



**Kiptorus & another v Shajanand Holdings Ltd (Civil Appeal
275 of 2019) [2025] KECA 467 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 467 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 275 OF 2019
MSA MAKHANDIA, LK KIMARU & AO MUCHELULE, JJA
MARCH 7, 2025**

BETWEEN

MICHAEL KIPTORUS 1ST APPELLANT

COUNTY GOVERNMENT OF KISUMU 2ND APPELLANT

AND

SHAJANAND HOLDINGS LTD RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Kisumu (Oloa, J.) dated 31st October 2019 and delivered on 15th November 2019 in ELC Case No. 240 of 2015)

JUDGMENT

1. This is an appeal against the judgment and decree of Oloa, J. dated 31st October 2019, in which the learned Judge allowed the respondent's claim and ordered the eviction of the 1st appellant from all that piece or parcel of land known as Kisumu Municipality/Block 4/154 ("the suit property"). In the same breadth, the 2nd appellant's counter-claim was dismissed. Finally, both appellants were ordered to bear the respondent's costs.
2. The history leading to this appeal is that the respondent filed a suit against the 1st appellant seeking for his eviction from the suit property, costs of the suit and any other relief deemed appropriate by the trial court.
3. The respondent claimed to be the bona fide registered proprietor of the suit property having purchased it from one, Paul Manwa Maina (hereinafter the "vendor"), for Kshs 16,000,000/=. That the 1st appellant had, however in his absence, trespassed thereon without any colour of right or authority, and occupied it as its residence thereby denying him its use.
4. The 1st appellant denied the respondent's ownership of the suit property and claimed to occupy land parcel No. Kisumu/ Municipality/4/155A as a tenant of the 2nd appellant who was his employer. The



- 1st appellant averred that the suit was therefore misconceived, bad in law, and an abuse of the court process.
5. Upon the 1st appellant's application, the 2nd appellant was enjoined as the 2nd defendant, whereas the District Land Registrar, Kisumu, and the National Land Commission were enjoined as the 1st and 2nd interested parties. The 2nd appellant subsequently, filed a defence and counter-claim, while the interested parties did not file any pleadings in response to the suit.
 6. The 2nd appellant in its defence and Counterclaim, averred that the 1st appellant was its employee and, occupied property No. Kisumu/Municipality/Block 4/155A, previously owned by the defunct Kisumu Municipal Council. The 2nd appellant averred that if the respondent owned any title to the suit property, it was obtained fraudulently and could not be protected by law under Article 40 (6) of *the Constitution*.
 7. In its counter-claim, the 2nd appellant asserted that the suit property was vested in it to hold in trust for the people of Kisumu. The lease was issued on 27th April 1999 in the name of the then Municipal Council of Kisumu. The 2nd appellant alleged that the suit property was registered in Zone 4 (Tom Mboya Area) and not Zone 1 (Kisumu Airport Area). It claimed that its transfer to the respondent on 23rd January 2013 was fraudulent, done without the 2nd appellant's consent, and during a period of rampant illegal grabbing of government assets.
 8. The 2nd appellant pleaded particulars of fraud, being the unauthorized transfer of the suit property without council resolution, falsification of zoning areas, and suing the 1st appellant despite its knowledge that it was the registered proprietor of the suit property. The 2nd appellant, therefore, sought for the cancellation of the certificate of lease issued to the respondent, costs of the suit, and interest thereon at court rates.
 9. In reply to the defence and defence to the counter-claim, the respondent joined the issue with the defence. It denied the 2nd appellant's counter-claim and allegations of fraud and the particulars thereof. In the end, it sought the dismissal of the counter-claim and judgment be entered in its favour as prayed in the plaint.
 10. The suit was heard on 5th November 2018 at the Environment and Land Court at Kisumu. The respondent's Director, Chandrukant Chabadia, testified that the suit property was purchased from the vendor following due diligence which established that the suit property belonged to the vendor and did not belong to the 2nd appellant at the time of the transaction. He tendered in evidence a certificate of lease dated 23rd January 2013 for the suit property in the respondent's name, as well as a certificate of lease dated 23rd March 2003 in the name of the vendor. Additionally, he tendered in evidence an agreement for sale dated 7th January 2013 between the respondent and vendor for the suit property at a consideration of Kshs. 16,000,000/00. He testified that the suit property was vacant at the time of purchase, and he took possession by leaving thereon, a security guard to secure the same. That he thereafter, took his father to India for treatment and upon returning, found that the security guard had been chased away and the 1st appellant had taken possession of the suit property. That when he took up the issue as to the rightful owner of the suit property with the vendor, the vendor gave him a letter dated 10th April 2007 from Rashid H. Mwakiwiwi, the then Town Clerk of the defunct Municipal Council of Kisumu, addressed to vendor confirming that, according to the council's records, the council was not the owner of the suit property which was registered in the name of the vendor. The letter also requested the vendor to pay the rates accordingly.



