



REPUBLIC OF KENYA



**KENYA LAW**  
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**Atinga v Ogumbo & 7 others (Environment & Land Case  
26 of 2019) [2024] KEELC 1570 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1570 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 26 OF 2019**

**SO OKONG'O, J  
MARCH 14, 2024**

**BETWEEN**

**JOHN OLUOCH ATINGA ..... PLAINTIFF**

**AND**

**DALMAS ADERO OGUMBO ..... 1<sup>ST</sup> DEFENDANT**

**JECTONE OWOKO ODUOR ..... 2<sup>ND</sup> DEFENDANT**

**SUPER TEN WOMEN GROUP ..... 3<sup>RD</sup> DEFENDANT**

**SOPHIA ATIENO WADULO ..... 4<sup>TH</sup> DEFENDANT**

**EMMA ACHIENG ORITA ..... 5<sup>TH</sup> DEFENDANT**

**OWISSO WINNIE STELLA ..... 6<sup>TH</sup> DEFENDANT**

**GERALD ODHIAMBO OPONDO ..... 7<sup>TH</sup> DEFENDANT**

**REGISTRAR OF TITLES, KISUMU ..... 8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit against the Defendants on 19<sup>th</sup> August 2019 seeking the following reliefs;
  - a. A declaration that the transfer to the 1<sup>st</sup> Defendant of all that parcel of land known as Kisumu/ Wathorego/1852 (hereinafter referred to only as “the suit property”) and all subsequent transactions involving the property are unlawful and thus null and void.
  - b. A declaration that the Plaintiff is the rightful and legal owner of the suit property now fraudulently and illegally subdivided into eight parcels namely, Kisumu/ Wathorego/ 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 (hereinafter together referred to only as “the



subdivisions” and individually as “Plot Nos. 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014” respectively).

- c. An order compelling the 8<sup>th</sup> Defendant to revoke all the said titles issued in respect of the subdivisions.
  - d. An order compelling the 8<sup>th</sup> Defendant to restore the ownership of the suit property to the Plaintiff.
  - e. The costs of the suit.
2. In his plaint dated 19<sup>th</sup> August 2019, the Plaintiff averred that he was at all material times the lawful owner of the suit property which measures approximately 0.28Ha. which he acquired on 11<sup>th</sup> December 2006. The Plaintiff averred that in May 2016, he discovered that the 1<sup>st</sup> Defendant had fraudulently registered a transfer in his favour in respect of the suit property thereby causing the property to be registered in his name. The Plaintiff averred that the 1<sup>st</sup> Defendant subsequently pretended that he had lost his title deed for the suit property and proceeded to obtain a provisional title deed.
