



Mat International Terminal Limited v Multiple ICD (K) Limited & 3 others (Environment & Land Petition 11 of 2017) [2024] KEELC 1648 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 11 OF 2017**

**NA MATHEKA, J
MARCH 20, 2024**

BETWEEN

MAT INTERNATIONAL TERMINAL LIMITED PETITIONER

AND

MULTIPLE ICD (K) LIMITED 1ST RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT**

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE COUNTY LAND REGISTRAR MOMBASA 4TH RESPONDENT

JUDGMENT

1. It is the petitioner’s case that it entered into an agreement of sale dated 4th July 2006 with Naran Mulji Properties Limited for the purchase of three parcels of land; L.R No. MN/VI/4106 Grant No. 33638 registered as CR 33638/1, L.R No. MN/VI/3910 Grant No. 29322 registered as CR 29322/1 and land allocated to the late Hon. Shariff Nassir vide a letter of allotment Reference No. No. 76474/XI for a consideration of Kshs 30,500,000/=. The petitioner contended that on 4th October 2010 its counsel, Balala & Abed Advocates wrote to the Land Registrar requesting for verification of the certificate of title to LR No. MN/VI/4173 for them to proceed with registration of the same. The petitioner’s director testified that the petitioner has not registered the transfer for the reason that there existed another transfer in favour of the 1st respondent. He maintained that the petitioner conducted due diligence before purchasing the suit property, stating that he had been informed there was an existing title and that the 1st respondent’s title was fraudulent.
2. The 1st respondent maintained that the then Commissioner of Lands granted L.R No. MN/VI/4173 Grant No. 43456 to Highrise Elevators Limited on 6th May 2003 and on 18th June 2003 the Registrar of Lands registered the grant as CR No. 43456/1. On 25th February 2010 Multiple ICD (Kenya) Limited,



the 1st respondent entered into an agreement of sale with Highrise Elevators Limited for the purchase of MN/VI/4173 CR 43456/1 for consideration of Kshs 70,000,000/=. On 12th May 2010, Highrise Elevators Limited transferred MN/VI/4173 CR 43456/1 to Multiple ICD (Kenya) Limited and the transfer was registered by the Registrar of Lands on 14th May 2010 as CR 43456/2. The 1st respondent made an application on 22nd November 2011 to the Mombasa District Physical Planner for a change of user on LR No. 4173/VI/MN from shops, offices and flats to light industrial warehousing and on 8th December 2011, the same was approved. The 1st respondent averred that they have remained in possession ever since.

3. The 4th respondent initially filed a Replying Affidavit dated 17th July 2012 sworn by Benson Mulele Ingonga, the then Senior Registrar at Mombasa land registry. He deponed that as per the records held by the 4th respondent MN/VI/4173 was allocated to Highrise Limited on 1st April 1999. The suit property was subsequently transferred and registered in the name of Multiple ICD (Kenya) Limited the 1st respondent. He further deponed that afterwards the 1st respondent applied for change of user and was allowed to change from shops office to light industrial use. He denied being aware that the petitioner acquired the suit property from Naran Mulji Properties, or that the petitioner ever presented a duly executed transfer for registration. He claimed that if the same was ever presented, it was rejected for a valid reason, which was communicated to the petitioner. He maintained that since the petitioner is not the registered owner of the suit property, he cannot claim to be the legal or beneficial owner.
4. The second Replying Affidavit to be filed by the 4th respondent was dated 7th July 2012, and was sworn by Samuel Mwangi, the then Land Registrar of Mombasa. He deponed that he has been informed by the Director of Land Administration that L.R MN/VI/4173 was first allocated to the late Hon. Shariff Nassir vide a letter of allotment reference number 76474/1, which he accepted and paid the prerequisite payment on 22nd July 2002. He further deponed that the suit property was then transferred to Naran Mulji Properties Limited vide a transfer dated 22nd July 2002, and the same was surveyed resulting to L.R No. MN/VI/4173 Deed Plan No. 247674 measuring 3.030ha. The grant was then registered at the land registry on 26th February 2008 as CR 43457. The deponent contended that on the face of the grant CR. 43456 bearing the names of Highrise Elevators Limited registered on 18th June 2003 could not have existed. He explained as per the registry H-Book records, the number CR No. 43456 was not allocated in the year 2003 but much later in the year 2008. He maintained that from their records, No. 43456 related to maisonette No. B on MN/I/6158. The deponent maintained that the grant was registered in favour of the 1st respondent on 6th March 2012 as CR No. 55229, as per their records was concerning a lease 44946/30 over an apartment in favour of Farhiya Abio Yusuf. He argued that the initial affidavit Replying Affidavit dated 17th July 2012 sworn by Benson Mulele Ingonga was based on illegal documents presented to and deceitful averments made to Benson Mulele Ingonga by the 1st respondent. He contended that the office of the 4th respondent was misguided and misrepresented by the 1st respondent into making the statements in the said affidavit. He urged court to withdraw and expunge the said affidavit and find that what he had deponed was the true position of the suit property.
5. The last Replying Affidavit to be filed by the 4th respondent is dated 27th October 2023, and was sworn by Sheila Soita the present-day Land Registrar of Mombasa. She deponed that based on the information she had received from the Director of Land Administration, LR No. MN/VI/4173 was allocated to Shariff Nassir (deceased) vide a letter of allotment reference number 76474/XII, and on 22nd July 2002 he accepted the offer and made the requisite payment. She further deponed that on the same day, 22nd July 2002 the suit property was transferred to Naran Mulji Properties Limited. The suit property was later surveyed resulting to LR No. MN/VI/4173 deed plan No. 247674 measuring 3.03ha, and the grant was registered on 26th February 2008 as CR 43457.



