



**Kirugu v Kerai & 2 others (Environment & Land Case 68 of 2014)  
[2024] KEELC 301 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 301 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 68 OF 2014**

**NA MATHEKA, J  
JANUARY 31, 2024**

**BETWEEN**

**FRANCIS MWANGI KIRUGU ..... PLAINTIFF**

**AND**

**VIMAL PREMJI KERAI ..... 1<sup>ST</sup> DEFENDANT**

**MARESKUMAR PREMJI KERAI ..... 2<sup>ND</sup> DEFENDANT**

**THE INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff avers that he is the owner and registered proprietor of all that property known as all that piece of land situated in the Mombasa Municipality in the Mombasa District containing by measurement Nought Decimal One Nought Nine Five (0.1095) hectares or thereabout and being Subdivision Number 1851 of Section 1 Mainland North which said piece of land is comprised in a Certificate of title dated the first day of March One Thousand Nine Hundred and eighty registered in the Land Titles Registry at Mombasa as Number CR 21360 /1 and is delineated, demarcated and described on the Land Survey Plan Number No. 152480. The plaintiff avers that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have jointly and severally through themselves, employee and/or agents trespassed onto the plaintiff's suit property, started constructing and/or erecting structures thereon. The plaintiff also avers that 1<sup>st</sup> and 2<sup>nd</sup> Defendants' are jointly and severally forcefully taking possession of the suit property albeit unlawfully. The plaintiff also avers that 3<sup>rd</sup> Defendants has failed and/or refused to act on his complaint as OB 72/25/2/2013.
2. The plaintiffs claim is for damages for the trespass by the 1<sup>ST</sup> and 2<sup>nd</sup> defendants on to the plaintiffs said parcel of land and for an injunction restraining the defendants, their servants, workmen and agents, from entering on the plaintiffs said property, or from erecting or causing construction of building or



any structures, or from in any way interfering with the plaintiffs use and enjoyment of the said property permanently. The plaintiff prays for judgement against the defendants jointly and/or severally for:

- a. A permanent injunction restraining the defendants, their servants, workmen and agents, from entering on and/or from erecting or causing to be erected thereon any structures, or from in any way interfering with the plaintiffs use and enjoyment of the plaintiffs said property.
  - b. A Declaration that the plaintiff is the legal and beneficial owner of all that piece of land situated in the Mombasa Municipality in the Mombasa District containing by measurement Nought Decimal One Nought Nine Five (O. 1095) hectares or thereabout and being Subdivision Number 1851 of Section 1 Mainland North which said piece of land is comprised in a Certificate of title dated the first day of march One Thousand Nine Hundred and eighty registered in the Land Titles Registry at Mombasa as Number CR 21360 /1 and is delineated, demarcated and described on the Land Survey Plan Number No. 152480 (hereinafter called the suit property)
  - c. General Damages.
  - d. Costs of this suit and Interest thereon.
  - e. Any other relief the court deems fit to grant.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that they are the legal and registered proprietors of CR. MN/ 1/ 1851 as purchasers for value without notice to the exclusion of Francis Mwangi Kirugu, the alleged Plaintiff herein for which Defendants hold the original grant thereto. The Defendants aver that since February 2013 a person purporting to be Francis Mwangi Kirugu made a complaint to the DCIO, Mombasa claiming that the Defendants have fraudulently obtained title to LR. NO. MN/ 1/1851. Pursuant to the complaint the Defendant were summoned by the DCIO and on 20<sup>th</sup> March 2013 the police confiscated the original title and other related documents from the Defendants for the purpose of investigations. The Defendant avers that the person purporting to be Francis Mwangi Kirugu was directed by the DCIO to deposit at the police the original title he purported to have but has to date not furnished the police with any evidence of ownership of the land. In a letter dated 30<sup>th</sup> October 2013 by the Senior Assistant Director of Public Prosecutions to the DCIO Mombasa it was clearly noted that only the original title from the Defendants was furnished and that the failure by the person claiming to be Francis Mwangi Kirugu to submit his title is suspicious. The Defendants state that consequently upon failure by the Plaintiff to co-operate in the investigations, the Regional CID Co-coordinator, Coast Province with advice from the Senior Assistant Director of Public Prosecutions returned the original title to the Defendants on 19<sup>th</sup> March 2014.
4. This court has considered the evidence and the submissions therein. PWI the Plaintiff testified that he is the lawful registered owner of the suit property namely Number CR. 21360 /1. He produced the certificate of title as an exhibit. Section 24 (a) of the *Land Registration Act* stipulates as follows:
- “subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....”



