

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC APPEAL NO. E034 OF 2024

FRANCIS KIMONDO
APPELLANT

VERSUS

LOICE WANJIRU RARUI (Suing through next friend

SAMUEL GITAU RARUI 1ST
RESPONDENT

MAHIRA HOUSING COMPANY LIMITED 2ND
RESPONDENT

(Being an appeal from the judgment and decree in Ruiru Senior Principal Magistrate's Court MELC No. E009 of 2021 delivered on 25th March 2024 by Hon. J.Were (S.P.M.)

JUDGMENT

1. This appeal arises from the judgment of Honourable Joseph Were (S.P.M) delivered on 25th March 2024 in which he declared that the Respondent is the lawful owner of land parcel number RUIRU/KIU BLOCK 10 (MAHIRA/1152.
2. In order to put the appeal into perspective it is necessary to give a brief background of the case. The Respondent who was the Plaintiff in the lower court filed suit against the Appellant and 2nd Respondent vide a plaint dated 24th December 2024. Her case is that she purchased a parcel of land comprised in land parcel number RUIRU/KIU BLOCK 10 (MAHIRA/1152 from the 2nd

Respondent and she was issued with a share certificate No. 747 dated 13th June 1988 . She took vacant possession of the plot as she waited to be issued with a title. She made several visits to the 2nd Respondent's office with a view to having the suit property transferred to her name but the 2nd Defendant failed or neglected to do so.

3. The 1st Respondent averred that sometime in 2013 the Appellant trespassed onto the 1st Respondent's land and carried out massive construction works. She later discovered that the Appellant had been issued with a title thus depriving her of her land.
4. The 1st Respondent sought a declaration that she is the lawful owner of the suit property, an order of eviction against the Appellant and permanent injunction to restrain him from interfering with her land. She also sought an order that the land register be amended and that she be issued with a title to the suit property.
5. The Appellant filed a Statement of Defense and Counterclaim dated 28th July 2022 in which he denied the 1st Respondent's claim. In his Counterclaim he stated that he had a title to the suit property and he was in exclusive and actual occupation thereof. He accused the 1st Respondent of interfering with his quiet enjoyment of the suit property. He prayed for a declaration that he is the true and legal proprietor of the suit property and an order of permanent injunction to restrain the 1st Respondent from interfering with his quiet enjoyment and possession of the suit property.

6. In response to the Counterclaim, the 1st Respondent filed a Defense to the Counterclaim in which he maintained that the Appellant had acquired the suit property fraudulently and therefore he cannot benefit from the same. She blamed the 2nd Respondent for failing to keep proper records and for colluding with the Appellant to transfer the suit property to the Appellant.
7. The 2nd Respondent did not file any Defense. Thereafter, the suit proceeded for hearing and both parties presented their cases after which the trial magistrate rendered his judgment in favour of the 1st Respondent.
8. Aggrieved by the judgment, the Appellant filed this appeal citing 12 grounds which can be collapsed into the following 4 grounds:
 - i. *That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's evidence on how he acquired the suit property.*
 - ii. *The learned trial magistrate erred in law and fact in holding that the 1st Respondent had proved that the Appellant acquired the suit property fraudulently.*
 - iii. *The learned trial magistrate erred in law and in fact in failing to find that the Appellant was a bona fide purchaser for value without notice.*
 - iv. *The learned trial magistrate erred in law and in fact in dismissing the Appellant's Counterclaim.*
9. The appeal was canvassed by way of written submissions and the Appellant and 1st Respondent duly complied by filing their submissions.

Appellant's Submissions

10. In his Submissions dated 22nd January 2025, learned counsel submitted that the trial magistrate erred in holding that the Appellant was an active participant in the fraud perpetrated by the 2nd Respondent as he was unable to produce any ownership documents to show whether Gideon Njau was a member of Mahira Housing Company (2nd Respondent) who initially owned the suit property or how he acquired the suit property from the said company.
11. Counsel placed reliance on the case of **Ndolo v Ndolo (2008) 1 (G &F) 742 KLR and Kuria Kiarie & 2 Others V Sammy Magera) 2018) eKLR** for the proposition that fraud must be specifically pleaded by setting out the particulars of fraud. Further, that fraud must be distinctly proved to a standard higher than on a balance of probabilities. The court also observed that in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.
12. It was counsel's contention that no evidence had been tendered by the 1st Respondent to demonstrate that the Appellant committed any fraud either through forgery or by involving himself in any criminal activity.
13. Counsel submitted that the trial magistrate ignored the Appellant's explanation as to how he acquired the suit property from Gideon Njau after confirming with the 2nd Respondent that he was their member. He explained that the Appellant could not produce the

plot certificate belonging to Gideon Njau as he had surrendered it back to the company before he was issued with a new certificate after which he was issued with a title.

