



REPUBLIC OF KENYA



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**Mbugua v Kerre & 2 others (Civil Appeal E121 of 2023)
[2026] KECA 638 (KLR) (25 March 2026) (Judgment)**

Neutral citation: [2026] KECA 638 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E121 OF 2023
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
MARCH 25, 2026**

BETWEEN

GEORGE NDICI MBUGUA APPELLANT

AND

REUBEN WABUKE KERRE 1ST RESPONDENT

PAVINDER SINGH SOKHI 2ND RESPONDENT

KWALE LAND REGISTRY 3RD RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Kwale (A. E. Dena, J.) delivered on 18th July 2023 in ELC Appeal No. E004 of 2022)

JUDGMENT

1. On 18th July 2023, the Environment and Land Court (the ELC) at Kwale (Dena, J.) sitting as a first appellate court from the decision of Senior Principal Magistrate's Court at Kwale in ELC Case No. 22 of 2014 delivered on 29th June 2022 by Omido J. M. - SPM (as he then was), dismissed the appeal filed by George Ndicu Mbugua (the appellant) against Reuben Wabuke Kerre (the 1st respondent), Pavinder Singh Sokhi (the 2nd respondent) and Kwale Land Registrar (the 3rd respondent).
2. The brief background to the dispute is that, vide a plaint dated 15th July 2015, the appellant pleaded that he was the bona fide purchaser for value of all that parcel of land known as Kwale/Diani Beach Block/1053 measuring 0.1996HA (the suit property), having purchased it from one Noah Rajab Khaoya; that, after conducting due diligence on the suit property and agreement on the terms of payment, the appellant paid a total of Kshs.3,000,000 as the purchase price. After compliance with all the legal requirements, the suit property was transferred to his name; that, upon taking possession of the suit property, the 1st respondent, through his employees, agents and/or servants, trespassed onto the suit property and despite asking the 1st respondent to leave the suit property, he declined to do so, and



- that, as a consequence, the appellant suffered loss and damage. He thus prayed for judgment against the 1st respondent for: “a permanent injunction restraining the 1st respondent by himself, his agents and/or servants, from trespassing onto the appellant’s suit property; a declaration that the appellant was the absolute owner of the suit property; costs of the suit and interest; and any other relief that the court deemed just and fair to grant.”
3. The 1st respondent filed a defence dated 24th July 2025, which was later amended on 25th June 2018 to include the 2nd and 3rd respondents as well as a counterclaim. The amended defence and counterclaim dated 25th June 2018 was filed jointly by the 1st and 2nd respondents. The 1st and 2nd respondents averred that they were the owners of the suit property, and that they had never relinquished its ownership to the said Noah Rajab Khaoya; that no transfer could have been effected to the appellant without their consent; that they are the ones who constructed the perimeter wall around the suit property, and have always been in occupation, hence they could not be termed as trespassers upon a property which they own. It was their defence that, for the reason that they were not trespassers upon their land, the appellant was not entitled to any loss or damage as claimed.
 4. In their counterclaim, the 1st and 2nd respondents averred that the appellant fraudulently acquired the title documents to the suit property and particularised the fraud on the part of the appellant as follows:
 - a. Fraudulently acquiring a Certificate of Lease of the suit land.
 - b. Tendering forged documents to the lands’ office for registration.
 - c. Colluding with Noah Rajab Khaoya an imposter to effect fraudulent transfer.
 - d. Purporting to transfer the parcel of land with one who has got no propriety interest to the suit land.
 - e. Transferring land without conducting requisitions of title.
 - f. Forging signatures of land officials.
 5. The 1st and 2nd respondents further particularised trespass on the part of the appellant as follows:
 - a. Entering the suit premises without authorization from the 1st and 2nd respondents.
 - b. Entering the suit premises forcefully.
 - c. Directing his servants to enter the suit premises.
 6. The 1st and 2nd respondents claimed that, as a result of the particularised fraud and trespass by the appellant: they were deprived of the peaceful and quiet enjoyment of their property; they were also hindered from developing the suit property; and that, as a result, they suffered loss and damage. They thus prayed for judgment against the appellant for: that the appellant’s suit be dismissed with costs; a declaration that the 1st and 2nd respondents are the absolute owners of the suit property; a declaration that the alleged sale and transfer of the suit property to the appellant was unlawful and fraudulent; an order directing the 3rd respondent to cancel the appellant’s Certificate of Lease; a permanent injunction restraining the appellant from entering into, or in any way interfering with the 1st and 2nd respondent’s lawful use of the suit property; general damages and interest thereon; and costs of the suit.
 7. At the hearing, the appellant testified as PW1. He reiterated that he purchased the suit property from Noah Rajab Khaoya in the year 2014 who then held its Title Deed; that the said Noah was given the suit property by his uncle, David Mango, who died in the year 2011; and that the 1st respondent, who