  3. The Plaintiff averred that the 1<sup>st</sup> Defendant immediately thereafter subdivided the suit property into Plot Nos. 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014. The Plaintiff averred that the 1<sup>st</sup> Defendant retained Plot Nos. 5007, 5011 and 5014 in his name and transferred Plot Nos. 5013, 5012, 5010, 5009, and 5008 to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> and 7<sup>th</sup> Defendants respectively. The Plaintiff averred that he came to discover the said acts of fraud when he noticed one of the Defendants developing a flat on a portion of the suit property. The Plaintiff averred that it was upon carrying out a search that he discovered that the suit property had been fraudulently transferred to the 1<sup>st</sup> Defendant and subsequently subdivided and transferred to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants.
  4. The Plaintiff averred that the said transfers were illegal and did not pass a good title to the 1<sup>st</sup> to 7<sup>th</sup> Defendants. The Plaintiff pleaded several particulars of fraud against the 1<sup>st</sup> Defendant. The Plaintiff averred that as a consequence of the said acts of fraud, he was deprived of his right to own property guaranteed under Article 40 of *the Constitution*.
  5. The 6<sup>th</sup> and 7<sup>th</sup> Defendants filed a joint statement of defence to the Plaintiff’s claim on 7<sup>th</sup> November 2019. The 6<sup>th</sup> and 7<sup>th</sup> Defendants averred that they were a wife and a husband respectively. The 6<sup>th</sup> and 7<sup>th</sup> Defendants averred that they were strangers to the Plaintiff’s claim over the suit property. The 6<sup>th</sup> and 7<sup>th</sup> Defendants averred that the 1<sup>st</sup> Defendant after subdividing the suit property transferred to them Plot No. 5008 around 29<sup>th</sup> May 2017. The 6<sup>th</sup> and 7<sup>th</sup> Defendants averred that they were registered as the owners of Plot No. 5008 and issued with a title deed on 19<sup>th</sup> July 2017 in respect thereof. The 6<sup>th</sup> and 7<sup>th</sup> Defendants averred that the transfer of Plot No. 5008 to them was legal and denied that the 1<sup>st</sup> Defendant did not pass a good title to them. The 6<sup>th</sup> and 7<sup>th</sup> Defendants averred that they were innocent purchasers of Plot No. 5008 from the 1<sup>st</sup> Defendant for value without notice of the Plaintiff’s interest in the suit property. The 6<sup>th</sup> and 7<sup>th</sup> Defendants averred that they purchased Plot No. 5008 from the 1<sup>st</sup> Defendant at a consideration of Kshs. 460,000/- and had invested heavily in the property.
  6. Although the 6<sup>th</sup> and 7<sup>th</sup> Defendants did not plead a counter-claim, they urged the court to dismiss the Plaintiff’s suit and make a declaration that they were innocent purchasers of Plot No. 5008 for value without notice and as such they held a good title to the same and were in lawful occupation thereof.
  7. The 3<sup>rd</sup> Defendant filed its defence on 9<sup>th</sup> December 2019. The 3<sup>rd</sup> Defendant averred that it conducted due diligence and established that Plot No. 5012 was owned by the 1<sup>st</sup> Defendant before it purchased



