



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 144 OF 2009

CANON ASSURANCE (K) LTD.....PLAINTIFF

VERSUS

ALI HAMADI MWAGUDE.....1ST DEFENDANT

FAIZA WANJIKU MAINA.....2ND DEFENDANT

MOHAMED OMAR IBRAHIM.....3RD DEFENDANT

LAND REGISTRAR.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

JUDGMENT

PLEADINGS

1. The Plaintiff moved this court by way of plaint dated 18th May, 2009 seeking for judgment against the defendants as follows:

a. A declaration that the plaintiff was and is the lawful registered owner of KWALE/DIANI/203 as per paragraph 7 hereof;

b. A declaration that the entry of the first defendant and issuance of a title as owner of KWALE/DIANI/203 made in Part B-Proprietorship Section by the fourth defendant was in abuse of her office and was illegal and fraudulently made in respect of the plaintiff's said plot without the prior knowledge or consent of the plaintiff and that the first defendant has not thereby acquired any lawful right or interest over the Plaintiff's said plot to entitle him to sub-divide, enter, occupy, sell and/or take possession of the Plaintiff's land and that all entries endorsed in the Part B- Proprietorship sections of the property and all the subdivided titles arising therefrom as stipulated herein and all subsequent transactions carried out by the first or second or third defendants in respect of the property are null and void ab initio;

c. An injunction restraining the first, second and third defendants by themselves, their servants, agents and/or employees howsoever from entering upon the plaintiff's land and from taking possession thereof or from trespassing upon or from developing, constructing, selling, leasing, alienating, transferring, charging, subdividing or in any way in dealing whatsoever with KWALE/DIANI/203 OR KWALE/DIANI/1838; KWALE/DIANI/1839; KWALE/DIANI/1858; KWALE/DIANI/1859; KWALE/DIANI/1914; KWALE/DIANI/1915; KWALE/DIANI/1916; KWALE/DIANI/1917; KWALE/DIANI/1918; KWALE/DIANI/1919; KWALE/DIANI/1920 AND KWALE/DIANI/1921.

d. The plaintiff further prays for orders directing the fourth and or fifth defendants to revoke and or cancel all entries made on Part B Proprietorship section relating to KWALE/DIANI/203 OR KWALE/DIANI/1838; KWALE/DIANI/1839; KWALE/DIANI/1858; KWALE/DIANI/1859; KWALE/DIANI/1914; KWALE/DIANI/1915; KWALE/DIANI/1916; KWALE/DIANI/1917; KWALE/DIANI/1918; KWALE/DIANI/1919; KWALE/DIANI/1920 AND KWALE/DIANI/1921 registered in the names of the first, second or third defendants and to rectify the entries in the titles so as to reinstate the plaintiff as the lawful registered owner of the said original title KWALE/DIANI/203.

e. Costs of and incidental to this suit against the defendants jointly and severally.

f. Such other or further relief or order which this Honourable court may deem fit to grant.

2. The plaintiff pleads therein as follows. That at all material times, the Plaintiff was and is the registered owner of all that parcel of land known as **KWALE/DIANI/203** comprising of a total of 2 hectares having an absolute interest and indefeasible title. That the plaintiff has been paying the annual rates on a regular basis to the fourth defendant in respect of the suit property.

3. The Plaintiff avers that in or about March 2009 the Plaintiff was alerted by its neighbours that some unknown persons were in the process of carrying on construction and development on the property. That the plaintiff immediately engaged a surveyor to verify the boundary beacons on the property in order to ascertain if the unlawful construction was being carried out on the property and the surveyor confirmed that the construction was being carried out on the property. That the Plaintiff thereafter carried out an official search of the property through the fourth defendant as a result of which the plaintiff discovered that the original records being the Registration and Proprietorship Section with the fourth defendant which registered the Plaintiff as the proprietor of the property have been removed and/or destroyed from the Lands Registry Kwale and have been fraudulently replaced with a false Registration and Proprietorship Section – Part B. That the Plaintiff has discovered that from the official search carried out by it that on or about 2nd May 2007, the 4th Defendant unlawfully and fraudulently registered the 1st Defendant as the registered proprietor of the property without any consideration and that the 4th defendant issued a title to the 1st defendant on the same day. That the 1st defendant thereafter unlawfully sub-divided the property and was issued with two sub-divided titles namely **KWALE/DIANI/1838** and **KWALE/DIANI/1839**.