- also held a Title Deed to the suit property, stated that he purchased it from the said David Mango in the year 2010.
8. PW2, Noah Rajab Khaoya, testified that the suit property belonged to his deceased uncle, David Mango (the deceased); that the suit property was transferred to him in his capacity as a trustee of the deceased's properties; that he later sold the suit property with no objection from family members; that he thereafter distributed the money (proceeds of the sale) to the deceased's family members; and that he first saw the 1st respondent in hospital with the deceased claiming to be a close family member, but that the other members of the deceased's family did not know him.
 9. PW3, Eunice Mukongo Kivuvu, the deceased's wife, testified that the suit property belonged to her deceased husband; that she mostly used to reside in Kibwezi but would visit the deceased in Diani; and that she had differences with the deceased when he married another woman by the name of Josephine Moons.
 10. PW3 confirmed that the 1st respondent was the deceased's relative, and that he even attended the burial of the deceased. It was her testimony that they (family members) asked the appellant to sell the suit property after which they shared the proceeds of the sale among themselves; that everyone was contented with the distribution of the money; and that she did not file succession proceedings in respect of the deceased's estate. She denied that the suit property belonged to the 1st respondent.
 11. PW4, Brian Wekesa Mango, the deceased's son, adopted his witness statement dated 20th February 2019. He testified that his father told him that he had transferred the suit property to his cousin, Noah Rajab, to hold it in trust for them; that, as a family, they agreed to sell the suit property, and Noah Rajab secured a purchaser, namely the appellant; that the 1st respondent used his influence to have him and Noah Rajab arrested before being charged in court with a criminal offence; that the 1st respondent was the complainant in the criminal case; and that the 1st respondent obtained the suit property illegally with a view to deprive them of their property.
 12. PW5, Emmanuel Vaselechah Mango, the deceased's son, adopted his witness statement dated 20th February 2019. He entirely corroborated the testimony of PW4. In addition, he testified that, in obtaining a title to the suit property, the 1st respondent had ill motive since he even retained title documents to other properties belonging to the deceased.
 13. On the part of the defence, DW1, Dick James Safari, the County Land Registrar, Kwale, produced the original register in respect of the suit property. In his testimony, he stated that the Green Card indicated that the title to the suit property was first issued to the deceased and one Irena Moons Josephine as joint owners on 4th September 2002; that a Certificate of Lease was issued on even date; that, on 3rd May 2011, a transfer was effected to the 1st respondent, and he was issued with a Certificate of Lease; and that, on 28th May 2012, the suit property was registered in the joint names of the 1st and 2nd respondents; that a White Card was opened pursuant to Section 79(2) and (3) of the *Land Registration Act*, Cap 300 in the event the Green Card was misplaced or lost; that the Green Card was reconstructed on 2nd November 2014 and registered in the appellant's name some two-and-a-half years after the last transfer; that the transfer of lease showed that there was a transfer to the appellant from Noah Rajab on 21st November 2014, but that that transfer was not documented; and that, therefore, there was nothing to show that the suit property was ever transferred to Noah Rajab.
 14. DW1 further testified that there were two conflicting green cards - the original and the reconstructed one; that the White Card showed that the last registration was effected to the 1st and 2nd respondents, and that it was dated 28th May 2012 while the reconstructed White/Green Card was dated 21st November 2014, and that it indicated the appellant as the registered owner of the suit property; that



