

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. E030 OF 2024

FLORENCE NDINDA:.....APPELLANT

VERSUS

PAUL

MAINGI

KIOKO:.....RESPONDENT

JUDGEMENT

The Appellant being dissatisfied with the Judgment of Hon. Daffline Nyaboke Sure, PM in Kangundo Chief Magistrate’s Court ELCC No. E010 of 2022 given on the 27th day of May, 2024 appealed to this court on the following grounds;

1. The learned trial Magistrate erred in fact and law in determining that the Respondent was the lawful owner of plots in dispute against the weight of evidence.
2. The learned trial Magistrate erred in law and fact in concluding that there was collusion between the Appellant and the Society officials when no evidence of such collusion was tendered by the Respondent and or pleaded in the pleadings.
3. The learned trial Magistrate erred in law and fact in failing to appreciate that the land the subject of the dispute was registered to Kwa-Matingi Farmers

Co-operative Society and the register of allocation maintained by the Society was the conclusive proof of the registration of a party as owner and not otherwise.

4. The learned trial Magistrate erred in fact and law in failing to appreciate that the Appellant held genuine registered ballots with the Society while the Respondent held disputed clandestinely obtained ballots.
5. The learned trial Magistrate erred in fact and law in granting land to the Respondent despite the dispute between the Respondent and the Society as to the authenticity of the clandestinely obtained ballots when the Society was not made a party to these proceedings.
6. The learned trial Magistrate erred in law in shifting the burden of proof to the Appellant.
7. The learned trial Magistrate erred in fact and law in failing to analyze the evidence and the report tendered on behalf of the Appellant.
8. The trial Magistrate failed to appreciate that Societies by nature have perpetual success and office holders are elected every year in rotation and therefore the records held by the Society remains authentic and the basis of any action irrespective of the occupant of the office.
9. The learned trial Magistrate erred in law and fact in importing and relying on evidence not tendered by the parties based on perception and conjecture.

10. The learned trial Magistrate erred in fact and law in failing to address the Appellant's Counter-claim.

The Appellant seeks the following orders;

1. Set aside the order of the trial court dated the 27th day of May, 2024.
2. Enter Judgment for the Appellant as prayed in the defence and Counter-claim dated 16th day of May, 2022.
3. Award the costs in the trial court and this court to the Appellant.
4. Grant any other relief that this court may deem fit to grant in the circumstances.

This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another vs Shah* (1968) EA 93 where it was held that;

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”

The court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon by the parties. The issues for determination are:


- a. *Who is the lawful proprietor of the land parcel known as plot number 1012 and 1013?*
- b. *What orders should this court issue?*

I have carefully perused the documents produced as exhibits and find that the Respondent's allotment of the suit plots was first in time compared with the Appellant's. The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR held that;

“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. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.”

DW1, the Defendant has led evidence that on or about the 21st February 2022 she bought the suit land from Mary Syokua Ngumbi member number 185 who had acquired the same from her mother Elizabeth Nduku Ngumbi ID No. 1463320 who were the legal and registered owners for Kshs. 750,000/=. The said Mary Syokua Ngumbi never testified. She took possession and fenced the suit plots. She stated that she was a bona fide purchaser. She produced a ballot and receipt dated 22nd January 2022. DW2 the Chairman of Kwa Matingi Farmer’s Cooperative Society from 2022 corroborated the Appellant’s testimony. He stated that the Defendant was the legitimate owner having bought the plots from the original owner. That she was shown the plots by the Society’s surveyor and they later noted that the Plaintiff had ballots that were not registered with them. That in the year 2013 the Society passed a resolution that all members who had ballot cards ought to take steps to register with the Society.

The definition of bona fide purchaser for value without notice is

 *“that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest”.*

Bona fide is a Latin word meaning good faith, without fraud, sincere, genuine. See (Black’s Law Dictionary 9th Edn Page 199) A bona fide purchaser is a buyer who buys without constructive or actual notice of any defects or infirmities against the seller’s title. See (page 1355 Black’s Law Dictionary 9th Edn.

It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith. The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice cover both actual and constructive notice of fraud.

In the case of Jones vs Smith (1841) 1 Hare 43, the Chancery Court held;

“a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...then the defence cannot be available to him or her”

In Yakobo M. N Senkungu & Others vs Cresencio Mukasa Civil Appeal No 17 of 2014. The court reaffirmed the law regarding the importance of due diligence in land transactions holding that;

“...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase.”

Section 109 of the Evidence Act Cap 80 is clear that;

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The well-known mantra “*he who asserts must prove.*” Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

In James Muigai Thungu vs County Government of Trans-Nzoia & 2 others (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may

expressly exempt him or her. Section 107 of the Evidence Act Chapter 80 Laws of Kenya succinctly states:

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

Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The Plaintiff /Respondent testified that he is a member of the Society is member number 1647. In 2007 and 2008 he balloted for various plots including the suit plots No. 1012 and 1013. He took possession after paying for the 17 shares and for the title deeds. He produced receipts dated 4th December 2007 for Kshs. 15,500/= and one dated 27th February 2008 for Kshs. 10,850/=. The Plaintiff produced a letter dated 25th April 2022 stated that;

“After Committee had done verification, it found that the above disputed plots by Maingi Kioko were officially registered under Florence Ndinda Kitevu. However, Paul Maingi Kioko had the same ballots for the same plots. He did not show any cause why the plots were not registered under his name.

The Committee considered and confirmend that the plots belong to Florence Ndinda Kitevu. Paul maingi Kioko was advised that he will be given plots once another balloting exercise will take place.”

This is clear evidence that the suit plots were first issued to the Plaintiff and the Society had no right to arbitrarily if at all, re issue them to someone else and then offer him alternative plots in the unknown future.

As in the Supreme Court decision in Dina Management Limited vs County Government of Mombasa (supra), the Court went on to hold that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of bona fide purchaser. I find that the suit land had already been sold to the Plaintiff in 2007 and 2008 and was not available for sale to the Defendant in 2022. Indeed, Defence stated in evidence that in the year 2013 the Society passed a resolution that all members who had ballot cards ought to take steps to register with the Society. No evidence was adduced that the Plaintiff was served or made aware of this resolution.

I find that the defence of bona fide purchaser is not available to the Appellant. I agree with the trial court that the Defendant has failed to prove her counter claim on a balance of probabilities. I find that the Plaintiff/Respondent has established that he is the legitimate proprietor of the suit plots and hence entitled to the said orders in the plaint. I find this appeal is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF
DECEMBER 2025.**

N.A. MATHEKA

JUDGE