- the same. The 3<sup>rd</sup> Defendant denied that the Plaintiff was the lawful owner of the suit property. The 3<sup>rd</sup> Defendant averred that it purchased the suit property for valuable consideration in good faith without notice of any defect in the 1<sup>st</sup> Defendant's title.
8. The 5<sup>th</sup> Defendant filed her defence on 18<sup>th</sup> December 2019. The 5<sup>th</sup> Defendant averred that she was a stranger to the Plaintiff's claim. The 5<sup>th</sup> Defendant averred that she acquired Plot No. 5009 lawfully and procedurally. The 5<sup>th</sup> Defendant averred that she was not involved in any fraud in the acquisition of the suit property. The 5<sup>th</sup> Defendant urged the court to dismiss the Plaintiff's claim and declare that she was an innocent purchaser of Plot No. 5009 without notice of the defect in the 1<sup>st</sup> Defendant's title.
  9. At the trial, the Plaintiff(PW1) adopted his witness statement dated 19<sup>th</sup> August 2019 as his evidence in chief and produced the documents attached to his list of documents dated 19<sup>th</sup> August 2019 as Plaintiff's exhibits 1 to 6 respectively. The Plaintiff told the court that he purchased the suit property from Tom Jillyanus Akun at Kshs. 600,000/- on 2<sup>nd</sup> October 2006 and was issued with a title deed on 11<sup>th</sup> December 2006. He stated that in July 2019, he noticed a construction being carried out on a portion of the suit property. He stated that he went to the land registry at Kisumu and conducted a search on the title of the property. He stated that the search revealed that the property was fraudulently transferred to the 1<sup>st</sup> Defendant on 17<sup>th</sup> May 2016 with the connivance of the 8<sup>th</sup> Defendant. He stated that the 1<sup>st</sup> Defendant thereafter fraudulently subdivided the suit property into eight portions some of which he retained in his name and transferred the rest to the 2<sup>nd</sup> and 7<sup>th</sup> Defendants. The Plaintiff called one witness, Tom Jillyanus Akun (PW2) who adopted his witness statement dated 6<sup>th</sup> February 2020 as his evidence in chief. He told the court that he sold the suit property to the Plaintiff at a consideration of Kshs. 600,000/-.
  10. After the close of the Plaintiff's case, the 6<sup>th</sup> Defendant, Owisso Winnie Stella (DW1) gave evidence. DW1 stated that the 7<sup>th</sup> Defendant was her husband. She adopted her witness statement dated 6<sup>th</sup> November 2019 as her evidence in chief and produced the documents attached to the 6<sup>th</sup> and 7<sup>th</sup> Defendants' list of documents dated 6<sup>th</sup> November 2019 as Defence exhibit 1. In her statement, she stated that in December 2016, she confirmed at the Kisumu land registry that the suit property was registered in the name of the 1<sup>st</sup> Defendant. She stated that on 8<sup>th</sup> December 2016, she innocently and without notice of the Plaintiff's interest in the property purchased from the 1<sup>st</sup> Defendant a portion of the suit property measuring 0.03Ha. at a consideration of Kshs. 460,000/- which she paid in full. She stated that after the subdivision of the suit property, the said portion of the suit property which was given Title No. Kisumu/Wathorego/5008 (Plot No. 5008) was transferred and registered in her name and that of the 7<sup>th</sup> Defendant on 11<sup>th</sup> July 2017. She stated that they were subsequently issued with a titled deed on 19<sup>th</sup> July 2017. She stated that the 7<sup>th</sup> Defendant and she had occupied Plot No. 5008 since December 2016 and that they had constructed a residential building thereon.
  11. The next to give evidence was Miriam Auma Otieno(DW2). DW2 told the court that she was the chairlady of the 3<sup>rd</sup> Defendant. DW2 adopted her witness statement filed on 9<sup>th</sup> December 2019 as her evidence in chief and produced the documents attached to the 3<sup>rd</sup> Defendant's list of documents of the same date as Defence exhibit 2. In her statement, DW2 stated that on 22<sup>nd</sup> February 2017, the 3<sup>rd</sup> Defendant purchased a portion of the suit property from the 1<sup>st</sup> Defendant. She stated that before entering into a sale agreement with the 1<sup>st</sup> Defendant, the 3<sup>rd</sup> Defendant carried out a search on the title of the suit property and confirmed that the same was registered in the name of the 1<sup>st</sup> Defendant. She stated that the said portion of the suit property was subsequently registered in the 3<sup>rd</sup> Defendant's name and the 3<sup>rd</sup> Defendant was issued with a title deed on 6<sup>th</sup> June 2017.