- the process of replacement of a white/green card require gazette, but that, in this case, no gazette notice was issued, and none existed in the file to the suit property; and that, for this reason, there could not have been a lawful transfer of the suit property from the deceased and Josephine Moons to Noah Rajab or to the appellant.
15. DW2, Robert Matheri Kamau, the Court Administrator, Kwale Law Courts, produced the court file in which Noah Rajab and Brian Wekesa Mango were charged with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code, with the appellant being the complainant. He stated that the matter was withdrawn under Section 204 of the Criminal Procedure Code.
 16. DW3, the 1st respondent, adopted his undated witness statement. He stated that he purchased the suit property vide a sale agreement dated 23rd August 2010 from the deceased and Josephine Moons for a consideration of Kshs.1,050,000; that after payment of the requisite stamp duty in April 2011, an entry was made in the Green Card as entry number three on 3rd May 2011, and that he was issued with a Certificate of Lease; and that since he wanted to do some investment on the suit property, he invited the 2nd respondent as co-investor whereupon the property was then registered in their joint names and a Certificate of Lease issued on 28th May 2012.
 17. According to DW3, although Noah Rajab and Brian Wekesa were alleged to have been the owners of the suit property, none produced evidence of ownership. It was his testimony that he was a bona fide purchaser for value of the suit property; that his name is Reuben Wabuke Kerre but that, on the entry for the transfer, it reads as Reuben Wabuke Khaoya, which was a typographical error by the Lands Officer; that his identity card number was correctly written; and that he and the 2nd respondent are the lawful owners of the suit property as indicated in the Certificate of Lease.
 18. Upon conclusion of the trial, the learned Magistrate considered the testimony of DW1, Noah Rajab, in which he contended that the deceased and Josephine Moons transferred the suit property to him to hold it in trust for the deceased's family and held that there were no records to support the claim of conveyance of interest to him as a trustee from the initial joint leaseholders. On the basis of this finding, the trial court found little or no difficulty in concluding that, since Noah Rajab Khaoya did not acquire the title lawfully from the previous joint proprietors, he could not pass a good title to the appellant; and that, therefore, the transfer of the suit property from Noah Rajab Khaoya to the appellant was irregular and unlawful since Noah did not have a good title capable of being transferred in a regular and lawful manner.
 19. The trial court further held that the records of the suit property as presented by the Land Registrar left no doubt that, as at the time when the 1st respondent purchased the suit property vide an agreement dated 23rd August 2010, it was in the joint names of the deceased and Josephine Moons, who had already been issued with a Certificate of Lease on 4th September 2002; that there was evidence that the suit property passed from the previous joint owners who had a good title to the 1st respondent through a sale agreement dated 23rd August 2010 and that, on 3rd May 2011, the transfer was effected in favour of the 1st respondent; and that the transfer in the joint names of the 1st and 2nd respondents as joint lessees over the suit property made on 28th May 2012 was regular and lawful.
 20. For the aforesaid reasons, the trial court entered judgment as follows: the appellant's suit was dismissed, and the 1st and 2nd respondents' counterclaim allowed by which they were declared to be the absolute lawful and/or legal proprietors of the suit property to the exclusion of the appellant; the purported sale and/or transfer of the suit property to the appellant was declared to be fraudulent, null and void; a permanent injunction against the appellant was issued restraining him from trespassing or interfering with the 1st and 2nd respondents' occupation and/or use of the suit property; the claim for



general damages against the appellant was disallowed since the evidence presented pointed to a lapse of procedure in registration perpetuated by the 3rd respondent; and the appellant was to bear the costs of the counterclaim.