4. The Plaintiff avers that on or about 21st December, 2008 the 1st defendant subdivided **KWALE/DIANI/1838** into two parcels, namely **KWALE/DIANI/1858** and **KWALE/DIANI/1859** and on or about 9th September, 2008 sold title no. **KWALE/DIANI/1839** to the 3rd defendant without obtaining the necessary or proper statutory consents to do so. That on or about 21st January, 2009 the 3rd defendant unlawfully sub-divided title **KWALE/DIANI/1839** into eight portions, namely **KWALE/DIANI/1914; KWALE/DIANI/1915; KWALE/DIANI/1916; KWALE/DIANI/1917; KWALE/DIANI/1918; KWALE/DIANI/1919; KWALE/DIANI/1920** and **KWALE/DIANI/1921** without obtaining the necessary or proper statutory consent to do so. That on 30th October, 2008 the 1st defendant sold the sub-divided title in **KWALE/DIANI/1839** to the 2nd defendant without obtaining any or any proper statutory consent to do so.

5. It is the Plaintiff's case that the 1st defendant fraudulently acquired the Plaintiff's plot with the complexity and unlawful assistance of the 4th Defendant through whose unlawful and fraudulent acts and/or omissions the 5th Defendant is liable. The Plaintiff has given the alleged particulars of fraud. The Plaintiff avers that by reason of the matters aforesaid, the 1st, 2nd and/or 3rd defendants have taken illegal possession of the Plaintiff's land to construct and/or build a wall and/or other developments and the Plaintiff will thereby be deprived of the use and enjoyment of its property and is thereby likely to suffer irreparable harm unless restrained by the court from developing, selling or disposing of the said land.

6. The 1st Defendant filed a statement of defence dated 24th August 2009 in which he denied that the Plaintiff is or was at any material time the registered owner of the parcel of land known as **KWALE/DIANI/203** and states that it is not feasible that the Plaintiff has been paying annual rates to the 4th Defendant. He denies that the 4th Defendant unlawfully and fraudulently registered him as the proprietor of the property and further denies, that he fraudulently acquired and unlawfully sub-divided the property. The 1st Defendant denies that the property belongs to the Plaintiff.

7. The 2nd defendant filed defence dated 7th July 2010 in which she avers that she bought the property known as **KWALE/DIANI/1859** from the 1st Defendant who in turn acquired it as part of a larger property **KWALE/DIANI/203** which she alleges the 1st Defendant acquired from Settlement Fund Trustee. The 2nd Defendant avers that she lawfully acquired proprietorship in the property and states that she is constructing on it in exercise of her rights of use and interest in the property. In the alternative, the 2nd Defendant avers that she purchased the suit property in the ordinary course of business for value and in good faith and without notice of the alleged defects in the 1st Defendant's title and consequently that her title cannot be defeated even if the 1st Defendant's title was defeated.

8. The 3rd defendant filed a statement of defence dated 31st July 2009 in which he denied forgery and fraud on his part. He contends that he purchased plot number **KWALE/DIANI/1839** from the 1st Defendant for valuable consideration without notice of any irregularity, fraud or forgery or illegality and after having conducted the required searches at the Kwale District Lands Office before the purchase. He therefore contends that he acquired his title properly and regularly and lawfully subdivided the said plot into eight portions **KWALE/DIANI/1914** to **1921** after having obtained all the necessary and proper statutory consents.

9. The 4th and 5th Defendants filed a joint statement of defence in which they deny that the Plaintiff is the registered owner of the suit property and admitted that the 4th Defendant registered the 1st Defendant as proprietor of the suit property. They however deny that the registration was unlawful and fraudulent as alleged by the Plaintiff. The 4th and 5th Defendants aver that the subsequent divisions and registration were lawful pursuant to documents presented to the 4th Defendant. The 5th defendant denies that notice of intention to sue was given as required under Section 13A of the Government Proceedings Act, Cap 40 Laws of Kenya.