11. On the part of the 1st appellant, he testified that he occupied land parcel No. Kisumu Municipality/Block 4/155A and not the suit property as a tenant of the 2nd appellant, who owned it. That he could not therefore, be evicted from the suit property which he did not occupy.
12. The 2nd appellant's Director of Housing, Arnold Omondi Guya, testified on its behalf. It was his evidence that the suit property was initially public land vested in the 2nd appellant and that the transfer and registration of the suit property in the respondent's name was unauthorized and fraudulent. It was his evidence that despite the 1st appellant's indication that he stayed on another property No. Kisumu Municipality/Block 4/155A, he was only confused and did not know the right parcel he resided on and that it was actually, on the suit property that he resided. He went further to produce a tenancy agreement between the appellants dated 2nd July 2012 which related to the Tenancy of Institutional House Block No. KSM/4/155A.
13. As to the letter dated 10th April 2007 produced by the respondent, the witness confirmed that indeed the said Mr. Rashid H. Mwakiwiwi was the Town Clerk to the then Municipal Council of Kisumu but he could not confirm whether or not he authored or signed the letter. The 2nd appellant went further to allege that he doubted the respondent's title. He asserted that there had been "Shenanigans" and "rampant illegal transfer and loss of public assets", which made it possible for the respondent to transfer the suit property into its names without the consent of the Municipal Council of Kisumu.
14. The trial court framed the issues for determination as: who between the respondent and the 2nd appellant was the legitimate owner of the suit property; whether the respondent obtained a title to the suit property fraudulently or illegally and if the same should be cancelled; whether the 1st appellant should be evicted from the suit property; whether the 2nd appellant had proved its counter-claim; and who should meet the costs of the suit.
15. In its determination, the trial court found that the respondent had obtained a valid title to the suit property, and there was no reason to cancel it as sought by the 2nd appellant in its counter-claim. The evidence did not disclose any fraud or mistake on the part of the respondent that would warrant the court to cancel the respondent's title under section 80 of the *Land Registration Act*. That the respondent's assertion that it was the "bona fide registered proprietor" of the suit property was not contested by the 1st and 2nd Interested Parties, who were best suited to vouch for the validity of the title. By failing to present any evidence to the contrary, the court concluded that the Interested Parties confirmed the respondent's entitlement to the suit property. The trial court further inferred that failure by these witnesses to testify meant that any evidence they might have tendered would have been adverse to the appellants' claims.
16. Ultimately, judgment was entered in favour of the respondent against the appellants in the manner stated at the beginning of this judgment.
17. It is the said judgment and decree that the appellants being aggrieved, filed this appeal on seven grounds alleging that the trial court made several errors in law and fact, including failing to ratify the 2nd appellant's title to the suit property; disregarding the 2nd appellant's title without evidence from the National Land Commission; arriving at a contradictory judgment by upholding the respondent's title while not canceling or impeaching the 2nd appellant's title; vouching for the respondent's title without evidence from the Land Registrar and the National Land Commission; failing to compel these entities to testify in the public interest, and erroneously finding that the appellant's witnesses gave contradictory statements on the occupation of the suit property.



18. The appeal was heard on 6th November 2024 by way of written submissions with limited oral highlights.
19. The appellants through Mr. Amondi, learned counsel submitted that the suit property was initially public land held in trust for the people of Kisumu County, with a Certificate of Lease issued on 27th April 1999, which was not impeached by the trial court. That the National Land Commission and the Land Registrar Kisumu had a public duty to provide evidence regarding the transfer and registration of the suit property in the names of either the 2nd appellant or the respondent. That the trial court did not properly exercise its discretion when it failed to summon the officials of National Land Commission and the Registrar of Lands to testify.