21. On appeal to the ELC, the appellant preferred 17 grounds of appeal, which we need not restate but will highlight the salient complaints. The appellant was aggrieved by the finding of the learned trial Magistrate that: Noah Rajab Khaoya did not hold a clean/good title; that the purported sale and transfer of the suit property by Noah Rajab Khaoya to the appellant was fraudulent; that, based on this finding, the said Noah did not have a good title to pass to him; and that, therefore, he was not a bona fide purchaser for value of the suit property. He was also aggrieved that the trial Magistrate failed to take into account the glaring discrepancies in the title held by the 1st respondent, which did not correspond with the records held in the Lands Office in respect to the suit property; and in holding that the 1st respondent held a good title to the suit property, and was therefore a bona fide purchaser. The appellant also faulted the trial court's judgment as being laced with conjectures, presumptions and theories, and for being unjust to him and not serving the interest of justice and equity.
22. In her judgment, the learned Judge (Dena, J.) accepted the evidence to the effect that the Certificate of Lease was first issued on 4th September 2020 to the deceased and Josephine Moons as joint owners and that, vide a sale agreement dated 23rd August 2010, the 1st respondent purchased the suit property from the joint owners with a subsequent transfer effected on 3rd May 2011.
23. The first appellate court further found that, from the evidence of the Land Registrar, DW1, the White Card was not reconstructed. It was clear to the learned Judge that there was already in existence a validly registered proprietor of the suit property as at 3rd May 2011 who was not the said Noah Rajab Khaoya and, hence, no valid legal interest could have been passed to the appellant. Consequently, it was found that the appellant was not the lawful registered owner of the suit property.
24. The learned Judge questioned the fact that the appellant took part in reconstruction of the file in respect of the suit property two years after the title was issued to the 1st and 2nd respondents without following the due process of gazettelement, yet he was not the registered proprietor, and instead of allowing Noah Rajab to apply for reconstruction. The learned Judge was of the view that the appellant was aware of, and he participated in, the fraud with full knowledge that there existed a lawful registered proprietor, hence the absence of bona fide intention on his (the appellant) part; and that, in the circumstances, the appellant could not have been a bona fide purchaser of the suit property for value without notice.
25. Consequently, the first appellate court upheld the decision of the trial court that the 1st and 2nd respondents were the lawful owners of the suit property and, accordingly, dismissed the appellant's appeal.
26. Further aggrieved, the appellant is before this Court on a second appeal. By a Memorandum of Appeal dated 15th August 2023, he has raised nine (9) needlessly argumentative grounds of appeal against the grain of rule 88 of this Court's Rules, and which we have summarised into the following four (4) grounds:
 - i. that the learned Judge erred by making a finding of fraud against the appellant when none was proved by evidence to the required standard and thereby left the issue of fraud to be inferred from the facts;
 - ii. that the learned Judge misapprehended and failed to address herself on the main issue as to whether the appellant's title initially held by the 1st respondent



was impugnable and that he could not subsequently pass good title to the 1st and 2nd respondents due to the discrepancies with the records held in the 3rd respondent's register and this discrepancy goes to the root of the title being held by the 1st respondent;

- iii. that the learned Judge erred by overlooking and disregarding critical ingredients of the bona fide doctrine in failing to distinguish who between the appellant and the 1st respondent was the bona fide purchaser for value; and
- iv. that the learned Judge erred by adversely dismissing the appellant's beneficial and equitable rights of ownership of the suit property by upholding the 1st and 2nd respondent's title despite their inability to prove their ownership.

27. We heard this appeal on 19th June 2025. Learned counsel Mr. Anthony Gikaria appeared for the appellant while learned counsel Mr. Gitonga was present for the 1st and 2nd respondents. The 3rd respondent did not attend Court despite satisfactory service with a hearing notice. Counsel relied on respective parties' written submissions which they briefly highlighted. Those of the appellant were dated 10th April 2024 while of the 1st and 2nd respondents were dated 29th April 2024.

28. This being a second appeal, we are restricted to determination of points of law only and not of fact as set out under Section 72(1) of the *Civil Procedure Act* thus:

Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-

- a. the decision being contrary to law or to some usage having the force of law;
- b. the decision having failed to determine some material issue of law or usage having the force of law;
- c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

29. This Court in the case of *Kenya Breweries Limited vs. Godfrey Oduyo* (2010) KECA 498 (KLR) (Civil Appeal No. 127 of 2007) Otieno – Onyango, JA. succinctly explained the role of a second appellate court as follows:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two court below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. We hasten to observe, however, that failure on the part of the first appellate court to re – evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law.”