THE EVIDENCE

10. The Plaintiff's evidence was through Martha Mutoro (PW1) who gave oral evidence and adopted her witness statement dated 11th March 2014. She produced the original title deed dated 20th August 1998 as P.Exhibits 1 showing that the Plaintiff is the registered owner of suit property known as **KWALE/DIANI/203**. She asserted that the suit property was purchased from the Settlement Fund Trustee and that a Certificate of Outright Purchase was issued to the Plaintiff dated 18th May, 1998. She stated that the Plaintiff is still the registered owner and is paying rates. She produced the demand for rates and payment requests and receipts issued by the county council of Kwale for the years 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010 as P.exhibits – 2. She also relied on the Plaintiff's List of Documents as well as the Supplementary List of Documents, save for the first 4 pages of which were produced as Plaintiff's exhibits by consent. PW1 testified that the original file containing all the documents of the supplementary list relating to the purchase of the suit property from the Settlement Fund Trustee (SFT) had been lost and she was unable to produce the original or certified copies of the Certificate of Outright Purchase issued to

the Plaintiff by SFT or the transfer of the land from SFT to the plaintiff. PW1 testified that on issuing the title deed to the plaintiff, the Land Registrar, Kwale (PW2) at the material time made an entry in the Green Card in the proprietorship Section of the name of the registered owner and the date when the title deed was issued. PW1 relied on the entire contents of the plaint and sought judgment for the plaintiff against the defendants for the declaratory orders in prayers (a) and (b) and the injunction sought in paragraph (c) as well as for orders directing the 4th and 5th defendants to revoke and/or cancel all entries made on part B (proprietorship section) of the Green Cards relating to KWALE/DIANI/203 and on the other titles registered in the names of the 1st, 2nd or 3rd defendants and to rectify the entries in the title so as to reinstate the plaintiff as the registered owner of the original title **KWALE/DIANI/203** with costs of the suit against the defendants jointly and severally.

11. The Plaintiff also called Harrison Stephen Wasiwasi Musumiah (PW2) to give evidence. PW2 relied on his witness statement dated 26th July, 2017 which he adopted as part of his testimony. PW2 served as the Land Registrar at Kwale Land Registry from 1991 until June 2002. He was stationed at Kwale Land Registry at the material time when he issued the title deed (P. exhibit 1) to the plaintiff on 20th August, 1998 and which he confirmed he signed and made Entry no. 2 on the title of the date and name of the plaintiff when the title deed was issued against which he signed. PW1 also confirmed that he recognized the signature of Mary Kai who was not the Land Registrar at Kwale in 1992 and therefore she could not have signed the Green Card on 10th March 1992. He confirmed that Mary Kai was the Land Registrar in Kwale in 2007 and confirmed that Entries No .2 and 3 made on 2nd May 2007 in name of 1st Defendant were signed by Mary Kai whose handwriting and signature he stated he recognized. The Entry NO. 4 was made by Ben Mwangada. PW2 stated that Entry No. 1 in the Green Card was fake as his signature does not appear. He further stated that SFT were not the registered owners of **PLOT NO.KWALE/DIANI/203** in 1984 and therefore could not have offered the plot to the 1st defendant. He was categorical that PLOT NO.203 was not in existence at the time i.e. 1984. He also confirmed that before he issued the title deed to the plaintiff, he was shown both the transfer and the discharge of charge by SFT and that he left the land Registry at Kwale in 2002, adding that entries made in 2007 by Mary Kai were fraudulent.

12. The 3rd defendant, Mohamed Omar Ibrahim testified as DW1 and relied on his witness statement filed on 21st October, 2016. He produced the documents filed on 21st October, 2016 as D. Exhibits 1 to 24. He stated that he met the 1st defendant around 2008/2009 through third parties and he purchased the PLOT NO. KWALE/DIANI/203 from him upon carrying out a search. That upon sub-division, he purchased title no. KWALE/DIANI/1839 which was transferred to him after obtaining consent from the Land Control Board. He was subsequently issued with a title deed dated 9th September 2008 (D. Exhibit 15). He subdivided the plot into eight pieces. He denied having conspired to take the land from the plaintiff. DW1 stated that he came to know the 2nd defendant when she purchased a parcel next to his. He stated that he had no reason to doubt that the land belonged to the 1st defendant.