12. The last witness to give evidence was the 5<sup>th</sup> Defendant, Emma Achieng Orita (DW3). DW3 adopted her witness statement filed in court on 16<sup>th</sup> July 2021 as her evidence in chief and produced her bundle of documents dated 16<sup>th</sup> July 2021 as Defence exhibit 3. DW3 denied that she acquired a portion of the suit property fraudulently. She stated that she acquired Plot No. 5009 from one, Okatch Emmanuel Oyugi through a sale agreement dated 14<sup>th</sup> December 2018 at a consideration of Kshs. 1,700,000/- a portion of which she paid through a bank loan. She stated that Plot No. 5009 was registered in her name and she was issued with a title deed on 6<sup>th</sup> February 2019. She stated that she did not know that the title held by Okach Emmanuel Oyugi had a problem. She stated that she conducted due diligence before acquiring the property.

### 13. The submissions

14. The Plaintiff filed submissions dated 19<sup>th</sup> October 2023. The 5<sup>th</sup> Defendant filed submissions dated 31<sup>st</sup> October 2023 while the 6<sup>th</sup> and 7<sup>th</sup> Defendants filed submissions dated 2<sup>nd</sup> November 2023.
15. The Plaintiff submitted that the suit was defended by the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants only. The Plaintiff submitted that the 1<sup>st</sup> and 8<sup>th</sup> Defendants entered appearance but neither filed a defence nor participated at the trial of the suit while the 2<sup>nd</sup> and 4<sup>th</sup> Defendants never entered appearance. The Plaintiff framed two issues for determination by the court namely; whether the 1<sup>st</sup> Defendant acquired a proper title to the suit property and whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants acquired valid titles from the 1<sup>st</sup> Defendant. On the first issue, the Plaintiff submitted that it was undisputed that the Plaintiff was registered as the owner of the suit property on 11<sup>th</sup> December 2006 after acquiring the same from PW2 at a consideration of Kshs. 600,000/-. The Plaintiff submitted that having demonstrated how he acquired the suit property, the burden shifted to the 1<sup>st</sup> Defendant to show that he acquired the property that was registered in the name of the Plaintiff lawfully. The Plaintiff submitted that the 1<sup>st</sup> Defendant did not discharge this burden since the 1<sup>st</sup> Defendant neither filed a defence nor tendered evidence at the hearing of the suit. The Plaintiff submitted that the evidence that the Plaintiff tendered was not controverted by the 1<sup>st</sup> Defendant. The Plaintiff submitted that his testimony that he did not know how the 1<sup>st</sup> Defendant acquired the suit property which he did not transfer to him as the owner thereof was not controverted. The Plaintiff submitted that the registration of the purported transfer of the suit property to the 1<sup>st</sup> Defendant cannot stand in the circumstances. The Plaintiff cited Section 26(1) of the *Land Registration Act* 2012 and several cases and submitted that a title acquired illegally, unprocedurally and/or through a corrupt scheme is impeachable. The Plaintiff submitted that he still held his original title to the suit property and that he never transferred the property to the 1<sup>st</sup> Defendant. The Plaintiff submitted that the particulars of fraud pleaded against the 1<sup>st</sup> Defendant were not controverted. The Plaintiff submitted that the 1<sup>st</sup> Defendant acquired the suit property unlawfully, unprocedurally and/or through a corrupt scheme. The Plaintiff submitted that since the Plaintiff did not acquire the title to the suit property lawfully, the title should be revoked.
16. On whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants acquired valid titles from the 1<sup>st</sup> Defendant, the Plaintiff submitted that having established that the 1<sup>st</sup> Defendant did not acquire a good title to the suit property, the 1<sup>st</sup> Defendant could not pass a good title to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants. The Plaintiff cited several authorities in support of this submission. The Plaintiff submitted that the defence of bona fide purchaser for value without notice was not available to the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants. The Plaintiff urged the court to enter judgment in his favour as prayed in the plaint.