30. As to whether he was a bona fide purchaser of the suit property for value, the appellant submitted that, having dealt with the registered owner of the suit property, Noah Rajab Khaoya, and undertaken an official search, and further having confirmed that the suit property was vacant at the time of purchase, he acquired an indefeasible right thereto notwithstanding the infirmity of the title. The decisions of superior courts in *David Peterson Kiengo vs. Kariuki Thuo - Machakos HCCC No. 81 of 2011*;



Lawrence Mukiri vs. The Attorney General & 4 Others (2013) KEHC 3676 (KLR); Peterson Kirengo & 2 Others vs. Kariuki Thuo (2012) KEHC 5881 (KLR); and Eunice Grace Njambi vs. Kamau & Anor (2013) KEHC 6274 (KLR) were relied upon where the common thread in the findings was that a bona fide purchaser for value without notice acquires an indefeasible good title if he was not aware of the fraud, or did not engage in any act leading to the creation of the title.

31. The appellant contended that he was entitled to protection of his proprietary rights to the suit property under Article 40 of *the Constitution* as he lawfully purchased the same as was held by the Supreme Court in the case of Rutongot Farm Limited vs. Kenya Forest Service & 3 Others (2018) KESC 27 (KLR) that: “Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of *the Constitution* is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution.’ According to the appellant, the learned Judge misapplied and misconstrued the doctrine of bona fide purchaser, which led her to upset well settled principles in this subject as enunciated in the case of Lawrence Mukiri (supra).
32. As to whether the 1st and 2nd respondents managed to prove their allegations that the suit property was fraudulently transferred to him (the Appellant), the appellant submitted that the 1st and 2nd respondents did not discharge their burden as required by law, more so as to proof of the alleged particulars of fraud in their counterclaim; that, as was held in the decision of this Court in Vijav Morajaria vs. Nansingh Madhusingh Darbar & Another (2000) KECA 223 (KLR) (Tunoi, JA.), a decision that was cited by the superior court in Eunice Grace Njambi Kamau (supra), fraud once alleged must be strictly proved; that fraud cannot be inferred from facts of a case; and that, in this regard, the 1st and 2nd respondents failed to discharge the burden of proof to establish the alleged fraud on his part as required under Sections 107 and 108 of the *Evidence Act*, and as was held in the decision of this Court in the case of Karugi & Another vs Kabiya & 3 Others (1983) KECA 38 (KLR).
33. The appellant further submitted that the 1st respondent did not tender evidence to demonstrate that he paid valuable consideration for the suit property for him to claim to be a bona fide purchaser; that he only alleged without proof that he paid the purchase price to the vendor, David Mango, in cash and in the presence of his lawyer; that the 1st respondent did not call as a witness the lawyer who witnessed the alleged payment to corroborate that position; that, in any event, the Land Registrar testified that he did not have the transfer instruments conveying the suit property to the 1st respondent; that, therefore, it was an error on the part of the learned judge to fail to interrogate whether the 1st respondent adhered to due process while buying the suit property; that for this omission, the superior court sanctioned the irregular, illegal and flawed process, thereby ignoring the fact that a title is an end product of a valid process; that the Certificate of Lease issued to the 1st respondent on 28th April 2011 failed to correspond with the White Card that was opened on 4th September 2002 by the 3rd respondent; and that entry No. 3 on the White Card revealed that the transfer of the suit property to the 1st respondent was registered on 3rd May 2011 and the Certificate of Lease issued on the same day, but that the actual Certificate of Lease produced by the 1st and 2nd Respondents was issued to them on 28th April 2011 before the transfer of the suit property was registered on the White Card.
34. The appellant posited that, based on the foregoing facts, the Certificate of Lease issued to the 1st and 2nd respondents on 28th April 2011 remained impugnable and, as such, the 1st and 2nd respondents did not acquire a valid interest in the suit property. To buttress this submission, the appellant relied on the decisions of this Court in Athi Highway Developers Limited vs. West End Butchery & 6 Others (2015) KECA 816 (KLR); and Mulemi vs. Angweye & another (2021) KECA 214 (KLR).