5. In the case of *Willy Kipsongok Morogo v Albert K. Morogo* (2017) eKLR the Court held as follows;
- “the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under Sections 24, 25 and 26 of the *Land Registration Act*.”
6. While in the case of *Joseph N.K. Arap Ng’ok v Moiyo Ole Keiwua & 4 Others* (1997) eKLR, where the Court of Appeal held that;
- “Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”
7. Further, in Civil Appeal No. 246 of 2013 *Arthi Highway Developers Limited v West End Butchery Limited and Others*, the Court of Appeal expressly stated thus:
- “Section 23(1) of the then *Registration of Titles Act* (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
8. Be that as it may, Section 26 of the *Land Registration Act*, No.3 of 2012 provides that;
- “26. 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.”
9. In the case of *Elijah Makeri Nyangw’ra -v- Stephen Mungai Njuguna & Another* (2013) eKLR the court held that:
- “the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.”



10. Hon. Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the [Land Registration Act](#) rendered himself as follows: -

“...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

11. For the first limb, it appears to me that the title of the 1<sup>st</sup> defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1<sup>st</sup> defendant was a party to the fraud or misrepresentation. Indeed, to me the 1<sup>st</sup> defendant was an innocent purchaser for value. He was probably conned of his money by the 2<sup>nd</sup> Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2<sup>nd</sup> Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2<sup>nd</sup> defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).
12. Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.
13. The Plaintiff has among his documents, attached the title deed for the suit property LR No. MN/1/1851 (PEX1) and official search (PEX2) dated 28<sup>th</sup> March 2014 revealing that he was registered as the owner of the suit property on 6<sup>th</sup> May 1991 and was issued with a title deed. DW1 the 1<sup>st</sup> Defendant testified that they bought the suit land from one Francis Mwangi Kirugu (but not the Plaintiff) after doing due diligence and through their Advocate Robison. He produced all the relevant documents in the transaction and states that it was above board. That the DCIO had also stated as much. The said seller and/or the Advocates were never called to testified. Although the Defendants allege they were bonafide purchasers they have not produced the said people involved in the dealings concerning the suit property to collaborate their story. 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.”

14. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in [Jennifer Nyambura Kamau v 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.”

15. In *James Muigai Thungu v 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.

16. It was upon the Defendant therein to prove his case and not put the Plaintiff to strict proof as to the existence of such an agreement. At no point did the evidential burden shift from the Defendants to the Plaintiff in terms of proving ownership of the suit premises. The burden was cast upon the Defendant who had the burden of proving the fact that he was the legal or beneficial owner of the suit premises, since he was the one who desired for the court to believe the existence of that fact.

17. It is the view of this court that it can only make a determination on the ownership of the suit property based on the title documents and the supporting documents thereto. In the instance suit the burden to prove the lies with the Defendant who have failed to adduced any evidence to support of these allegation that the sale agreement was not fraudulent the cheques for the purchase of the suit property were all in the name of their Advocate and not the seller. The ID number used in both the sale and transfer do not belong to the Plaintiff. The KRA PIN and the photo used in the transfer transaction does not belong to the Plaintiff and the Defendant stated he never dealt with the Plaintiff. I find that the Plaintiff never sold his property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and is still holding the original title deed. General damages were not proved and the same will not be awarded. In associating myself with the cited decisions, the legal provisions cited above as well as the evidence before me, I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A permanent injunction restraining the defendants, their servants, workmen and agents, from entering on and/or from erecting or causing to be erected thereon any structures, or from in any way interfering with the plaintiffs use and enjoyment of the plaintiffs said property.
2. A Declaration that the plaintiff is the legal and beneficial owner of all that piece of land situated in the Mombasa Municipality in the Mombasa District containing by measurement Nought Decimal One Nought Nine Five (0. 1095) hectares or thereabout and being Subdivision Number 1851 of Section 1 Mainland North which said piece of land is comprised in a Certificate of title dated the first day of march One Thousand Nine Hundred and eighty registered in the Land Titles Registry at Mombasa as Number CR 21360 /1 and is delineated, demarcated and described on the Land Survey Plan Number No. 152480.



3. Costs of this suit.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