17. In her submissions, the 5<sup>th</sup> Defendant submitted that she was a bona fide purchaser of Plot No. 5009 without notice of any defect in its title. The 5<sup>th</sup> Defendant submitted that she purchased the property from one, Okatch Emmanuel Oyugi at a consideration of Kshs. 1,700,000/- on 14<sup>th</sup> December 2018. The 5<sup>th</sup> Defendant submitted that when purchasing the property from Okatch Emmanuel Oyugi, she carried out a search which showed that the property was registered in the name of Okatch Emmanuel Oyugi. The 5<sup>th</sup> Defendant submitted that from that search, Okatch Emmanuel Oyugi had an apparent valid title to the suit property. The 5<sup>th</sup> Defendant submitted that she did not know how the 1<sup>st</sup> Defendant acquired the suit property as she never dealt with him. The 5<sup>th</sup> Defendant cited Black's Law Dictionary, 8<sup>th</sup> Edition and *Katende v. Haridar & Company Limited* [2008] 2 E.A 173 in support of her submission on this issue. The 5<sup>th</sup> Defendant submitted that she was a bona fide purchaser of the suit property for value and as such she acquired a valid title to Plot No. 5009. The 5<sup>th</sup> Defendant averred that the Plaintiff did not prove the allegations of fraud pleaded against her. The 5<sup>th</sup> Defendant urged the court to dismiss the Plaintiff's suit with costs.
18. The 6<sup>th</sup> and 7<sup>th</sup> Defendants framed one issue for determination by the court namely, whether the Plaintiff had proved his case against the 6<sup>th</sup> and 7<sup>th</sup> Defendant. The 6<sup>th</sup> and 7<sup>th</sup> Defendants submitted that Sections 24 and 25 of the *Land Registration Act* 2012 protects title to land. The 6<sup>th</sup> and 7<sup>th</sup> Defendants submitted that under Sections 26(1) and 80 of the *Land Registration Act* 2012, a title may be cancelled on account of fraud or misrepresentation to which the title holder is a party and where a title has been acquired illegally, unprocedurally or corruptly. The 6<sup>th</sup> and 7<sup>th</sup> Defendants submitted that the Plaintiff did not prove that he did not transfer the suit property to the 1<sup>st</sup> Defendant. The 6<sup>th</sup> and 7<sup>th</sup> Defendants submitted further that there was no evidence adduced by the Plaintiff showing that he had reported the alleged fraud by the 1<sup>st</sup> Defendant to the Police and that criminal proceedings had been instituted against the 1<sup>st</sup> Defendant. The 6<sup>th</sup> and 7<sup>th</sup> Defendants submitted that the Plaintiff did not plead that the 6<sup>th</sup> and 7<sup>th</sup> Defendants were a party to the alleged fraud by the 1<sup>st</sup> Defendant.
19. The 6<sup>th</sup> and 7<sup>th</sup> Defendants submitted that the evidence adduced by them showed that they carried out due diligence and confirmed that the 1<sup>st</sup> Defendant was the owner of Plot No. 5008 before purchasing the same from the 1<sup>st</sup> Defendant at a consideration of Kshs. 460,000/-. The 6<sup>th</sup> and 7<sup>th</sup> Defendants urged the court to find that the 6<sup>th</sup> and 7<sup>th</sup> Defendants were bona fide purchasers of Plot No. 5008 as no evidence linking them to any illegality and/or fraud was adduced by the Plaintiff. The 6<sup>th</sup> and 7<sup>th</sup> Defendants cited *Tarabana Company Limited v. Sehmi & 7 others* [2021]eKLR in support of their submission. The 6<sup>th</sup> and 7<sup>th</sup> Defendants urged the court to find that the Plaintiff had not proved his case against the 6<sup>th</sup> and 7<sup>th</sup> Defendants to the required standard and to proceed to dismiss the Plaintiff's suit with costs.

### **Analysis and determination**

20. In my view, the issues arising for determination in this suit are the following;
- a. Whether the 1<sup>st</sup> Defendant acquired the suit property lawfully.
  - b. Whether the 2<sup>nd</sup> to 7<sup>th</sup> Defendants acquired valid titles in respect of the portions of the suit property known as Plot Nos. 5013, 5012, 5009, and 5008 from the 1<sup>st</sup> Defendant and the persons to whom the 1<sup>st</sup> Defendant sold the same.
  - c. Whether the Plaintiff is entitled to the orders sought in the plaint.
  - d. Who is liable for the costs of the suit?



21. I will consider these issues one after the other. In *Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 Others*[2016] eKLR, the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain... Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

21. In *Adan Abdirahani Hassan & 2 others v Registrar of Tiles & 2 others* [2013] eKLR, the court stated as follows:

“20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that *the Constitution* protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by *the Constitution*, he must show that he has followed the due process in acquiring that which he wants to be protected.”

