



REPUBLIC OF KENYA



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**Kenya Post Office Saving Bank Staff Retirement Benefit Scheme
Registered Trustees v Attorney General & 7 others (Civil Appeal
275 of 2019) [2025] KECA 438 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 438 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 275 OF 2019
MSA MAKHANDIA, SG KAIRU & LA ACHODE, JJA
MARCH 7, 2025

BETWEEN

**KENYA POST OFFICE SAVING BANK STAFF RETIREMENT BENEFIT
SCHEME REGISTERED TRUSTEES APPELLANT**

AND

THE ATTORNEY GENERAL 1ST RESPONDENT
THE CHIEF LAND REGISTRAR 2ND RESPONDENT
THE CHAIRMAN NATIONAL LAND COMMISSION 3RD RESPONDENT
ENOS MAYAA 4TH RESPONDENT
TANABEL ENTERPRISES LIMITED 5TH RESPONDENT
LUKOYANI ENTERPRISES LIMITED 6TH RESPONDENT
DESUKA PROPERTIES LIMITED 7TH RESPONDENT
LEOSAN INVESTMENT 8TH RESPONDENT

*(Being an appeal from the judgement of the Environment and Land Court at
Nairobi (Obaga J), delivered on 28th February, 2019 in ELC NO. 158 of 2014)*

JUDGMENT

1. Kenya Post Office Saving Bank Staff Retirement Benefit Scheme Registered Trustees (the appellant) is appealing against the judgment of the Environment and Land court (“the ELC”) delivered on 28th February 2019 by Obaga J. The Attorney General, The Chief Land Registrar, The Chairman National Land Commission, Enos Mayaa, Tanabel Enterprises Limited, Lukoyani Enterprises Limited, Desuka Properties Limited and Leosan Investment are the 1st to 8th Respondents respectively.



2. To contextualize this appeal, we give a brief summary of the dispute. It all began when the appellant filed a petition dated 21st January 2014 seeking the following orders:
 1. A declaration that the actions by the 2nd and 3rd Respondents to register grants and the subsequent transfers in relation to the parcels of land known as L.R. Nos 22516, 23260, 23259, 23261, 22492, 22491 and 24123 was unlawful and unconstitutional and denied the appellant the right to own or acquire property, contrary to Article 40 of *the Constitution*.
 2. An order of compensation to compel the respondents jointly and severally to indemnify and compensate for the loss and damage suffered as a result of unlawful excision from gazette forest area, registration of grants and subsequent transfer to the appellant of the parcels of land, which reasonable compensation be assessed at a fair current commercial value of the suit premises totaling ksh.974 260 000.
 3. In the alternative to (2) above, an order of compensation to the petitioner in the amount of ksh.126 945 000 being the total purchase price of suit properties together with interest at commercial bank rates from date of payment until date of payment in full.
 4. General damages.
 5. The respondent be condemned to pay the cost of the petition.
 6. Such further other relief as the honourable court may deem fair and reasonable.
3. The appellant's case was that it purchased the suit properties known as L.R No's 22492, 23262, 23261, 22516 and 22491 from the 4th to 7th respondents respectively. On 12th August 1999 it instituted a suit HCCC No. 1598 of 1999 (OS) seeking an order for transfer of the suit property. On 27th October 1999, Aganyanya J. (as he then was), issued Vesting Orders in respect of the suit properties to be registered and titles issued to the appellant.
4. The appellant then lodged the Vesting Orders for registration and consequent issuance of Certificates of Title by the Land Registrar conferring ownership of the parcels of land to the appellant. However, the Vesting Orders were not registered despite several letters written to the 2nd and 3rd respondent respectively. Instead, the Kenya Forest Service, via a letter dated 23rd May 2013, notified the appellant that the de-gazettement process had not been followed, hence, the suit properties did not lie in the ambit of presidential grants.
5. The appellant averred that the 2nd and 3rd respondents were fully aware that the de-gazettement process had not been followed but nevertheless, proceeded to issue grants to the 4th to 8th respondents. As such their fraudulent actions were in gross violation of the appellant's right to property as provided for under Article 40 of *the Constitution*, since the appellant was an innocent purchaser without notice, and it suffered a substantial loss of money as a result. Subsequently, the appellant requested for judgment in default of appearance by the 1st, 2nd and 3rd respondents by an application dated 17th June 2015. The record does not reflect that an exparte judgment was entered following this request.
6. It was averred that their advocates, M/s Rachier & Company Advocates conducted due diligence before the purchase of the land and therefore, the purchase was anchored on an informed decision. That the title deeds issued to the 4th to 7th Respondents were valid since, the grants were registered by the 2nd and 3rd Respondents in line with the Registration of Titles Act (Repealed).
7. It was its case that the Torrens System emphasizes the accuracy of the land register, and serves as a mirror depicting all active registrable interests. That the Appellant is a bona-fide purchaser without notice and



