



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KERICHO**

**ELC NO. 51 OF 2014 (O.S)**

ALICE CHEMUTAI TOO(*Suing in her capacity as the personal representative of Kipkoech Tele (deceased)*).....APPLICANT

**VERSUS**

NICKSON KIPKURUI KORIR.....1ST RESPONDENT

THE ATTORNEY GENERAL (*Sued on behalf of the Chief Land Registrar*)..... 2ND RESPONDENT

CONSOLIDATED BANK OF KENYA.....3RD RESPONDENT

**J U D G M E N T**

***(Suit for cancellation of title; title having been in name of deceased; no succession conducted; 1st respondent, a stranger to the beneficiaries of the estate fraudulently procuring title and charging it to 3rd respondent; whether the title of 1st respondent ought to be cancelled; whether because of the charge the title cannot be revoked; held that fraudulent title must be cancelled; 1st respondent having procured title by fraud could not charge the property; charge also subject to be cancelled; judgment entered for the applicant).***

1. This suit was commenced by way of an Originating Summons filed on 22nd September, 2014 and the facts of the case are largely not in dispute.
2. The applicant holds a limited grant of letters of administration ad litem authorizing her to sue on behalf of the estate of Kipkoech Tele (deceased). Kipkoech Tele died on 28th December 1987, and so far, no grant of letters of administration has been issued in respect of his estate, and his estate has not been distributed. The deceased was the first registered proprietor of the land parcel Kericho/Cheborge/120 (the suit property), having procured registration on 26 September 1968, and issued with a title deed under the Registered Land Act (CAP 300) (repealed by the Land Registration Act, 2012, which came into effect on 2 May 2012).
3. On 8th March 2012, the 1st respondent had himself registered as proprietor of the suit property. He thereafter approached the 3rd respondent (the bank) for a loan facility and offered the suit property as security. The bank loaned him the sum of Kshs 1, 200,000/= and charged the suit property. The charge was registered against the title on 23rd October 2013. The loan was not serviced as agreed and the bank moved to have the property sold so as to recover its money. It was when the bank sent its agents to value the property for purposes of putting it up for sale, that the applicant states she first became suspicious and proceeded to conduct a search of the property. It is then that she discovered that the property had been transferred to the 1st respondent.