6. In response to the 1st respondent's claim to the suit property, she deponed that the grant CR 43456 in the name of Highrise Elevators Limited, registered on 18th June 2018, could not have been issued in the year 2003 as that series of grants were issued in 2008. She maintained that as per the H-Book, No. 43456 was relating to a maisonette on MN/I/6158 and could not relate to the suit property. She contended that the grant registered in favour of the 1st respondent CR No. 55229 on 6th March 2012, as per their records held in the H-Book relates to a lease 44946/30 in favour of Farhiya Abio Yusuf. The deponent further claimed that the initial Replying Affidavit deponed by Benson Igongo was based on false allegations and fraudulent documents presented by the 1st respondent and urged the court to expunge it from the court records.

Analysis and determination

7. On 27th September 2022, the 1st respondent made an oral application to the court to strike out the 4th respondent's replying affidavit dated 7th July 2022 and sworn by Samuel Mwangi for being contradictory to the 4th respondent's affidavit sworn by Benson Mulele filed on 17th July 2012. This court delivered its ruling on the said application on 25th October 2022. It held that the court would take judicial notice of the contradictions between the affidavits and consider the weight and reliability of the said affidavits. The court disallowed the application and the affidavits remain on record.
8. The petitioner contended that vide an agreement of sale dated 4th July 2006, they purchased three parcels of land from Naran Mulji Properties Limited; MN/VI/4106 registered as CR 33638/1, MN/VI/3910 registered as CR 29322/1 and MN/VI/4173 registered as CR 43457. Of the three parcels of land, MN/VI/4173 is what is contentious, between the petitioner and 1st respondent. Clause 1 (iii) of the said agreement of sale describes the vendor as the "transferee of the land allocated by the Commissioner of Lands vide Reference No. 76474/XI dated 25th March 1999 to the late Hon. Shariff Nassir and sold by him to the vendor as appearing in the form of Transfer dated 24th July 2002 signed by the said late Hon. Shariff Nassir". It is the petitioner's case that upon seeking to register their transfer between themselves and Naran Mulji Properties Limited the same could not proceed as they were notified that the suit property was already registered and title issued in favour of the 1st respondent. The petitioner maintained that the 1st respondent had tampered with the title records of the suit property and had acquired a forged title, which he urged the court to cancel and have the same registered in their name. In order to determine the question of whether the petitioner has any valid claim to the suit property, it must be demonstrated to the court that the same was properly acquired and that the 1st respondent's title was fraudulently acquired.
9. On 25th March 1999, the Department of Lands allotted Hon. Shariff Nassir an Unsurveyed Industrial Plot 'A' M. North measuring 3.1ha for a term of 99 years from 1st April 1999 vide a letter of allotment Reference No. 76474/XII. On 24th July 2002, Hon. Shariff Nassir for a consideration of Kshs 1,300,000/= transferred LR No. Unsurveyed Light Industrial Plot No. 'A' is situated in Kibarani-Mombasa Mainland North to Naran Mulji Properties Limited. In the same breath, there is another transfer document from the Ministry of Lands and Settlement indicating that on 22nd July 2002 Hon. Shariff Nassir transferred MN/VI/4173 to Naran Mulji Properties Limited. It can also be seen from a receipt No. F 143471 that Hon. Shariff Nassir on 9th August 2002 paid Kshs 591,000/= as planning and approval fees for the Unsurveyed Industrial Plot 'A' M. North. Naran Mulji Properties Limited became the registered owner of MN/VI/4173 as seen from the grant dated 28th June 2007 and registered as CR 43457/1 on 26th February 2008.
10. The 4th respondent deponed, through the affidavit of Sheila Soita and Samuel Mwangi that the suit property was initially allotted to Hon. Shariff Nassir on 25th March 1999 as unsurveyed and was later