That the validation of the respondent's title without canceling the appellant's earlier title was also an error.
20. Counsel contended that the trial court disregarded evidence of public asset misappropriation during the transition to devolved government units and failed to question the acquisition of the respondent's title on the basis of fraud, illegality, and corruption. That the suit property was fraudulently transferred by the respondent, despite the appellant being the registered owner since 1999. They cited this Court's decision in *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR, where it was held that when a registered proprietor's root of title is challenged, it is not enough to present the title as proof of ownership; the proprietor must prove the legality of the acquisition. That this principle was reaffirmed in *Dina Management Limited vs. County Government of Mombasa & 5 Others* [SC Petition No.8 (E010) of 2021], where the Supreme Court held that the registered proprietor must demonstrate that the acquisition was legal, formal, and free from any encumbrances. In the circumstances of this case, the respondent had failed to demonstrate that it had properly and legally acquired the title to the suit property. The appellant thus prayed that the appeal be allowed with costs.
21. The respondent on the other hand through Ms. Akinyi, learned counsel submitted that the respondent was the legitimate owner of the suit property having purchased it from the vendor and a title issued in its favour. That the 1st appellant had gained entry into the suit property as a trespasser when the respondent's director, PW1 had traveled to India to take his father to hospital. That the 2nd appellant's witness DW2 confirmed that indeed the title to the suit property initially belonged to the vendor before its transfer to the respondent. Counsel submitted that in a bid to prove ownership of the suit property, DW2 produced a title for the suit property. However, it transpired that the title was in respect of a totally different parcel of land. That in any event, the said title was not accompanied by supporting documents that showed how the lease certificate was obtained. Counsel went on to submit that the same title indicated that one, Chanan Singh s/o Santa Singh was the lessee yet on the proprietorship section, the 2nd appellant was indicated as the first lessee. This contradiction was enough to cast doubt as to the eligibility and authenticity of the 2nd appellant's alleged title.
22. On eviction, counsel submitted that having established that the respondent was the bonafide owner of the suit property, it followed automatically that the 1st appellant was liable to eviction from the suit property forthwith, as he was a trespasser and his continued stay thereon was no longer tenable. The trial court did not therefore err in so finding.
23. Regarding the counterclaim, the respondent submitted that the 2nd appellant having failed to lead evidence to the effect that the respondent's title was fraudulently acquired and being trite that he who alleges must prove, it then followed that the said counterclaim was not proved and was properly dismissed. In conclusion, the respondent prayed that the appeal be dismissed with costs.



24. This is a first appeal against the decision of the trial court as earlier stated in this judgment. The duty of the first appellate court is to re-evaluate, re-assess, and re-analyze the evidence on record and then determine whether the conclusions reached by the trial court should stand or not. This principle was reiterated in the case of *Selle v Associated Motor Boat Co. Ltd.* [1968] EA 123, where the court stated:

“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 allowance in this respect.”

We have considered the record of appeal before us, the written submissions by both parties, the authorities cited, and the law. The issues we find relevant to consider are; who the legitimate owner of the suit property is and whether the order of eviction was properly issued.

