



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC PETITION NO.3 OF 2017**

**1. MOHAMED SHEIKH ABDULLAHI**

**2. SHEIKH DAIB MOHAMED.....PETITIONERS**

**VERSUS**

**1. THE NATIONAL LAND COMMISSION**

**2. CHIEF LAND REGISTRAR**

**3. BILL KIPSANG ROTICH**

**4. MASHA BIRYA DENA.....RESPONDENTS**

**AND**

**1. THE KENYA DEPOSIT INSURANCE CORPORATION**

**(Receivers of Dubai Bank Kenya Limited)**

**2. GARAM INVESTMENTS AUCTIONEERS.....INTERESTED PARTIES**

**RULING**

1. This suit was commenced by a Petition dated 24<sup>th</sup> March, 2017. It is the petitioner’s case that they are bona fide innocent purchasers of the subject land for valuable consideration without notice of any inconsistent claim or title. They aver that they acquired from the registered owner, the 4<sup>th</sup> Respondent, the property known as **Title No. CR 62008, Plot. 6589/I/MN** measuring 0.2146 Ha after exercising due diligence at the Mombasa Land Registry and were issued with Certificate of Postal Search indicating the proprietor of the suit plot as the 4<sup>th</sup> Respondent who had offered the same for sale. The Petitioners agreed and proceeded to transact over the suit plot and entered into a written sale agreement dated 24<sup>th</sup> March, 2015 between the 1<sup>st</sup> Petitioner as purchaser and the 4<sup>th</sup> Respondent as vendor. The Petitioners aver that pursuant to the said purchase, they took possession consequent to which appropriate development approvals/permissions were sought and obtained from the County Government of Mombasa and the National Environment Management Authority. The Petitioners aver that they are in possession of the suit land on which they have carried out massive developments without any interruptions or objections till completion.

2. The petitioners aver that on or about 10<sup>th</sup> October 2016, while at the suit land, a valuer came to view the property purportedly on instructions of the 1<sup>st</sup> interested party and thereby produced a copy of a letter and **Title Number CR. 59150** for parcel of land **NO. 6589/I/MN** which was in the 3<sup>rd</sup> Respondent’s name and indicated to have been authorized to value the property on the basis that the same title had been given as security for a loan that was unpaid by M/s Dubai Bank Kenya Limited, now under receivership. The Petitioners aver that the Respondents have in breach of the National values and principles of Governance under Article 10 of the Constitution and principle of legality under Sections 7 (1) of the Land Registration Act occasioned a double registration of the same parcel of land. It is the petitioners contention that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents maintenance of two registers or titles/grants for the same parcel of land is contrary to constitutional order, an affront to the principle of legality and sanctity of title rendering naught and absurd private proprietary rights contrary to Article 40 of the Constitution, which if left unchecked will occasion total collapse and a national crisis in the Kenya Land Tenure System contrary to public interest, security and policy. The petitioners aver that the 3<sup>rd</sup> Respondent is estopped from asserting rights, if any over the suit land having stood by as the Petitioners cleared bushes at the subject land and constructed massive residential premises and wall to completion thereon without objection or challenge. The Petitioners aver that in balancing the parties rights, the court should declare as

extinguished the 3<sup>rd</sup> Respondent's rights over the subject land in favour of the Petitioners who are in possession and occupation having put up massive development thereon.

3. Bill Kipsang Rotich, the 3<sup>rd</sup> Respondent filed a cross –petition in which he avers that he was issued with Grant of Title dated 7<sup>th</sup> September, 2011 and that his Grant is the first in time, having been issued about three years before the Grant and title which the Petitioners claims. That upon being registered as proprietor and after receiving the Title to the Suit Property, he developed a perimeter wall around the property. He further avers that prior to charging the property, he conducted a search and the search of 10<sup>th</sup> October 2013 indicated that the property was his. The charge was later registered at the Land Registry at Mombasa as No. 59150/2 on 14<sup>th</sup> March 2014. It is the 3<sup>rd</sup> Respondent's contention that the existence of the Certificate of Title to the Petitioners egregiously violates his fundamental right to the property. The 3<sup>rd</sup> Respondent wants the title held by the Petitioners to be declared invalid and to be cancelled.

4. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents filed separate Replying Affidavits in support of the Petitioners cases, while the 1<sup>st</sup> Interested Party filed a Replying Affidavit in support of the cross-petition. The parties herein agreed to canvass the petition and the cross-petition by way of written submissions which were duly filed and also highlighted by the advocates for the parties.

4. The issue here is about two competing titles over the same land. The suit has been commenced by way of a Constitutional Petition. The Petitioners seek *inter alia*, an order for cancellation of the title in the name of the 3<sup>rd</sup> Respondent. On the other hand, the 3<sup>rd</sup> Respondent in his cross-petition wants the title held by the Petitioners to be cancelled. This court can indeed cancel a title by ordering the rectification of the register where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake pursuant to Section 80 of the Land Registration Act, 2012. However, in my considered view, a title can only be cancelled by the court after evidence has been tendered to show that the same was procured fraudulently or by mistake. To prove fraud, one has to examine in detail the documents that led to the acquisition of the said title, examination and cross-examination of the people involved in the processing of the title and sometimes the calling of expert witnesses or the officials from the Ministry of Lands and other relevant institutions. For the Petitioners and the 3<sup>rd</sup> Respondents to prove their respective positions, there will be need for detailed discovery, issue of interrogatories and cross-examination of witnesses to establish the truth. Because of the complex serious issues raised in the petition and cross-petition and cross-petition, a full hearing is required.

5. Accordingly, I hereby invoke the provisions of Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and Section 3 of the Environment and Land Court Act and order that the proceedings herein continue as if the cause had been begun by filing of a plaint. The Petition and the cross-petition and affidavits filed shall stand as pleadings, with liberty to the parties to add affidavits and or witness statements.

**DATED, SIGNED and DELIVERED at MOMBASA this 21<sup>st</sup> day of May 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Monari holding brief for Mogaka for Petitioner

Ms. Kiti holding brief for Mrs. Waswa for 2<sup>nd</sup> respondent

Wafula for interested parties and holding brief for Echeza for 3<sup>rd</sup> respondent

No appearance for Shimaka for 4<sup>th</sup> defendant

No appearance 1<sup>st</sup> defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**