13. DW2, Dick James Safari is the current Land Registrar, Kwale. He produced the record for parcel NO.KWALE/DIANI/203 and the subsequent subdivisions. That the land which originally belongs to SFT was awarded to 1st defendant and on 8th September 2008, the parcel was subdivided resulting to parcel No. 1838 and 1839. Later plot no.1839 was transferred to the 3rd defendant and further subdivided into **TITLE NO.S KWALE/DIANI/1914** to 1921. Title no.1838 was closed on subdivisions into Plot no.1858 and 1859. Plot no.1858 remained in the name of the 1st defendant while plot no. 1859 was transferred to the 2nd defendant. The Green Card produced as D.Exhibit 25 does not indicate the Plaintiff as owner of the property. DW2 stated that there was no transfer in the record from SFT to the Plaintiff and there no entry in the Green Card in support of the issuance of Title Deed to the Plaintiff. However, there was a letter of offer from SFT to the 1st defendant.

SUBMISSIONS

14. The Plaintiff filed their submissions on 15th November, 2018 wherein its counsel submitted inter alia that the original title deed dated 20th August, 1998 which was issued to the plaintiff by the Land Registrar, Kwale is *prima facie* evidence of absolute and indefeasible ownership of the suit property. That PW2 being the Land Registrar in Kwale at the material time when the title deed was issued to the Plaintiff was in fact giving evidence on behalf of the 4th defendant. That DW 2 had no direct knowledge of what transpired during the material time as he was not stationed at the Kwale Land Registry as the Registrar at the time. That his evidence was only limited to what was in the file records relating to the suit property. It was submitted that the title deed issued to the Plaintiff by PW2 was genuine. It was further submitted that the original Green Card which was opened in March 1992 by William Mwamkale Kamoti with entries also made by PW2 showing the Plaintiff as the lawful registered owner had been removed and was replaced with a fresh Green Card by Mary Kai in 2007, and that the replaced Green Card forming D.exhibits 25 showing entries 1, 2 and 3 which were entered and signed by Mary Kai when she replaced and opened another Green Card in place of the original.

15. It was also submitted that the defendants have not shown any evidence that the plaintiff in its capacity was not entitled in law to benefit from the Settlement Scheme. It was the plaintiff's submission that the defendants did not call any material witness to give evidence touching on the matters in controversy and in support of their defence. It was further submitted that the Green Card that was replaced by Mary Kai could not have been done on 2nd May, 2007 when she made entries 1, 2 and 3 simultaneously and against which she also signed with her signatures all at the same time, consequently that the searches carried out by the 2nd and 3rd defendants were based on a fraudulently opened Green Card by Mary Kai. The Plaintiff further submitted that no discharge of charge has been produced by the defendants yet both DW2 and PW2 categorically stated that the same is a necessary document that is required to be produced by an allottee before a title deed can be issued. It was also submitted that the letters of consent by the 2nd and 3rd defendants are invalid and are null and void as the same were issued before the sale agreement was entered into. The plaintiff submitted that all the particulars of the fraud as pleaded in the plaint against the 4th defendant have been established under a balance of probability and urged the court to enter judgment as prayed against the 2nd, 3rd, 4th and 5th defendants jointly and severally. Reliance was made on the provisions of the Land Control Act and the case of **Rose Wakinyi Karanja & 3 Others** as legal representatives of the Estate of the late Kirundi & Another, CA No. 172 of 2010, and CA No. 246 of 2013 between **Arthi Highway Ltd and West Butchery Limited & 6 Others**.

16. The 2nd and 3rd defendants filed their submissions on 23rd January, 2019 in which they listed the legal issues as:

i. Whether the 1st defendant is the legal owner of the suit property and if the subdivision of the suit property into two sub-divisions, Kwale/Diani/1838 and 1839 by 1st defendant was lawful

ii. Whether the sale of the suit property by the 1st defendant to the 2nd and 3rd defendants was lawful and followed the proper legal procedure provided by the law.

iii. Whether the letters of consent obtained by the 2nd and 3rd defendants are valid and in accordance with the law.

iv. Whether the prayers sought can be granted.

17. Counsel for the 2nd and 3rd defendants submitted that the plaintiff is not the legal owner of the suit property because inter alia, PW1 failed to produce the original documents or certified copies to confirm the purchase by the Plaintiff from the Settlement Fund Trustee and that the title deed dated 20th August, 1998 produced as P.exhibit 1 was not reflected in the Green Card at the Lands office. Relying on the case of **Munyu Maina –v- Hiram Gathiha Maina Civil Appeal No.239 Of 2009** cited in **Kenya Railways Corporation –v- Fermento Investments Ltd, C.A. No.163 of 2009** (unreported), they submitted that it is not enough for the plaintiff to waive the title arguing that the plaintiff had the onus of proving the root of its title, mode of acquisition and various acts of possession exercised over the subject matter. They submitted that the plaintiff is a company and thus cannot be a beneficiary of the SFT.