25. On the first issue, Article 40 of *the Constitution* of Kenya guarantees the right to property, including land ownership, and provides protection against arbitrary deprivation of such property. The *Land Act* 2012 outlines the processes for land acquisition, management, and administration. Section 7 thereof specifies the methods of acquiring title to land, which encompasses allocation, adjudication, and compulsory acquisition. Section 26 (1) of the same Act stipulates that a certificate of title issued by the registrar is prima facie evidence that the person named therein as the proprietor is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions, and conditions. However, the title is open to challenge on grounds of fraud, misrepresentation, or if it was acquired illegally, unprocedurally, or through a corrupt scheme. Lastly, the *National Land Commission Act*, 2012 establishes the National Land Commission (“NLC”), which is responsible for managing public land on behalf of the national and county governments. The NLC also has the mandate to investigate historical land injustices and recommend appropriate redress.
26. From the record before us and the documents filed in the trial court, on the face of them it would appear that the Government of Kenya was the lessor of the suit property. The 2nd appellant produced documents showing that a 99-year lease was issued to Chanan Singh s/o Santa Singh from 1st March 1959. Subsequently, and in unclear circumstances, a certificate of lease was then issued to the defunct Municipal Council of Kisumu on 27th April 1999. It is unknown what the considerations and the circumstances of the transfer were, and any payments made in that regard. This raises a red flag as to the authenticity of the 2nd appellant’s title.
27. On the other hand, the respondent produced a certificate of lease dated 23rd March 2003, in the name of the vendor. An agreement for sale dated 7th January 2013, showing that it purchased the suit property from the vendor for Kshs. 16,000,000 was also tendered in evidence. The respondent therefore obtained the title for the suit property from the vendor who was the registered proprietor holding a 99-year lease from the Government. The respondent’s Director testified that the suit property was vacant at the time of purchase, but upon returning from India, found that the 1st appellant had taken possession. The 1st appellant denied occupying the property, claiming to occupy another property. However, the 2nd appellant’s representative confirmed that the 1st appellant occupied the suit property and was only confused as to which property he occupied.
28. Further, a tenancy agreement dated 2nd July 2012 between the 1st and 2nd appellants, described the house occupied by the 1st appellant as being a totally different property other than the suit property. Yet, the respondent served the 1st appellant with the court papers on the suit property, as confirmed by an affidavit of service. A letter dated 10th April 2007, from the Town Clerk of the defunct Municipal



- Council of Kisumu, confirmed that the suit property was registered in the name of the vendor. All these pieces of evidence went to show that the 1st appellant was in occupation of the suit property belonging to the respondent and not any other property as he had initially claimed.
29. This Court in *Wambui v Mwangi & 3 Others* (Civil Appeal 465 of 2019) [2021] KECA, emphasized that the sanctity of title vested in a title holder under sections 25 and 26 of the Land Registration Act is absolute and indefeasible, challengeable only on grounds of fraud or misrepresentation to which the owner is proved to be a party. Further, in *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 Others* [2015] eKLR, this Court held that the appellant's title was protected under section 23 of the Registration of Titles Act and was guaranteed by *the Constitution*, reinforcing the principle that a registered title is conclusive evidence of ownership unless proven otherwise.
 30. The Supreme Court in *Dina Management Limited vs. County Government of Mombasa & 5 Others* (supra), held that the burden of proving the legality and validity of a title rests with the buyer. The court confirmed that registered title to property can be invalidated if the process followed prior to the issuance of the title did not comply with the law, meaning that innocent buyers cannot rely on the principle of indefeasibility of title if the initial allocation of the land was illegal or un-procedural. The initial title held by the vendor was not challenged at all by the appellants. They only challenged the title held by the respondent which was a product of the title held by the vendor. In the absence of such a challenge to the vendor's title, we do not see how they can impugn the respondent's title. It is interesting that confronted with the respondent's claim, the appellants never sought to join the vendor in the proceedings. We note that from the evidence, the appellants allege that this was public land and remained so and was only rented to the 1st appellant but remained the property of the 2nd appellant. However, this cannot be entirely correct since on the face of the title tendered in evidence by DW2, and as we have already indicated one, Chanan Singh s/o Santa Singh was the lessee yet on the proprietorship section, the 2nd appellant was shown as the proprietor. This contradiction was sufficient enough to cast doubt as to the authenticity of the 2nd appellant's title. It is also not lost on us that DW2 produced a title for a different parcel of land other than the suit property, which was not even accompanied by any other supporting documents such as an official search, transfers, payment of rates or even licences by the appellants, as the respondent did.
 31. Indeed, the National Land Commission (NLC) and the Land Registrar were enjoined in proceedings in the trial court, so that they could shed light as to the rightful proprietor of the suit property. However, both parties elected deliberately not to participate in the proceedings. We are aware that the NLC is mandated to challenge any title that is irregularly, illegally, and unprocedurally issued over public land. Failure to do so as was the case here, would render the title under challenge unimpugnable. This principle was reiterated by the Supreme Court in the case of *National Land Commission vs. Attorney General & 6 Others* [2014] eKLR, when it emphasized the NLC's role in managing public land on behalf of the National and County Governments and its responsibility to ensure that any titles issued over public land are legitimate. The court's decision reinforced the importance of the NLC's oversight in maintaining the integrity of public land titles. In the current case, the said NLC as already stated, did not participate in the trial and one is left wondering what its evidence would have been. One can but only surmise that such evidence would have been adverse to the appellants' case as the trial court correctly held.
 32. We do not think that it was the duty of the trial court to compel the attendance of the officers of NLC and the Land Registrar to testify as submitted by the appellants merely because the dispute allegedly involved public. The trial court in doing so, risked descending into the arena of conflict. In any case, nothing stopped the appellants from applying for the witness summons and thereafter, the warrants



for their arrest if the said witnesses defied to attend court. They did none of the above at their own peril and cannot now turn around and blame the trial court for their omission.