21. In *Samuel Kamere v Land Registrar Kajiado*, Nairobi Court of Appeal, Civil Appeal No. 28 of 2005, the Court addressing the issue of competing titles stated that:

“It is evident that there are two competing claims over the suit property, and we have said that the plaintiff’s proprietary interest is already established. Since the appellant’s title is under challenge, in order to be considered a bona fide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”

37. In *Munyu Maina v. Hiram Gathiha Maina*, Civil Appeal No.239 of 2009, the Court of Appeal stated that:

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

37. In *Mwangi James Njehia v Janetta Wanjiku Mwangi & another* [2021] eKLR, the court stated as follows:

“



“37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased” properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.

39. The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard earned property, because a party has “purchased” the property on the basis of an “apparent title” at the land registry which had been transplanted in place of the genuine title, only for the genuine one to reemerge after the transaction? In our view, no legitimate owner of property should be divested of their property unlawfully, under the guise that the “purchaser” was duped to buy land which he/she could have believed to be genuinely owned by the person holding himself out as the vendor.”



37. In *Alberta Mae Gacie v Attorney General & 4 Others* [2006] eKLR the court stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

37. In the Court of Appeal case of *Arthi Highways Developers Limited v. West End Butchery Limited & 6 others*[2015]eKLR, the court stated as follows on the applicability of the doctrine of bona fide purchaser without notice:

“

“67. Furthermore, the protection accorded by law in the event of fraud, is to a “bona fide purchaser without notice” and even then, only against equitable interests. We have seen the definition of “bona fide purchaser” from Black’s Law Dictionary and from the *Katende* case (supra). The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. *Snell’s Principles of Equity* (supra) illustrate the issue, thus:-

“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.

The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B’s right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser’s conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.”

42. The suit property was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed) when the Plaintiff acquired the same. Sections 27 and 28 of the Registered *Land Act* provide as follows:

27. Subject to this Act -

- (a) a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in



this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

42. When the 1<sup>st</sup> Defendant purportedly acquired the suit property, subdivided it and sold portions thereof to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants while retaining some portions to himself, the Registered Land Act had been repealed and the relevant law that was in force was the Land Registration Act 2012. Sections 24, 25, 26 and 80 of the Land Registration Act 2012 provide as follows:

24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

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.

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.
42. As mentioned earlier, this suit was defended by the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants only. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 8<sup>th</sup> defendants did not defend the suit. It is not disputed that the suit property was registered in the name of the Plaintiff on 11<sup>th</sup> December 2006. The Plaintiff acquired the suit property from PW2 who was the first registered owner of the suit property having been registered as such on 29<sup>th</sup> November 1994. The Plaintiff proved its registration and ownership of the suit property and that he acquired the property from PW2. The 1<sup>st</sup> Defendant was registered as the owner of the suit property on 17<sup>th</sup> May 2016 through “transfer”. As at 17<sup>th</sup> May 2016, the Plaintiff was the registered owner of the suit property. It follows therefore that it was only the Plaintiff who could transfer the suit property to the 1<sup>st</sup> Defendant.
43. The Plaintiff has denied that he transferred the suit property to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant did not file a defence to the Plaintiff’s claim. The 1<sup>st</sup> Defendant did not controvert the Plaintiff’s claim that he did not transfer the property to the 1<sup>st</sup> Defendant and that the purported transfer of the suit property to the 1<sup>st</sup> Defendant was fraudulent. There is no explanation of how the 1<sup>st</sup> Defendant came to be registered as the owner of the suit property a part from that proffered by the Plaintiff. The burden was on the 1<sup>st</sup> Defendant to prove that he acquired the suit property legally.
44. The Plaintiff having proved that he was the owner of the suit property as at 17<sup>th</sup> May 2016 when it was purportedly transferred to the 1<sup>st</sup> Defendant, the burden was upon the 1<sup>st</sup> Defendant to prove that he acquired the suit property from the Plaintiff. In the absence of a defence or evidence from the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant did not explain how the suit property moved from the name of the Plaintiff to his name. In the absence of any explanation of how the 1<sup>st</sup> Defendant acquired the suit property, it is my finding and I so hold that the 1<sup>st</sup> Defendant acquired the suit property illegally and fraudulently.
45. Since the 1<sup>st</sup> Defendant acquired his title to the suit property illegally and fraudulently as I have held above, the purported title to the suit property that was acquired by the 1<sup>st</sup> Defendant was null and void. In *Macfoy v United Africa Co. Ltd.*[1961] 3 All E.R. 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.