35. In conclusion, it was the appellant's submission that the 1st and 2nd respondents did not discharge their burden on a balance on probabilities as was held in the case of *Miller vs. Minister of Pensions (1947)* 2 ALL ER 372 by Denning, J. to prove that they held a good title; and that, in contrast, he was able to prove that he had a good title which the two courts below erred in impeaching. He thus urged that we allow the appeal with costs in his favour.
36. As for the 1st and 2nd respondents, they submitted that Noah Rajab, who it is alleged sold the suit property to the appellant, did not produce evidence to show that he was registered as the sole trustee of the deceased's properties; that cursory tracing of the root of the title dislodged the claim that the appellant holds a good title to the suit property; that this is buttressed by the fact that it is questionable how the appellant would apply for a White Card to be reconstructed if indeed he purchased the suit property from the legitimate owners who would otherwise have had a good title to pass to him; that it was impossible for the appellant to apply for a replacement of the title in his name if he had it (the title) registered in his name in the first place; that it was demonstrated that, as at the time the appellant was applying for replacement of the White Card, the 1st and 2nd respondents were already registered as the owners of the suit property; and that, therefore, it was only they who could have applied for the said replacement in the event that the title was lost.
37. According to the 1st and 2nd respondents, the appellant was not a bona fide purchaser as he was part of the fraud through which he acquired a bad title; that the appellant did not attempt to explain how the person who sold the suit property to him acquired it from the original owners (the deceased persons); that the principle of *nemo dat quod non habet*, that is to say that you cannot pass a title you do not have, which effectively pins down the appellant who admitted that he purchased the suit property from someone who did not have a title to pass against the tenets underpinned in this Court's decision in *Daudi Kiptugen vs. Commissioner of Lands & 4 Others (2015) KECA 13 (KLR)* that even a bona fide purchaser must obtain a good title; that, under Sections 25(1) and 26(1) of the [Land Registration Act](#), they (the 1st and 2nd respondents) held a good title which the appellant was not able to impeach; and that, as such, the two courts below cannot be faulted in ordering the 3rd respondent to cancel the appellant's title.
38. Finally, the 1st and 2nd respondents submitted that they proved their counterclaim to the required standard on a balance of probabilities; and that, on the other hand, the appellant failed to demonstrate how he was able to transfer the Certificate of Lease to himself, or, why he applied for a new title without the loss of the title being first gazetted as required. We were accordingly urged to dismiss the appeal with costs.
39. We have considered the record of appeal, the respective parties' submissions, the authorities relied upon and the applicable law. In our considered view, the only issue that falls for our determination is whether the appellant holds a legitimate Certificate of Lease to the suit property.
40. The common undisputed fact is that the title to the suit property was first held jointly by the deceased and his wife Irena Josephine Moons who, according to PW3 on cross examination, testified that she was also deceased. The Certificate of Lease was issued to the aforesaid joint proprietors on 4th September 2002. Noah Rajab Khaoya, who is undisputedly the deceased's nephew, testified in evidence that the suit property was transferred to him by the deceased to hold in trust for the family.
41. The appellant defended his acquisition of the suit property through a sale agreement dated 29th October 2014 with Noah Rajab Khaoya at a consideration of Kshs.2,700,000. According to the appellant, Noah was the legal registered owner of the suit property, and that, after he fulfilled all



obligations in the purchase process, he became the registered owner through a Certificate of Lease dated 21st November 2014.

42. On the other hand, the 1st respondent claimed ownership of the suit property through a sale agreement dated 23rd August 2010 entered between himself and the joint proprietors and that, subsequently, a transfer was effected and a Certificate of Lease issued to him on 3rd May 2011. Later, the 1st and 2nd respondents were registered as joint proprietors on 28th May 2012. This thread of acquisition of the suit property by the
43. Section 26(1) and (2) of the [Land Registration Act](#), Cap 300 provides that:

1. The certificate of title issued by the Registrar upon registration, or 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 ground 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.
2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

44. Inasmuch as the law protects the registered owner of a title as the absolute proprietor, it is not immune to being impeached if, after interrogation, it is found that the Certificate of Lease or Title Deed as the case may be, was obtained through fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. What these pre-conditions in law allude to is that, if there are doubts as to the validity of the ownership of a Certificate of Lease by the currently registered owner, the history of acquisition of the title should be investigated. Put differently, it is not sufficient for a holder of a Certificate of Lease to dangle it as full-proof evidence of indefeasible ownership. A title holder must defend the root of the title. That is also to say that where the legality of a title is brought into question, its (the title) root must be interrogated. And, this is what that the two courts below were called upon to do.