- the title confers upon it fundamental rights protected under Article 40 of *the Constitution*. Further, that there was no evidence in court that the Certificate of Title was obtained un-procedurally. As such the Commissioner of Land and the 2nd respondent squarely liable for the loss the appellant suffered.
8. The record of appeal does not indicate when the 1st and 2nd respondents entered appearance, but it indicates that they filed grounds of opposition dated 20th April 2017. They averred that the appellant failed to prove that they acted illegally and asserted that the appellant ought to have sued the 4th to 8th respondents for breach of contract.
 9. They stated that failure to follow the de-gazettment process rendered the titles illegal, and no more than mere papers that do not prove ownership. They relied on the common law maxim *Nemo dat quod non habet* which means 'A person cannot give that which he does not have' to assert that the appellant acquired fraudulent titles from the 4th, 5th, 6th and 7th respondents and cannot claim the right to own property that was illegally acquired. They contended that they acted in accordance with the law and the appellant failed to prove that they had knowledge that the de- gazettement process was not followed.
 10. Again the record does not indicate when the 3rd Respondent entered appearance, but he filed his grounds of opposition dated 14th November 2017. Its position was that the appellant was seeking to enforce new rights retroactively from *the Constitution* of Kenya 2010, which it would not have enjoyed in the former Constitution. That pursuant to Section 9 of the *Land Registration Act*, it was the duty of the Land Registrar to keep and maintain a true record of the register. That the Land Registrar is the custodian of the register and not the 3rd respondent. Further, that the appellant did not specify the constitutional right infringed and in what manner. Hence, it fell short of the threshold of the principles for a constitutional petition and the orders seeking compensation from the 3rd respondent cannot be granted.
 11. In a quick rejoinder to the 3rd respondent's averments, the appellant filed a supplementary affidavit sworn on 28th March 2018 by Mr. Hannington Ouko, the Trust Secretary/Head Legal Officer of the appellant. He posited that according to section 5(2)(b) of the National Commission *Land Act* 2012 and Article 67(3) of *the Constitution* the Commission is required to monitor the registration of rights and interests in land. He also deposed that the first valuation report dated 15th April 2011 compiled by Transcountry Valuers Limited, placed the value of the properties at Kshs 974,268,000. A subsequent report dated 10th February 2017 compiled by Metrocosmo Limited valued the property at Kshs. 2,400,000,000. He urged the court to use the latter report in determining compensation.
 12. Upon considering the matter before him, Obaga J. in a Judgment delivered on 28th February, 2019, held that the appellant was not a prudent or an innocent purchaser, having failed to take possession of the property and waited for decades to come under the guise of Constitutional violation, rather than pursue the matter under Contract Law. Further, Article 40 (6) of *the Constitution* does not extend protection to property that has been unlawfully acquired, and that the Appellant ought to have pursued the purchase price of Kshs. 126,945,000/= from the 4th to 7th Respondents under breach of contract. The learned Judge found that the petition lacked merit and dismissed it.
 13. Dissatisfied with that judgment and decree of the trial court, the appellant filed this appeal and in the Memorandum of Appeal dated 25th June 2019, raised four grounds of appeal, alleging that the learned Judge erred in fact and in law by:
 - a. Ignoring the fact that the appellant had clearly illustrated how the actions of the respondents of allocating gazetted forest land despite having full knowledge of the same have deprived the appellant of properties and which translated to loss of substantial sums of the purchase price and use of the properties.