42. It follows from the foregoing that the void title could not confer any valid interest in the suit property upon the 1<sup>st</sup> Defendant. Since the 1<sup>st</sup> Defendant did not have a valid interest in the suit property, he had no right to subdivide the suit property. It follows therefore that the subdivision of the suit property on 22<sup>nd</sup> March 2017 that gave rise to Plot Nos. 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 was illegal null and void. Due to the illegality of the said subdivision exercise that was carried out in furtherance of the 1<sup>st</sup> Defendant's acts of fraud, the 1<sup>st</sup> Defendant had no valid interest in the resultant Plot Nos. 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 that he could convey to himself and third parties. The registration of Plot Nos. 5007, 5011 and 5014 in the name of the 1<sup>st</sup> Defendant was equally void, the same as the transfer of Plot Nos. 5013, 5012 and 5010 to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, Plot No. 5009 to Okatch Emmanuel Oyugi from whom the 5<sup>th</sup> Defendant acquired the same and Plot No. 5008 to the 6<sup>th</sup> and 7<sup>th</sup> Defendants. The 2<sup>nd</sup> to 7<sup>th</sup> Defendants could not acquire a better title in the suit property and its subdivisions than that which the 1<sup>st</sup> Defendant held. Since the title held by the 1<sup>st</sup> Defendant in the suit property and the subdivisions thereof were null and void, that is what the 2<sup>nd</sup> to 7<sup>th</sup> Defendants acquired. The 2<sup>nd</sup> to 7<sup>th</sup> Defendants did not therefore acquire any valid interest in the suit property and its subdivisions, Plot Nos. 5013, 5012, 5010, 5009, and 5008. The 2<sup>nd</sup> to 7<sup>th</sup> Defendants' titles were tainted with fraud and illegality committed by the 1<sup>st</sup> Defendant and as such the same were similarly null and void.
43. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants have raised the defence of innocent purchaser for value without notice. The 5<sup>th</sup> Defendant acquired Plot No. 5009 on 6<sup>th</sup> February 2019 from one, Okatch Emmanuel Oyugi who acquired the same from the 1<sup>st</sup> Defendant on 24<sup>th</sup> November 2018. The 6<sup>th</sup> and 7<sup>th</sup> Defendants on the other hand acquired Plot No. 5008 from the 1<sup>st</sup> Defendant on 11<sup>th</sup> July 2017. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants have contended that they carried out reasonable due diligence on the two parcels of land and did not notice any defect on the titles that were held by the sellers. I am of the view that the defence of innocent purchaser without notice is not available to the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants, and the other Defendants. As the Court of Appeal stated in *Arthi Highways Developers Limited v. West End Butchery Limited & 6 others*(supra), the defence is only available against equitable interests. The Plaintiff held a legal interest in the suit property and its subdivisions. The Plaintiff's legal interest is enforceable against Defendants whether they had notice of the same or not. The 2<sup>nd</sup> to 7<sup>th</sup> Defendants acquired their purported interests in the subdivisions of the suit property subject to the Plaintiff's legal interest that was in existence at the time of the purported acquisition by the said Defendants of their interests in the said properties. I have said countless times but it is worth repeating here that a title to land whose foundation is tainted with fraud and illegality however innocently acquired cannot prevail against a valid legal interest in the same land. In any event, the titles that were held by the 1<sup>st</sup> Defendant in the suit property and its subdivisions were all void as I have mentioned above. Even if the Defendants acquired void titles innocently, the same shall remain void.
42. In *Wambui v Mwangi & 3 others*, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) the Court of Appeal stated as follows:
- “70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void abinitio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3<sup>rd</sup> respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity



and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.
72. In light of all the above, we reiterate that the Judge's reasoning as to why appellant's title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable."