surveyed on 25th April 2003 vide Deed Plan No. 247674 and issued with the land parcel number L.R No. MN/VI/4173. However, the evidence that ought to support this narrative proves otherwise. The foremost document bearing the suit property's parcel number MN/VI/4173 is from the Ministry of Lands and Settlement indicating that on 22nd July 2002, Hon. Shariff Nassir transferred MN/VI/4173 measuring 3.03ha to Naran Mulji Properties Limited. Next to it, is the transfer form dated 22nd July 2002, which indicated that Hon. Shariff Nassir for consideration of Kshs 1,300,000/= transferred 3.1ha of Unsurveyed Light Industrial Plot No. 'A' to Naran Mulji Properties Limited. Naran Mulji Properties Limited was then issued with a grant to the suit property on 28th June 2007 and the same was registered as CR 43457/1 on 26th February 2008.

11. Sheila Soita in her affidavit deponed that the records held at the land registry in particular an H-Book indicated that on 21st February 2008, a new grant was created No. 43457 for the deed plan No. 247674 Subdivision No. 4173/VI/MN. This presents another mismatch of information, while the 4th respondent maintains that the grant was registered on 26th February 2008 as CR 43457, the supposed extract of H-Book reveals that the same was created on 21st February 2008. The petitioner, on the other hand, in their affidavit in support of the petition annexed a title document to L.R No. MN/VI/4173 in the name of Naran Mulji Properties Limited bearing Grant No. 43456, and upon registration on 28th February 2008 became CR 43457/1. Yet according to the 4th respondent's H-Book, Grant No. 43456 was created on 21st February 2008 over lease CR No. 21840/7 MN/I/6158.
12. The court draws an inevitable conclusion, from the documentary evidence presented by the 4th respondent and the petitioner that some glaring inconsistencies and contradictions were not clarified during the viva voce evidence. For starters, L.R No. MN/VI/4173 was first mentioned on 22nd July 2002 in the transfer documents of Hon. Shariff Nassir even before the suit property was surveyed on 25th April 2003 for allocation of the said parcel number. The petitioner's agreement of sale with Naran Mulji Properties Limited, which is dated 4th July 2006, dated the suit property's transfer from 24th July 2002, while the evidence on record is the transfer form dated 22nd July 2002. Further to that, the agreement of sale does not refer to the suit property as LR. MN/VI/4173 despite the same having been surveyed on 25th April 2003. While the petitioner has presented a certificate of title Grant No. 43456 it has been registered as CR No. 43457/1 on 28th February 2008; the 4th respondent has presented a certificate of title Grant No. 43457 which was registered, as per their records on 21st February 2008. The petitioner also did not clarify to the court why the vendor had the suit property transferred to him in 2002 only for the title to be processed in 2008, eight years after the transfer was executed.
13. As the custodians and issuers of title documents, the 4th respondent did not explain the disparities in these title documents held by themselves and the petitioner, whom they seem to support their claim to the suit property. The Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR held,

“As regards complicity by the Commissioner of Lands, the trial court found the officials at the land Registry, who are the custodians and issuers of Titles to have allowed the existence of two different Titles on the same property with all endorsements made thereon, which on its own was participation in the forgery. It observed that the Ministry of Lands kept the master record of all land and the registered owners, under a system which guarantees a land title certificate to be full, valid and indefeasible Title. The Commissioner of Lands failed to explain in this case how two land Title certificates on the same land could exist and which one was genuine. The responsibility to ensure accuracy of the register and authenticity of Titles lay with the Government, which is by law required to pay compensation for any fraud or other errors committed during registration. It was on that basis that the Commissioner



of lands was found to have been privy to the forged entries during registration and issuance of the title.”