- b. By failing to consider the uncontroverted evidence placed before the court that the appellant was a purchaser for value ignoring the provisions of Section 23(1) of the Registration of Titles Act (Now Repealed).
 - c. By holding that failure to take immediate possession of the properties by the appellant amounted to knowledge of the fraud by the 2nd and 3rd respondents.
 - d. By placing blame of the acts of commission or omission of the 2nd and 3rd respondents squarely on the 4th to 5th respondents yet it is the 2nd and the 3rd respondents who are mandated to deal with public land including the gazettelement and de-gazettelement of public property.
14. This Appeal was canvassed by way of written submissions. The firm of M/s Wacira Wambugu & Co. Advocates LLP filed written submissions dated 27th February 2024 on behalf of the Appellant.
 15. There was neither representation nor submissions from the respondents though served by court with the relevant hearing notices
 16. The appellant urges that the unlawful actions of the 2nd and 3rd respondent of allocating gazetted forest land despite having full knowledge of the same breached its Constitutional right to ownership of property as per Article 40 of *the Constitution*. As such, it suffered a loss of substantial sums of the purchase price and use of the properties.
 17. It contended that it conducted due diligence before purchasing the properties by obtaining official searches whereby it discovered that the parcels of land were registered in the names of the 4th, 5th, 6th and 7th Respondents and title deeds issued respectively. Consequently, it purchased land parcel Ref: Nos. 22516, 23260, 23259, 23261, 22492, 22491 and 24123 from the 4th, 5th, 6th and 7th Respondents herein for valuable consideration totaling to the sum of Kshs. 104,445,000.
 18. It was submitted that there is no way the appellant would have known that the due process of de-gazettelement of the said parcels of land was not followed, before the titles were issued and it did not have good title, as the same only came to their attention when the 2nd Respondent refused to issue title. It relied on the case of Permanent Markets Society & 11 Others V. Salima Enterprises & 2 others Civil Appeal No. 185 of 1997 to urge that even where it is shown that past registrations were obtained illegally, the title of the last bona fide purchaser for value was indefeasible under Section 23 (1) of the RTA.
 19. Additionally, it was urged that the appellant is a bona fide purchaser for value without notice of fraud and therefore the titles obtained for the suit properties cannot be impeached and are protected by Section 23 of the Registration of Titles Act Cap 281(repealed).
 20. The appellant submitted that the Nemo Dat quod Non Habet rule has no application to immovable properties and the law that then applied to immovable property in Kenya was Section 23 of the Registration of Titles Act (repealed).
 21. The appellant relied on the case of Clement Kipchirchir & 38 Others versus Principal Secretary Ministry of Lands Housing & Urban Development & 3 others [2015] eKLR, to assert that the appellant was given the title deeds by the Government and there was no evidence to suggest that it was involved in the unlawful manner in which the titles were acquired. As such, it can fit itself within the provisions of Article 40(4) of *the Constitution* and is entitled to compensation since it occupied the parcels of land that it was given in good faith and have to move out because it has emerged that the titles were unlawfully acquired.



22. It was urged that Article 40 (4) stipulates that where the Government takes over land it is acceptable for it to make provision for compensation to persons occupying the land in good faith and who may not hold title to such land. Reliance was placed on the case of *Gitwany Investment Limited V Tajmal Limited & 3 Others* [2006] eKLR where the Court held that the entire mess in which the parties found themselves in was the creation of and a matter that must be put squarely at the doorstep of the Commissioner of Lands, the 3rd Party. The Commissioner of Lands was ordered to compensate the parties since he had not prepared all the documents required for the issuance of title.
23. As such, the appellants sought compensation in the sum of Kshs. 974,268,000 as the Government is the keeper of the master record of all land and the owners and guarantees indefeasibility and compensation in case of loss arising from an error in registration.
24. We have considered the record of appeal and the submissions on record. This being the first appeal, our mandate as was stated in this Court's decision in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR is that:
- “An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
25. From the foregoing arguments we have framed the issues for determination as follows:
- i. Whether the appellant is a bona fide purchaser without notice.
 - ii. Whether the 2nd and 3rd respondents infringed the appellant's constitutional rights.
 - iii. Whether the appellant is entitled to compensation from the 2nd and 3rd respondents.
26. On the first issue, the appellant claims that it is an innocent purchaser for value without notice and had no way of knowing that the title was unlawful. That it conducted further investigations after the 2nd and 3rd respondents failed to register the vesting orders and only came to know of the defect in the title when the investigations revealed that the de-gazettement process had not been followed.
27. It is trite that the onus lay with the appellant to conduct due diligence before purchasing the properties. The Supreme Court in landmark case of *Dina Management Limited v County Government of Mombasa & 5 others* (2003) eKLR held that:
- “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. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above, the appellant could not benefit from the doctrine of bona fide purchaser.”
28. Article 40 of *the Constitution* provides that;
- “1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
 - a. of any description; and