42. Due to the foregoing, it is my finding that the 1<sup>st</sup> to 7<sup>th</sup> Defendants did not acquire valid titles in respect of Plot Nos. 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014.
43. On whether the Plaintiff is entitled to the reliefs sought, I am satisfied that the Plaintiff has proved his claim against the Defendants on a balance of probabilities. The Plaintiff is therefore entitled to the reliefs sought in the plaint.
44. On the issue of costs, I am of the view that the 1<sup>st</sup> Defendant should pay all the costs of the suit. It was the 1<sup>st</sup> Defendant who acquired the suit property illegally and fraudulently from the Plaintiff subdivided it, retained some portions in his name and sold some portions thereof to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants and Okatch Emmanuel Oyugi from whom the 5<sup>th</sup> Defendant acquired her plot.

## Conclusion

42. In conclusion, I hereby enter judgment for the Plaintiff against the Defendants for:
  - a. I declare that the transfer of all that parcel of land known as Title No. Kisumu/Wathorego/1852 to the 1<sup>st</sup> Defendant, the subdivision thereof by the 1<sup>st</sup> Defendant and the transfer of the resultant plots to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants and other parties were unlawful and as such null and void.
  - b. I declare that the Plaintiff is the lawful owner of all that parcel of land known as Title No. Kisumu/Wathorego/1852 which was illegally and fraudulently subdivided by the 1<sup>st</sup> Defendant into eight (8) parcels namely; Title Nos. Kisumu/Wathorego/ 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014.
  - c. The Land Registrar, Kisumu County shall forthwith; cancel the transfer of Title No. Kisumu/Wathorego/1852 to the 1<sup>st</sup> Defendant and the title that was issued to him in respect thereof, cancel the subdivision of Title No. Kisumu/Wathorego/1852 into eight (8) parcels namely, Title Nos. Kisumu/Wathorego/ 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 and cancel the transfer and/or registration of Title Nos. Kisumu/Wathorego/ 5007, 5011 and 5014 in the name of the 1<sup>st</sup> Defendant, Title Nos. Kisumu/Wathorego/ 5013, 5012, 5010, and 5008 in the names of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 6 and 7<sup>th</sup> Defendants respectively and Title No. Kisumu/Wathorego/ 5009 in the names of Okatch Emmanuel Oyugi and the 5<sup>th</sup> Defendant.



- d. The Director of Surveys shall amend the relevant Registry Index Map for Kisumu/Wathorego to effect the cancellation of the subdivision of Title No. Kisumu/Wathorego/1852 into eight (8) parcels namely, Title Nos. Kisumu/Wathorego/ 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014 and the cancellation of the titles issued in respect of the said resultant plots.
- e. The Land Registrar Kisumu County shall forthwith restore the ownership of Title No. Kisumu/Wathorego/1852 to the Plaintiff.
- f. The Plaintiff shall have the costs of the suit to be paid by the 1<sup>st</sup> Defendant.

**DELIVERED AND DATED AT KISUMU THIS 14<sup>TH</sup> DAY OF MARCH 2024**

**S. OKONG'O**

**JUDGE**

**Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

**Mr. Oyatta for the Plaintiff**

**Ms. Ngire for the 3<sup>rd</sup> Defendant**

**Mr. Ojuro for the 5<sup>th</sup> Defendant**

**Mr. Okello for the 6<sup>th</sup> and 7<sup>th</sup> Defendants**

**Ms. Ocholla h/b for Ms. Omondi for the 8<sup>th</sup> Defendant**

**Ms. J. Omondi-Court Assistant**