45. In *Dina Management Ltd vs. County Government of Mombasa & 5 others* (2023) KESC 30 (KLR), the Supreme Court affirmed this Court's decision in *Munyu Maina vs. Hiram Gathiha Maina* (2013) KECA 94 (KLR) that:

“where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”



46. In the Dina Management Ltd case (ibid), the Supreme Court expressed itself thus:

“94. 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...

... ..

110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...

111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired.”

47. This Court in Embakasi Properties Limited & another vs. Commissioner of Lands & another [2019] eKLR added its voice to the same subject as follows:

“Although it has been held time without end that the certificate of title is: “... conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof,” it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act, 2012* though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme.” [Emphasis added]

48. Similarly, this Court in Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR stated that:

“... when a registered proprietor’s root of the title is under challenge, it is not sufficient to dangle the instruments of title has 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 would not be noted in the register.”

49. As noted above, the appellant’s position is that he acquired the suit property after purchasing it from Noah Rajab, who allegedly held the property in trust for the family of the now deceased joint proprietors. As demonstrated by the case law cited above, for a person to state that they validly hold a title to a property, they must be able to defend the history behind the acquisition. A person cannot by a stroke of luck one day be entitled to claim ownership of property without an explanation behind its acquisition.

50. DW1, Dick James Safari, the Land Registrar, in his testimony revealed critical deficiencies in the appellant’s root title. First, he stated that the Green Card confirmed without a doubt that the title was registered in the names of the joint deceased proprietors on 4th September 2002 and a Certificate of Lease issued on even date. Thereafter, the title was registered solely in the name of the 1st respondent



on 3rd May 2011, and subsequently in the joint names of the 1st and 2nd respondents on 28th May 2012. The next registration in the

51. Noah Rajab's position was that he was the registered trustee of the property. For Noah to have been registered as a trustee of the suit property, there had to be transfer instruments executed by the deceased joint proprietors and himself. Certainly, the least that Noah would have readily demonstrated before the trial court was the process through which the deceased joint proprietors transferred the suit property to him before a title was issued in his name. The transfer and registration in his name could not have been done and effected verbally. There being no such transaction which took place, the conduct of conveying the title to Noah Rajab Khaoya's name was no doubt tainted with illegality.
52. Furthermore, to claim that the suit property was registered under trust, is a matter of evidence. It is trite law that the burden lies on the person alleging the trust to prove the existence of the trust. The fact of creation of trust is not implied, and courts are enjoined never to presume the existence of a trust save in cases of absolute necessity, such as for the purpose of giving effect to the intentions of the parties. Even in such situations, the intention of the parties to create a trust must be clearly determined before a trust is implied. See: Decisions of the Court of Appeal of *Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley* (2017) KECA 118 (KLR); *Gichuki vs. Gichuki* (1982) KECA 37 (KLR); and *Mwangi Mbothu & 8 others vs. Gachira Waitimu & 11 others* (1986) KECA 24 (KLR).
53. In this instance, in the absence of proof of trust by Noah Rajab, the two courts below arrived at the correct conclusion by making an adverse finding against the assertion by the appellant that Noah Rajab had a good title to pass to him.
54. Furthermore, Section 79(1) and (2) of the *Land Registration Act*, provides a full-proof procedure of rectification of a register by the Registrar of Lands. The law prohibits the Registrar to suo moto rectify the register without the proprietor's consent or without the consent of all affected parties. They provide as follows: -
 1. The Registrar may rectify the register or any instrument presented for registration in the following cases-
 - a. in formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;
 - b. in any case and at any time with the consent of all affected parties;
 - c. if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;
 - d. for purposes of updating the register; or
 - e. for purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.
 2. No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor's consent unless-
 - a. the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or
 - b. it would for any other reason be unjust for the alteration not to be made.



Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.

55. According to DW1, as soon as the White Card was reconstructed on 21st November 2014, the suit property was immediately registered in the appellant's name. It is common knowledge that the purpose of reconstruction of a green/white card will ordinarily be in instances where the owner of a title reports that the title is lost. Upon receiving a report of a lost title, the Registrar then invokes gazette of the loss. This critical process was not carried out, leading us to conclude that the appellant did not acquire his title lawfully after the reconstruction of the White/Green Card. More critically, is the fact that when the White/Green Card was reconstructed in the year 2014, the 1st and 2nd respondents were the already registered joint owners having obtained the Certificate of Lease on 28th May 2012. It follows that the omission to comply with this critical process of gazetting a lost title subsequent to which the file to the suit property had to be reconstructed speaks volumes. It is rather telling that the appellant hastened the process of the reconstruction of the file and so soon thereafter he was registered as the title holder, not only without following the correct procedure of acquisition, but also when the 1st and 2nd respondents were still registered as the title holders. We then conclude that the acquisition of the title by the appellant prima facie, fell short of what would warrant the appellant to be deemed as a bona fide purchaser of the suit property from Noah Rajab.
56. Even if we were for a moment to assume that the above perspective of how the suit property was acquired by the appellant from those lenses was wrong, it is on record that Noah Rajab claimed that he sold the suit property after the death of the joint proprietors. Since Noah alleged that he was holding the suit property in trust, he had the fiduciary duty as a person entrusted with the suit property to initiate succession proceedings in respect of the deceased's estate before any transmission to himself or any other person could take place. Again, this is another critical, yet mandatory procedure that seems to have escaped the attention of Noah so that he could claim to have lawfully transmitted the suit property to the appellant. And, for failure by Noah to take out letters of administration which would have otherwise given him the authority to deal with the deceased persons' estate, his actions of transferring the suit property to the appellant amounted to intermeddling with the estate of the deceased persons, which, in any event, is a criminal offence under Section 45 of the *Law of Succession Act*. Of paramount note is that, the failure to first acquire the authority to deal with the deceased's estate, incapacitated his ability to pass a good title to the appellant.
57. Further, our thorough perusal of the record does not bear testament that the deceased persons executed a transfer of lease in favour of Noah Rajab. There was no consent obtained from the Land Control Board, and neither was it demonstrated that stamp duty, if need be, was paid. The least the appellant would have done was to interrogate critically how it was possible for Noah Rajab to have obtained the Certificate of Lease dated 14th April 2011 after missing out on the above crucial steps. Furthermore, the extracted White Card is very clear on the sequential transfer of the suit property from the joint deceased proprietors on 29th April 2011 to the 1st respondent before he was issued with a Certificate of Lease on 3rd May 2011. We dare say that no history led us to how Noah Rajab acquired the Certificate of Lease on 14th April 2011.
58. We thus find that there was no evidence adduced to demonstrate that there was good title which the appellant could have obtained in relation to the suit property. Accordingly, the appellant cannot be heard to say that his right to property under Article 40 of *the Constitution* was violated when the two courts below ruled that he did not lawfully acquire the Certificate of Lease that he holds.
59. Our final findings after considering the material before us is that Noah Rajab did not hold good title to the suit property and, as a result, he was incapable of passing on good title to the appellant or to any



other person for that matter. It was not sufficient for the appellant to dangle the paper title to the suit property and expect that the court would take it as prima facie proof of ownership of the suit property. The title having been impeached, the appellant was under a duty to demonstrate how the root of the title was untainted for him to have obtained a good title. Unfortunately, he did not, consequent to which we have no reason upon which to fault the decisions of the two courts below.

60. In the end, we find that the appeal lacks merit and is hereby dismissed with costs to the 1st and 2nd respondents. We accordingly uphold the Judgment of the Environment and Land Court at Kwale in ELC Appeal No. E004 of 2022 (Dena, J.) delivered on 18th July 2023.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF MARCH, 2026.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