18. It was their submission that the 1st defendant is the legal owner of the suit property as the property was registered to SFT and subsequently allocated to the 1st defendant in 1984 who acquired it through a Settlement Scheme charge and later issued with a title deed on 2nd May 2007. That DW1 and DW2 testified that the suit property belonged to the 1st defendant. It was further submitted that the subdivision and sale of the suit properties were lawful. Alternatively, it was submitted that the 2nd and 3rd defendants are bona fide purchasers for value without notice. They relied in the case of **Katende –v- Haridar & Company Ltd (2008) 2 EA 173 and Falcon Global Logistics Co. Ltd –v- Management Committee of Eldama Ravine Boarding Primary School (2018)eKLR; Jackson Kamau Kanyuru –v- Stephen Githinji Weru (2018) eKLR, and Charles Karathe Kiarie & 2 Others –v- Administrators of the Estate of John Wallace (2013)eKLR**. Further, it was submitted that the letters of the consent obtained by the 2nd and 3rd defendants are valid and in accordance with the law. The 2nd and 3rd defendants urged the court to dismiss the Plaintiff's claim with costs.

DETERMINATION

19. The dispute is over **TITLE NO.KWALE/DIANI/203** and the subsequent titles that resulted from sub-divisions. There is no dispute that each of the main protagonists herein, namely the plaintiff and the 1st, 2nd and 3rd defendants hold what they assert to be genuine title documents to support their claim on the suit property. The court must determine whether the plaintiff has established its case on a balance of probabilities to be entitled to the prayers sought in the plaint.

20. In my considered view the main issue for determination by the court is which of the proffered titles is sanctionable. The plaintiff alleges that it was and is still the lawful registered owner of the suit property known as KWALE/DIANI/203. The plaintiff alleged that it has been paying annual rates on regular basis to the 4th defendant in respect of the suit property. The plaintiff's evidence is that it purchased the property directly from the Settlement Fund Trustee and that a certificate of outright purchase was issued to the plaintiff dated 18th May, 1998. It is the Plaintiff's evidence that the Original file containing all the documents relating to the purchase of the property from the Settlement Fund Trustee had been lost. The Plaintiff mainly relied on the original Title Deed which was issued to the Plaintiff on 20th August, 1998. It is the Plaintiff's case that the Original Green Card which was opened in March 1992 with entries made by PW2 showing the Plaintiff as the lawful registered owner had been removed and replaced with a fresh Green Card in 2007.

21. PW2 stated in his evidence that he was the Land Registrar at Kwale when he issued the title deed in the plaintiffs name on 20th August, 1998. He also stated that he made entries on the green Card on the date when the title deed was issued and the name of the registered proprietor being the plaintiff at Part B of the proprietorship Section.

22. On the other hand, the defendants called DW2, the Land Registrar and the custodian of the documents at the Lands Registry. In his evidence, he stated that there were no records in the land registry showing that the plaintiff was ever registered as the owner of the suit property or that the Settlement Fund Trustee transferred the property to the plaintiff. He testified that there was no record in the Green Card to support the issuance of the title on 20th August, 1998 to the Plaintiff. Dw2 further confirmed that there was no indication that the records at the lands office had been interfered nor was there any reconstruction of the register. Whereas the 1st defendant was already deceased at the time of hearing, and was therefore was unable to give any account of the origin of his impugned title or titles, notably however, the evidence of DW2 seem to support the 1st defendant and indeed the other defendants defences as pleaded. DW2, though relying on the records at the lands office, did give evidence to explain how the 1st defendant came into ownership and subsequently how the 2nd and 3rd defendants came into ownership of their respective titles.