4. It is her case that the property was transferred to the 1st respondent through fraud and illegal falsification of the register. Inter alia, she has averred that the 1st respondent must have colluded with the Land Registrar (2nd respondent) to have the property transferred into his name, and that false and/or forged documents, must have been presented for registration. It is her position that the 1st respondent could not have had a good title to charge to the 3rd respondent and that the charge was meant to further his fraud. In her case, she wants a rectification of the register so that the title reflects the name of the deceased as proprietor in order that the estate may commence succession proceedings.
5. Neither the 1st respondent nor the 2nd respondent entered appearance and they did not participate in these proceedings. The 3rd respondent however opposed the summons by filing a replying affidavit sworn by Janet Mwaluma, its legal manager. She has deposed that the bank is not privy to any illegal transactions; that the 1st respondent presented to the bank a title deed; and that the bank did not have any notice of any defect in the title. She has deposed that the bank carried out due diligence and obtained a search which showed that the 1st respondent was the registered proprietor. She has deposed that without any proof of participation in the alleged fraud, the charge is valid, and that it is now too late to rectify the register. It is her view that nullifying the charge will set a dangerous precedent which will harm the economy that relies heavily on secured borrowing .
6. Since the facts were not really in contest, I directed the matter to be disposed of by way of affidavit evidence and asked counsels to file written submissions.
7. In his submissions, Mr. Caleb Koech for the applicant, inter alia submitted that the 1st respondent must have procured registration by fraud since the registered owner had long died, and he could not have risen from the dead to transfer the land to the 1st respondent. He submitted that Section 45 of the Law of Succession Act, CAP 160, prohibits intermeddling with a deceased estate. He submitted that one cannot pass a better title than he has; that the illegal title of the 1st respondent is null and void, and that no valid charge could be created. He submitted that an illegal title is subject to being revoked pursuant to the provisions of Section 26 of the Land Registration Act. To support his position, he relied on the cases of *Monica Achieng Akumu & 3 Others vs Dishon Omindi Nyamondo & 2 Others (2013) eKLR*; *Alice Wanjiru Thika & Others vs Joseph Gichono Mwangi & Others, Embu High Court Misc. Application No. 84 of 2007*; and *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another (2013) eKLR*.
8. On his part, Mr. Odhiambo for the 3rd respondent, inter alia submitted that an innocent purchaser for value is protected irrespective of fraud and that his title cannot be impeached. He termed this as the paradox of registered conveyancing as stated in the Ugandan case of *Lwanga vs Registrar of Titles Misc. Cause No. 7A of 1977 (1980) HCB 24*. He submitted that no evidence was tabled that the bank was privy to any illegality, as the search certificate confirmed that the 1st respondent was owner of the land. He submitted that although Section 26 of the Land Registration Act allows for cancellation of title, this is clawed back by Section 80 of the same statute. He submitted that the bank undertook due diligence as required by law by conducting a search. He submitted that the charge is protected. He further submitted that the applicant has been indolent as there has been no activity from the year 1987 when the deceased died. He submitted that Section 50 of the Land Registration Act, makes provision for prejudicial dispositions and that Section 53 of the same statute protects a person who acquires property in good faith. He was of the view that the remedy that the applicant has is to prefer criminal charges against the 1st respondent, or compel the 1st respondent to pay his loan, and after obtaining a discharge, pursue him on the title which would then not have an encumbrance. He finalized his conclusion that this court ought not set a precedent that is harmful to the economy which relies heavily on secured borrowing. He also had several authorities of his own to support his position.
9. I have considered the pleadings and the submissions of counsel and I trust that in the discourse that follows, I will have addressed all pertinent issues.
10. The deceased herein died in the year 1987. It has not been shown how the 1st respondent had himself registered as proprietor of the suit property 25 years after the death of the previous registered owner. No succession proceedings have ever been filed in respect of the estate of the deceased and it follows that the estate of the deceased has not been distributed. I do not think it necessary to belabour the point that the title of the 1st respondent was improperly acquired. It does

not need space science to bring one to the conclusion that the 1st respondent must have acquired registration of the suit property by way of fraud. He obviously could not have perpetrated the fraud on his own and he must have colluded with corrupt and morally deficient fellows in the land registry.

11. I am prepared to give the 3rd respondent benefit of doubt that they were not privy to the fraudulent transactions. It is another matter whether they undertook proper due diligence. Their position is that they conducted a search and that constituted good due diligence. I would not want to set any precedent that a person has any legal obligation to go beyond conducting an official search from the land registry so as to find the proper owner. That may be the legal obligation. However, there is no harm in going the extra mile and digging deeper into the title. In fact, it is probably advisable to do so, given the fact that this country is notorious when it comes to land scams, and land fraudsters have continuously been in the kitchen, creating new recipes for land con schemes. I would inform any prudent person wishing to deal with land, to go beyond the legal obligation of conducting an official search, and always prod a little more to find out if the person has good title to the land. It is not easy, but it is advisable to do so. In our case, I cannot fault the bank for not going beyond the legal obligation, but if they had gone the extra mile, they would probably have discovered that the title of the 1st respondent is not a good title. Whether they stand to suffer the consequences will soon be seen.

12. Having acquired title by way of fraud, can the title of the 1st respondent be protected? My short answer is a resounding NO! The applicable law is **Section 26** of the **Land Registration Act** which provides as follows :-

*26. (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.*

13. It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.

14. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of **Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012** where I stated as follows :-

*"...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 that 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 or 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 their titles by subsequent transactions."*

I stand by the above words and I am unable to put it better than I did in the said dictum.