14. It was counsel's contention that the trial magistrate ought to have made a finding that the Appellant was a bona fide purchaser for value without notice of any defects in title.
15. He relied on the Ugandan Supreme Court decision of **Lwanga v Mubiru & others (Civil Appeal 18 of 2022) 92024) UGSC7** where the court held that the principle of bona fide purchaser for value without notice is a general defence in any transaction of sale or purchase of land or any property particularly land. The court further stated that a bona fide purchaser is that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest.
16. He was of the view that the court failed to protect the Appellant yet the Appellant had demonstrated that he conducted proper due diligence before he purchased the suit property, paid valuable consideration and he had not committed any fraud. See the case of **Weston Gitonga & 10 Others v Peter Rugu Gikanga & Another**. He submitted that the Appellant fitted the description of a bona fide purchaser in the case of **Katende v Harider & Co Ltd** as he purchased the land in good faith, without notice of prior defects, for valuable consideration and he holds a valid title.
17. Further, the Appellant was unaware of the existence of the 1st Respondent before he purchased the land and he was not involved

in any fraud. He had therefore satisfied the conditions set out in the case of **Dina Management Limited v County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021 (2024) KESC 30 (KLR)** where the Supreme Court held that for a court to establish whether a party is a bona fide purchase for value, the court must first establish the root of the title right from the first allotment.

18. Regarding the validity of the Appellant's title, counsel submitted that there was no evidence to support the court's finding that the Appellant's title was null and void and it ought to have upheld the Appellant's title in line with Article 40 of the Constitution. He therefore urged the court to allow the appeal.

1st Respondent' Submissions

19. On his part, leaned counsel for the 1st Respondent submitted that the 1st Respondent had tendered sufficient evidence to demonstrate that she was the lawful owner of the suit property by producing the plot certificate No. 747 dated 13th June 1988 together with payment receipts issued by the 2nd Respondent. He contended that the 1st Respondent had taken possession of the suit property and carried out some farming activities before she fell sick and she had therefore established her interest in the suit property.
20. Counsel submitted that the 2nd Respondent took advantage of the 1st Respondent's mental illness to deprive her of her property.
21. It was counsel's submission that the Appellant did not acquire a good title as he failed to produce any ownership documents that

were issued to Gideon Njau whom he purchased the suit property from.

22. Counsel submitted that the manner in which the 2nd Respondent dealt with the suit property was fraudulent as no register was produced to show that Gideon Njau was a member of Mahira Housing Company nor were any receipts and certificate issued to Gideon Njau produced in evidence.
23. He relied on the on the case of **Alice Chemutai Too v Nickson Kipkurui (2015) eKLR** where the court cautioned purchasers of land to be more vigilant and dig a little deeper after conducting an official search in order to find out if the vendor has a good title.
24. Counsel pointed out that the trial court had observed that the plot certificate issued to the Appellant appeared not to be genuine as the signature for the Chairperson and Secretary was the same.
25. It was his submission that in line with the case of **Elijah Makeri Nyangwara Stephen Mungai Njuguna 7 another (2013) eKLR**, a certificate that is acquired illegally, unprocedurally or through a corrupt scheme can be impeached in accordance with section 20 of the Land Registration Act.
26. Similarly, in **Republic v Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others (2006) 1 KLR E7L 563** the Court of Appeal held that courts should nullify titles held by land grabbers who plead the principle of indefeasibility of title.

27. On whether the Appellant is a bona fide purchaser for value without notice, counsel submitted that one cannot be a bona fide purchaser for value when the title that was transferred to him was not validly acquired. He relied on the cases of **Samuel Kamere v Land Registrar Kajiado (2025) eKLR** and **Katende v Harider (supra)**.
28. In conclusion he submitted that the Appellant had failed to prove that he acquired a good title. Further, that the 2nd Respondent had taken advantage of the 1st Respondent's mental incapacity to deprive her of her land and the court ought to protect the 1st Respondent's rights.