14. Fraud is a serious accusation that has to be pleaded and proved to a standard above the balance of probabilities but not beyond reasonable doubt. The petitioner must demonstrate clear and distinct fraud by leading evidence. The petitioner has averred that the 1st respondent forged the title documents to the suit property while the 4th respondent stated that the documents in the land registry do not show that the suit property was ever registered in the name of Highrise Elevators. Samuel Mwangi denied the 1st respondent’s title to the suit property Grant No. 55229 registered on 6th March 2012, and maintained that as per the records at the land registry (H-Book), CR 55229 related to a lease registered as 44946/30. The petitioner maintained that the 1st respondent did not produce any document to support how it acquired the suit property.
15. The 1st respondent has denied fraudulently acquiring the title and maintained that it bought the same from Highrise Elevators Limited which held Grant No. 43456 that was registered as CR 43456/1 on 18th June 2003. The 1st respondent entered into an agreement of sale with Highrise Elevators Limited on 25th February 2010 for the purchase of the suit property and on 12th May 2010 executed a transfer, which was subsequently registered on 14th May 2010. The 1st respondent averred that after the transfer was registered in their favour, they sought a change of user from office use to light industrial use and the same was allowed on 8th December 2011. Following the change of user, they were issued with a title to the suit property Grant No. CR 55229 on 6th March 2012. The 1st respondent’s claim to the suit property is supported by the initial affidavit sworn by Benson Mulele on behalf of the 4th respondent. He produced a letter dated 5th May 2012 from the then Commissioner of Lands Aseri Kirungu addressed to the Senior Registrar of Titles Mombasa. The said letter claimed that the suit property was allocated to Highrise Elevators and later a change of user was made and on 12th February 2012 a new title was issued.
16. It is the view of this court that the petitioner, as a purchaser, cannot claim to have carried out due diligence at all stages before proceeding with the purchase of the suit property. For this reason, the petitioner entered into an agreement of sale with Naran Mulji Properties Limited on 4th July 2006 but only wrote to the Land Registrar on 4th October 2010 seeking the registration of transfer for the suit property. The said transfer that has been attached to the affidavit in support of the petition is not executed by the parties to it and cannot be considered by the court as a transfer that was rightfully presented before the Land Registrar for registration. The petitioner also did not present a certificate of postal search of the suit property that would have verified that Naran Mulji Properties Limited were the registered owner of the suit property at the time of purchase, despite stating on cross-examination that they were informed that at the time of purchase, there was a title document. What interest was the petitioner purchasing from Naran Mulji at the point of entering into an agreement of sale with them? The petitioner did not acquire equitable interest from the sale, which would have been proved by evidence that the purchase price was paid. The petitioner’s claim against the 1st respondent’s indefeasible title as protected by Section 26 of the *Land Registration Act* cannot succeed based on the evidence presented.
17. It is clear to the court that the history of the previous ownership of the suit property is questionable. The title held by Naran Mulji was contradictory in comparison with the evidence presented by the 4th respondent explaining the origin of the CR numbers. The 4th respondent’s officers deponed different affidavits each supporting either of the antagonizing parties. Their evidence as to the ownership of the suit property was full of inconsistencies, despite them being in custody of all title documents relating to the suit property. The petitioner did little to seek a deeper insight into the pre-ownership of the land,



there is no evidence that they carried out a perusal of the documents in the parcel file before embarking on purchasing the suit property. In the mind of the court, the petitioner was satisfied in purchasing land that was allegedly previously held by Hon. Sharrif Nassir and that was negligence and creates a perception of knowledge of the existence of fraud on their part. The petitioner took no step that would have consolidated their interest in the suit property, there is no executed land transfer form, no stamp duty receipt and no application for registration of transfer forms. The petitioner remains a spectator in the transactions that they claim to be invested in with no legal or equitable interest in the suit property that would warrant them to be certain that the 1st respondent's title was acquired fraudulently.

18. The overreliance the petitioner had on the evidence presented by the Land Registrars, who did little to clarify who between the petitioner and the 1st respondent, who of the two was the true owner of the suit property. From the evidence adduced, it is clear to the court that on a balance of probabilities, the petitioner has failed to establish fraud on the part of the 1st respondent's title, which is protected by the law in Section 26 of the *Land Registration Act*. The petitioner's case has failed to meet the high standard of proof required in establishing fraud and for that reason, the petitioner's case as outlined in the Amended Petition dated 16th February 2021 is dismissed with costs to the 1st respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF MARCH 2024.

N.A. MATHEKA

JUDGE