15. In our case, there is no doubt that in so far as the title of the 1st respondent is concerned, it was procured by way of fraud or misrepresentation, and there is no way that the 1st respondent could have procured title without his own involvement in the fraud or misrepresentation. The title of the 1st respondent is clearly impeachable by dint of the provisions of Section 26 (1) (a). It cannot be allowed to stand and must be cancelled. If it is cancelled then it follows that any subsequent transactions have to be cancelled as well, for they were entered into by a party who had no capacity to do so, he not having a title in the first place.
16. The position that a fraudulent title cannot be allowed to stand has been affirmed in a number of other cases. They are several and it is not necessary to set them out here. I will only mention one where the point was clearly made, that is the Court of Appeal decision in the case of ***Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR***. This is a case where certain crooks fraudulently acquired title to land and later sold the same to other parties. The Environment and Land Court at Nairobi, cancelled all titles and ordered the land to revert back to the original owner. The decision was upheld by the Court of Appeal.
17. I find the submissions of Mr. Odhiambo curious, that because of the charge, the register cannot be rectified. Mr. Odhiambo was of the opinion that it would be a dangerous precedent to set if I proceed to cancel the charge. On the contrary, it is my view that it would be a dangerous precedent to set, if I were not to proceed to cancel the charge. It would mean that all a person needs to do is to fraudulently acquire title, then proceed to charge it, and because of that charge, his fraudulent transactions will be sanitized. The fraudster would end up being unjustly enriched, for he will have money in return for the charge, which money he will obviously have no incentive to pay, and the bank will still be able to recover its money by a sale of the property. The loser will of course be the proper title holder.
18. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.
19. Mr. Odhiambo referred me to a chain of authorities which he said assert the sanctity of title including the Court of Appeal decision in the case of ***Charles Karathe Kiarie & 2 Others vs The Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others, Nairobi Court of Appeal, Civil Application Sup. No. 12 of 2013***. I have looked at that decision which is one that concerned land registered under the Registration of Titles Act, CAP 281 (repealed). The land herein is registered under the Registered Land Act, and the two regimes are different. The authority provided was also not a substantive decision on merits, but dealt with an application seeking leave to file an appeal at the Supreme Court. It is inapplicable in the circumstances of this case. I have also seen the case of ***Joyce Wanjiku Madsen & Another vs Daniel Kairu Kiaraho & 3 Others (2014) eKLR*** cited by Mr. Odhiambo. In that case, the plaintiffs had a sale agreement with the 1st defendant for certain land. The 1st defendant later sold the land to the 3rd defendant who charged it to the 4th defendant. In the matter, the question arose as to whether the title of the 3rd defendant had been procured by fraud. The court answered in the negative, and did not find any evidence of fraud in the sale to the 3rd defendant, as the 1st defendant was of the honest, though mistaken belief, that the plaintiffs had not complied with the terms of the contract and was of the honest belief that he was entitled to sell the property to the 3rd defendant. It is because there was no evidence of fraud that the court did not vitiate the sale to the 3rd defendant. But that is not

the situation we face herein. The 1st respondent, without any shadow of doubt obtained title by fraud, unlike the 3rd defendant in the cited case. The authority is markedly distinguishable. The last authority offered by Mr. Odhiambo, that of **Nairobi Permanent Markets Society & 11 Others vs Salima Enterprises & 2 Others, Nairobi Civil Appeal No. 185 of 1997 (1997) eKLR**, also concerned a title issued under the Registration of Titles Act, and Section 23 of the Act, cited herein as giving authority for sanctity of title, is inapplicable in the circumstances of this case.