ANALYSIS AND DETERMINATION

29. I have carefully considered the Memorandum of appeal, the judgment of the lower court and indeed the entire record of appeal and in my view the following issues fall for determination:

- i. Whether the Appellant acquired a good title to land parcel number RUIRU/KIU BLOCK 10 (MAHIRA/1152.***
- ii. Whether the Appellant is a bona fide purchaser for value without notice.***
- iii. Whether the appeal ought to be allowed.***

Whether the Appellant acquired a good title to and parcel number RUIRU/KIU BLOCK 10 (MAHIRA/1152.

30. Section 26 of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration 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 grounds 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”

31. It is not in dispute that the suit property is registered in the name of the Appellant. However, the said title has been challenged by the 1st Respondent who also claims to own the suit property.
32. The Supreme Court of Kenya in the case of **Dina Management Limited v County Government of Mombasa & 5 Others (Petition 8(E010) of 2021 (2023) KESC 30 (KLR) (Constitutional and Human Rights) 21 April 2023 (Judgment)** cited the case of **Munyu Maina V Hiram Gathiha Maina Civil Appeal No. 239 of 2009 (2013) eKLR** 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.”

To establish whether the Appellant is a bona fide purchaser for value, therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter”

33. What can be gleaned from **Dina Management** (supra) is that a registered title though cloaked in outward authority of the register, is not in itself conclusive proof of ownership where its origin is in question.
34. The law as restated by the Supreme Court does not permit a purchaser to hide behind registration where the foundation of that title is alleged to be unlawful.
35. The Appellant’s case is that he purchased the suit property from one Gideon Njau after confirming that he was a member of the 2nd Respondent company which initially owned the land. The said Gideon Njau was issued with a plot ownership certificate which he gave to the Appellant. The Appellant then surrendered the certificate to the 2nd Respondent and he was issued with a new plot certificate before his title was processed. He also alleged that he confirmed from the 2nd Respondent’s company register that the said Gideon Njau was a member of the company.

36. Having perused the lower court record, I have not seen any document demonstrating that Gideon purchased the suit property from the 2nd Respondent, nor was any register produced to show that the said Geoffrey is a member of the 2nd Respondent company. The plot certificate issued to the Appellant by the 2nd Respondent is suspect as the signature for the Chairman and Secretary appear to be the same. The Appellant also produced receipts to show that he paid the Transfer fee to the company so that the title could be processed in his name. If indeed the said Gideon was a member of the 2nd Defendant company, why was the company's register not produced in court? Also absent is the testimony of the said Gideon to confirm when he purchased the suit property from the 2nd Respondent.
37. What emerges is a broken chain of ownership that does not show how the suit property moved from Mahira Housing Company Limited to Gideon Njau and subsequently to the Appellant. This broken chain casts a doubt on whether the Appellant lawfully and procedurally acquired the suit from Mahira Housing Company Limited. The fact that neither Gideon Njau nor a witness from Mahira Housing Company Limited testified to bridge this gap does not assist the Appellant's case.
38. It is trite that he who alleges must prove and unlike the 1st Respondent who was able to produce the primary document of ownership being the plot certificate issued by the company and the receipts for the purchase of the suit property, the Appellant only

produced a suspicious looking plot certificate and transfer receipts as well as the title deed.

39. The absence of an explanation from the 2nd Respondent regarding the status of the plot certificate issued to the 1st Respondent way back in 1988 lends credence to the 1st Respondent's assertion that the 2nd Respondent took advantage of her mental illness to dispossess her. I am therefore not persuaded that the Appellant obtained a good title.
40. Consequently, I find no good reason to interfere with the decision of the trial magistrate. The Appeal lacks merit and it is hereby dismissed with costs to the 1st Respondent.

Dated, signed and delivered virtually this 1st day of December 2025.

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J. M ONYANGO
JUDGE

In the presence of:

1. Ms Tanui for the Appellant
2. Miss Kiema for Ms Gichio for the 1st Respondent

Court Assistant: Hinga