- b. in any part of Kenya.
 - 2. Parliament shall not enact a law that permits the State or any person--
 - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
 - 3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--
 - a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--
 - i. requires prompt payment in full, of just compensation to the person; and
 - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
 - 4. Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
 - 5. The State shall support, promote and protect the intellectual property rights of the people of Kenya.
 - 6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
29. According to Article 40(6) of *the Constitution* protection does not extend to property that is acquired unlawfully. The Appellant states that it is a bona fide purchaser however, it has never enjoyed the right of possession from the date of the purchase to date.
30. It is not disputed that the de-gazettement process had not been followed hence, the suit properties did not lie in the ambit of presidential grants although the appellant claims that it was not aware that the title was illegal until decades later. We hold that the appellant ought to have investigated the root of the property before acquisition as there is no protection offered to a purchaser in respect of a Title acquired illegally.
31. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR the court held that:
- “It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”



32. The Appellant was keen to paint itself as a bona fide purchaser without notice of fraud, but it was aware of the challenge relating to the properties. That Ngong Forest where the properties were situated was gazetted and that, without a doubt, explains why the appellant did not make any effort to enjoy the right to exclusive possession over it for decades since 1999. It is clear that no valid title passed to the 4th to 7th respondents hence the same applies to the titles acquired by the appellant. This is in line with the common law maxim *Nemo dat quod non habet*,
33. Accordingly, we find that the appellant has failed to sufficiently prove that it was an innocent purchaser and was not aware that the title was marred with illegality. The Appellant as a buyer could not acquire a better title to the property than the sellers whose root of title was challenged. It is quite telling that the appellant did not deem it fit to pursue the 4th to 7th respondents under breach of contract to recover the Kshs.126,945,000 purchase price.
34. The second issue is whether the 2nd and 3rd Respondents infringed the appellant's constitutional right to own property. We call to mind the case of *Samuel Kamere v Lands Registrar (2015) eKLR*, where the Court held that:
- “...in order to be considered a bonafide purchaser for value, they must prove; that they acquired a valid and legal title, secondly they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”
35. It is evident therefore, that if the process of the initial acquisition of a title was un-procedural and unlawful, all subsequent transfers of the title are considered invalid, as no legal or equitable interest is deemed to have passed. The de-gazettement process having not been undertaken, it follows that the land did not fall under the ambit of presidential grants. Therefore the 4th to 7th respondents did not acquire good title and consequently, they are incapable of transferring legal interest in the property to the appellant.
36. It is paramount that purchasers do due diligence by investigating the root of the titles they intend to acquire, in order to detect any illegalities that may bar them from obtaining a valid title, or impede their right to own property and enjoy the protection of Article 40 of *the Constitution*. The law does not operate in a vacuum and it follows that one cannot invoke the protection and enforcement of constitutional rights, based on claims which are pegged on actions whose very object and nature are tainted with illegality.
37. We hold that the 2nd and 3rd respondents registered the valid titles relating to some of the properties. They rightfully declined to register the other properties by dint of it being gazetted. We repeat for emphasis sake that the vendors did not have valid titles, the process of de-gazettement having not been followed. As such they could not pass to the appellant as a subsequent purchaser, a good title whilst the title they purportedly held is unlawful, illegal and invalid.
38. We find that the appellant has failed to prove the infringement of its constitutional right and that the protection of a bona fide purchaser for value does not apply to it where the title to property was acquired illegally.
39. The last issue is whether the appellant is entitled to compensation from the 2nd and 3rd respondents. We agree with the learned trial Judge that compensation would only accrue if the appellant's constitutional rights were found to have been grossly violated by the 2nd and 3rd respondents. The 2nd and 3rd respondents do not owe the appellant compensation. As stated earlier, the appellant ought to have laid its claim against the 4th to 7th respondents for the purchase price under breach of contract.



Consequently, we find that this appeal is devoid of merit and is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