20.Mr. Odhiambo, further argued that Section 80 of the Land Registration Act, claws back on Section 26 of the statute. I have looked at Section 80 which is drawn as follows :-

*Rectification by order of Court.*

**80. (1)** *Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

**(2)** *The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.*

21.I do not see how Section 80 can assist the 3rd respondent. Section 80 may afford a defence against rectification of the register, where the person affected is in possession of the property, and acquired it without any notice of any vitiating factors. There may be argument that there is a conflict between **Section 80** and **Section 26** as asserted by Mr. Odhiambo, but I do not think that this is the forum to address this, for clearly, the 3rd respondent cannot afford itself the shelter (if any) of Section 80. This is because the 3rd respondent is a chargee, and she is not in possession of the suit property. Neither is the 1st respondent, the fraudster, in possession. The applicant has demonstrated that the 1st respondent has never been in possession, and that he is a complete stranger, to her and to the larger family of the deceased. The applicant has indeed shown that all along, she and the rest of the family of the deceased, are the ones who have continuously been in possession. Possession is key for any party to afford himself the shelter of Section 80, and I really do not see how Section 80 can protect the cancellation of the title in this instance, neither of the respondents being in possession.

22.Mr. Odhiambo also mentioned Sections 50 and 53 of the Land Registration Act, which I have also considered. They are drawn as follows :-

*Court orders on prejudicial dispositions.*

**50.** *The court may order that any interest in private land acquired or received under or through certain prejudicial dispositions of those interests in private land made by a debtor, or the value of those interests in land, be restored for the benefit of unsecured creditors and the order made under this section shall not increase or prejudice the value of any security held by a creditor over the interest in land of the debtor.*

**53. (1)** *If a person acquires or receives land in respect of which the court could make an order for restoration or for the payment of reasonable compensation, the court shall not make that order against that person if that person proves that the land was—*

*(a) acquired or received in good faith and without knowledge of the fact that it has been the subject of a disposition to which this part applies, or*

*(b) acquired or received through a person who acquired or received it in the circumstances set out in paragraph (a).*

**(2)** *Reference to knowledge in this section shall include actual, constructive and imputed knowledge.*

23. In referring me to Sections 50 and 53, Mr. Odhiambo was vainly clutching at straws, for looking at the above provisions, I am at a loss as to what role they play in the circumstances of this case. We are not dealing with any case of dispositions prejudicial to creditors. Sections 50 and 53 above, deal with a situation where a debtor, probably in order to hide assets from his creditors, sells property to third parties. What Section 53 attempts to do, is to protect those 3rd parties, if they have acquired the land in good faith and without the knowledge, that the same was a disposition made in order to defeat creditors. Clearly, Sections 50 and 53 do not apply in our case.

24. Having considered all arguments I frankly do not see how the title of the 1st respondent, the star fraudster, can be upheld, and having nothing to charge, I do not see how the charge in favour of the bank can be upheld. It was argued that a decision to cancel the charge would be injurious to the economy. But it is no less, and in fact, it may probably be more injurious, if I am to deny the applicant and the heirs of the estate of the deceased their rightful inheritance, which comprises of the suit property. The charge has to be cancelled and I am afraid that in this instance, the bank will have to pursue the 1st respondent personally to recover its money. I sincerely hope that they will be successful in this mission. As for the applicant, she has succeeded in this case and the title has to revert back to the name of the deceased. On costs, I do not see why the same should not follow the event. The applicants shall have costs jointly and/or severally against the respondents.

25. I now make the following orders :-

(1) That the title of the 1st respondent, Nickson Kipkirui Korir, to the land parcel Kericho/Cheborge/ 120, was improperly procured and the same is hereby cancelled.

(2) That having no title, Nickson Kipkirui Korir, could not have properly charged the land parcel Kericho/Cheborge/120 and the charge is also hereby cancelled.

(3) That the register of the land parcel Kericho/Cheborge/120 be rectified, so as to remove the entries in favour of Nickson Kipkirui Korir, and the Charge in favour of Consolidated Bank of Kenya, and the title to revert back to the proprietorship of Kipkoech Tele.

(4) That the applicant shall have costs jointly and/or severally against the respondents.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 30<sup>th</sup> DAY OF OCTOBER, 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

In the presence of:

Mr. Caleb Koech of M/s Bett & Company Advocates for the Applicant

Ms. Chepkurui Koech holding brief for Mr. Odhiambo of M/s Cheptumo & Company Advocates for the 3<sup>rd</sup> Respondent

No appearance for 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

Court assistant- Mr. Kenei