33. In our view, the respondent gave credible background as to how it came by the suit property compared to that of the 2nd appellant, which was murky. The respondent also presented as part of its evidence a letter dated 10th April 2007, from Rashid H. Mwakiwiwi, the Town Clerk of the defunct Municipal Council of Kisumu, addressed to the vendor confirming that the suit property did not belong to the Council but the vendor.
34. In his evidence in chief, DW2 confirmed that Mr. Rashid H. Mwakiwiwi was indeed the Town Clerk to the then Municipal Council of Kisumu. As rightly held by the trial court, the authenticity of the letter was not in doubt, and as the Clerk, Mr. Rashid H. Mwakiwiwi would be expected to be the custodian of the council's assets and confirm whether the suit property was part of the Council's assets. The letter by Mr. Rashid H. Mwakiwiwi serves to show that the suit property was properly transferred and registered in the name of the respondent.
35. The 2nd appellant alleged fraud on the part of the respondent in its acquisition of the suit property, in its defence and counter-claim. It is trite that allegations of fraud must be pleaded and strictly proved. The Supreme Court of Kenya in *Wamae & 97 Others vs. Barclays Bank of Kenya Limited* (Petition 19 (E022) of 2020) 5 (KLR), emphasized that fraud must be distinctly proved and cannot be inferred from mere allegations. Similarly, in *Trattoria Limited v Maina & 3 Others* (Petition (Application) 26 (E029) of 2022) 54 (KLR), the court reiterated that the burden of proving fraud lies with the party alleging it, and such allegations must be supported by clear and convincing evidence. These cases underscore the necessity of providing credible evidence when alleging fraud in property transactions. In the instant appeal, much as the 2nd appellant pleaded fraud, its witness DW2 did not provide any scintilla evidence to support the particulars thereof. There was no one from the Land Registrar to prove that no title was issued to the vendor.
36. From the record, DW2 mentioned “shenanigans” and “rampant illegal transfer and loss of public assets”, but the Town Clerk had already stated that the Council had no interest in the suit property. There was no evidence connecting the respondent to any illegal actions in acquiring the title to the suit property. The respondent was therefore an innocent purchaser for value and without notice. The concept of an innocent purchaser for value was emphasized by the Supreme Court in the case of *Law Society of Kenya vs. Commissioner of Lands & Others* [2001] eKLR where the court stated:
- “A bona fide purchaser for value without notice of any fraud or irregularity is protected by law. Such a purchaser acquires a good title to the property, even if the vendor's title was defective, provided that the purchaser acted in good faith and without knowledge of the defect.”
37. Indeed, there was no fraud proved at all on the part of the respondent and we agree with the trial court that in the absence of evidence of fraud, and considering that the vendor had a valid title, there was no basis to cancel the respondent's title to the suit property. The respondent established its right to the property, and allegations of fraud by the 2nd appellant were not proved.
38. Regarding the eviction of the 1st appellant, we are satisfied that the trial court properly considered the circumstances and evidence presented in arriving at the decision. The 2nd appellant was not the legitimate proprietor of the suit property and was only attempting to use the 1st appellant to force ownership of the suit property. The trial court properly found that the title held by the respondent was obtained legally, and the 1st appellant without any colour of right was occupying the suit property,



hence, the eviction order was necessary to uphold the respondent's proprietary rights. Therefore, the orders for eviction were richly deserved.

39. In the ultimate, we are satisfied that the appeal is devoid of merit. Consequently, it is dismissed in its entirety with costs to the respondent.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

L. KIMARU

JUDGE OF APPEAL

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A. O. MUCHELULE

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed.

DEPUTY REGISTRAR

