolute rights of ownership under section 24 and 25 of the Land Registration Act, 2012. The title issued to them was absolute and indefeasible in terms of section 26 of the Act. The title could only be challenged on the limited grounds provided under section 26 (1) (a) & (b) of the Land Registration Act 2012 on the grounds of fraud and/or misrepresentation in regard to which the registered owner is proved to be a party; and/or if it is shown the title was illegally and unprocedurally acquired through a corrupt scheme. In the instant suit the 1st defendant has failed to prove any fraud and/or that the plaintiffs fraudulently and/or illegally and unprocedurally acquired the title to the suit land.

43. After having carefully evaluated the evidence I am satisfied the plaintiffs have proved their case on a balance of probabilities and are entitled to judgment. However I note that even though the plaintiffs in their prayers have claimed damages for trespass and mesne profits, no basis was laid to enable the court to make any assessment for damages. I will accordingly make no award for damages.

44. As regard the 1st defendant's counter claim I find and hold the same to be unproven on a balance of probabilities. Besides, to the extent that the 1st defendant was claiming the suit land through her deceased husband and she had not obtained any letters of administration (full or limited) to enable her to represent the deceased estate, she lacked the legal capacity to plead the counterclaim on behalf of the deceased estate. The counterclaim was unsustainable and is dismissed.

45. The upshot is that I enter judgment in favour of the plaintiffs and make the following final orders:-

a. The plaintiffs were the lawful owners of land parcel Dundori Mugwathi Block 2/38 (Koilel) now subdivided into land parcels Dundori Mugwathi Block 2/2594,2595,2596,2597,2598,2599,2600 ,2601,2602,2603,2604, & 2605 (Koilel) together referred to as the suit properties and are entitled to exclusive possession and use.

b. The 1st defendant is ordered to vacate and deliver vacant possession of the suit property within thirty (30) days from the date of service of the judgment/decreed upon her failing which the plaintiffs will upon application be entitled to an order of eviction of the 1st defendant, her agents and servants.

c. A permanent injunction is issued against the 1st defendant her agents and servants restraining them from trespassing on the suit properties .

d. The 1st defendant's counterclaim is dismissed.

a. The costs of the suit and the counter claim are awarded to the plaintiffs and the 2nd defendant

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF SEPTEMBER 2021.

J M MUTUNGI

JUDGE