23. Chronologically, the evidence presented in my considered view showed that the earliest to be in existence and to be acquired was the title of the 1st defendant. The material on record indicate that the certificate of Outright Purchase in the plaintiff's name is dated 18th May, 1989, while the transfer from the Settlement Fund Trustee to the Plaintiff is dated 10th August 1992. The Plaintiff was allegedly registered as proprietor and issued with a title deed on 20th August, 1998. On the other hand, the documents which were produced by DW1 as D.exhibits 1-24 shows that the land was originally owned by the Settlement Fund Trustee before it was allocated to the 1st defendant through the letter of offer dated 7th February, 1984 which was produced as D.exhibit 1. There is also a charge dated 18th May 2005, D.exhibt 3. The said documents indicate the suit land was subsequently registered in the 1st defendant's name on 2nd May, 2007. Thereafter, the original title was subdivided to give rise to other titles including the ones in the 2nd and 3rd defendants' names DW2 stated that the titles in the names of the 2nd and 3rd defendants originated from the **TITLE NO.KWALE/DIANI/203** which was in the name of the 1st defendant. The 2nd and 3rd

defendants maintain that they purchased their respective plots from the 1st defendant upon carrying out due diligence. It is their contention that they are innocent purchasers for valuable consideration and without notice of any defects in the 1st defendant's title.

24. In the case of **Eunice Grace Njambi Kamau and Arthur –v- The Attorney General & 5 others civil suit No.976 of 2012 the court cited the case of Fletcher –vs- Peck 10 U.S 87 (1810)** to illustrate how other jurisdictions have handled the issue of sanctity of title and the plight of innocent third parties where Marshall J, stated:

“If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved the conveyance will be set aside, as between the parties, but the rights of third persons who are purchasers without notice for a valuable consideration cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchases is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect be set up against him. He has paid money for a title good at law, he is innocent whatever may be the guilt of others and equity will not subject him to the penalties attached to that guilt, titles would be insecure, and intercourse between man and man would be very seriously obstructed if this principle be overturned. ”

25. In this case, the plaintiff alleges that the 1st defendant fraudulently acquired the plaintiff's plot with the complicity and unlawful assistance of the 4th defendant. However, DW2 gave evidence confirming that the records at the lands registry are intact and that there were no interferences and no reconstruction made. DW2 maintained that there were no entries in support of the plaintiff's title. Even though the plaintiff called PW2 whose evidence was at variance with that of DW2, there was no evidence to prove the alleged fraud.

26. In the case of **Munyu Maina –v- Hiram Gathiha Maina (2013) eKLR, the Court of Appeal** expressed itself thus:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of the 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. ”

27. In the case of **National Bank of Kenya –v- Lawrence Otweyo Gumbe (2006) eKLR, the Court of Appeal** had this to say:

“Unlike RTA a certificate of title under RLA is merely prima facie evidence of the matters shown therein. (See Section 32(2)). Those entries are subject to the entries in the registered and overriding interests set out under Section 30 of the Act. We do not know what the land register for the subject property contains nor do we know whether or not there exists overriding interests which would include occupational rights.... ”

28. The Court of Appeal in **Charles Karathe Kiarie & 2 Others –v- Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others (2013) eKLR** held that:

“This statutory presumption of indefeasibility and conclusiveness of title under the torrens system can be rebutted only by proof of fraud or misrepresentation in which the buyer is himself involved.”

29. The 2nd and 3rd defendants have demonstrated the manner in which they acquired their titles from the 1st defendant. DW2 had given evidence regarding how the 1st defendant acquired his title. The plaintiff had the evidential burden to prove how he acquired the suit property in order to dislodge the evidence of the defendants and in particular the testimony of DW2 that the suit property initially belonged to the 1st defendant before the same was subdivided and portions thereof transferred to the 2nd and 3rd defendants. In my view the plaintiff did not discharge the burden of proof on how it acquired the title. The plaintiff simply dangled the title deed in its name. That in my view did not demonstrate convincingly the manner in which the plaintiff came to be the title holder of the suit property. No satisfactory evidence was availed to confirm that the plaintiff acquired the suit land from the Settlement Fund Trustee. Even though the plaintiff indicated that the original documents got lost or were misplaced, there was no evidence to support that allegation. The plaintiff faulted the defendants for failing to call a witness from the Settlement Fund Trustee. In my view, the defendants had no obligation to do so especially when they had produced documents in support of their case. The onus in my considered view was on the plaintiff to call the said witness to prove its case and possibly disprove the defendants' evidence.

30. For the reasons stated hereinabove, I find that the plaintiff has not proved its case on a balance of probabilities. Consequently, the plaintiff's suit is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 9th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Khanna for Plaintiff

Sitonik for 2nd and 3rd defendants

Mwandenje for Wachira 4th and 5th defendants

No appearance for 1st defendant

Yumna Court Assistant

C.K. YANO

JUDGE