



**Chutha v Ndung’u (Civil Appeal 293 of 2018)
[2024] KECA 418 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 418 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 293 OF 2018
S OLE KANTAI, JM MATIVO & PM GACHOKA, JJA
APRIL 26, 2024**

BETWEEN

ROBERT NGARUIYA CHUTHA APPELLANT

AND

JOSEPH CHEGE NDUNG’U RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court of Kenya at Nairobi (Mwangi Njoroge, J.) delivered on 10th November, 2017 in ELC No. 239 of 2012)

JUDGMENT

1. The dispute before us sheds light on the importance and place of documentary evidence, proper drafting of pleadings and presentation of a case theme and case theory; a trilogy necessitated towards urging the trial court to make a finding in a party’s favor. This is more in cases involving ownership of land in Kenya. It is a sad story that holding a title does not sufficiently establish that land belongs to the person appearing as the registered owner. This should not happen in a country where there is a credible land registration system. Often, courts are now forced to trace the history of title documents to establish who is the rightful owner.
2. In this appeal, the trial court was tasked to determine which of the two parties was the genuine and lawful proprietor of all that parcel of land namely Ruiru West Block 1/673 (the suit land). Here, the sanctity of the appellant’s title came into question. It led the trial court to demystify the applicability of the Torrens system of registration that was recently held by our apex court as insufficient proof of ownership where it is demonstrated that the title was obtained through fraud or misrepresentation. (See Dina Management Limited vs. County Government of Mombasa & 5 others [2023] KESC 30 (KLR)).
3. Summarizing the background of facts as captured in the plaint dated 7th May, 2012, the appellant contended that he purchased the suit land from the original shareholder of Githunguri Constituency



Ranching Company Limited in 1993 for a sum of Kshs. 33,000.00; that he subsequently paid the requisite fees and was issued with a certificate of lease on 31st October, 2011; that he took possession in 1993; and that he had been in occupation of the suit land for 19 years.

4. It is for the above reasons that the appellant enumerated the following reliefs in his plaint: a permanent injunction restraining the respondent or anyone acting under him from trespassing, erecting structures and interfering with his ownership, occupation and possession; an eviction order to remove the respondent, his family and the structures set up by him within a period of 30 days after the judgment; an order of supervision to the OCS Ruiru Police Station for enforcement of the eviction orders; general damages for trespass; and costs of the suit.
5. The facts as captured in the plaint were opposed by the respondent. He filed a statement of defence and counterclaim dated 22nd May, 2012. According to the respondent: he purchased the suit land on 14th March, 2008 from his aunt Teresia (alias Telesia) Wambui Gitahi (deceased), the original shareholder bearing share certificate no. 2421, dated 10th October, 1972 and holder of ballot no. 673 for a sum of Kshs. 120,000.00; that he immediately took possession and constructed a two bedroomed house made of corrugated iron sheets and set up other structures; and that he was the bona fide purchaser having bought the parcel of land from the original shareholder.
6. The respondent prayed for the following prayers in his counterclaim: a declaration that he was the bona fide and rightful owner of the suit land; a cancellation order of the registration of the appellant as the owner of the suit land; upon cancellation, an order that the respondent be registered as the proprietor of the suit land. He further prayed for the costs of the suit.
7. The trial court took the viva voce evidence of the parties and held thus:

“The plaintiff has not sufficiently explained why he does not have documents from the original owners of the plot he allegedly bought. I therefore find that he did not buy the land from the original owner or any person genuinely acting on his or her behalf. I also find that the defendant was the rightful transferee of the share owned by Telesia Wambui Gitahi...

...Due diligence was a necessity especially in view of the fact that the company which he was seeking land from was established decades before his attempts to obtain land. In the circumstances, he knew or ought to have realized that not being an old subscriber, he had to deal personally with the owners of the share or the land he wished to purchase. It is also implausible that the plaintiff, who appears to this court to be a well-informed gentleman, would buy land whose location he did not know and worse, through third parties who were not the owners thereof. It is most probable that he knew of the illegality of the transaction and he shut his eyes to it and nevertheless went ahead with it.

The plaintiff, not having quested sufficiently to know the genuine owners of the suit land became a beneficiary of the said fraud. I find that he cannot be regarded as an innocent purchaser for value without notice for the reason that he never conducted due diligence. He played a role in the fraud.”

8. In view of the foregoing, the Judge found that the lease and certificate of lease had been obtained unprocedurally and illegally. Consequently, the appellant’s suit was dismissed while the respondent’s counterclaim was allowed in the following terms:
 1. A declaration that the defendant is the rightful owner of land parcel no. Ruiru West Block 1/673;



2. That the registration of the plaintiff as the lessee in respect of LR No. Ruiru West Block 1/673 is illegal and incapable of granting him any rights over the suit land;
 3. That the illegally obtained title to Land Parcel No. Ruiru West Block 1/673 issued in the name of the plaintiff is hereby declared null and void and is consequently cancelled for having being fraudulently obtained;
 4. That the defendant be registered as the lessee over that land parcel known as LR No. Ruiru West Block 1/673;
 5. That the plaintiff shall bear the costs of these proceedings.
9. It is that edict that is the subject of the present appeal. The appellant filed his notice of appeal dated 17th July, 2018 and a memorandum of appeal dated 20th August, 2018 raising 10 grounds impugning the findings of the learned Judge. We have taken the liberty to summarize the grounds as follows: that since Teresia (Telesia) Wambui Gitahi's name was not on the original shareholder's list, the learned Judge's findings as the rightful original shareholder were based on conjectures and thus erroneous; that it is the appellant's name that was in fact in the original list; that the trial court disregarded the appellant's evidence on the steps he had taken towards lawful acquisition of the suit land and shareholding at Githunguri Constituency Ranching Company Limited; that the trial court extraneously found that he obtained the suit land by means of fraud, a fact that was neither pleaded nor proved by the respondent; that the witness statements of Boniface Njuguna Kimani and Teresia Wambui Gitahi were inadmissible in evidence since the makers were not subjected to cross examination; and that the sale agreement dated 14th March, 2008 was unexecuted and did not capture the particulars of the land reference number.
 10. The appellant thus proposed that the appeal be allowed by setting aside the orders of the learned Judge and be substituted with an order allowing the prayers in the plaint.
 11. The appeal was heard on 30th January, 2024 through the GoTo virtual link platform. Learned Counsel Mr. Gitau appeared for the appellant while Miss. Kamau was present for the respondent. The appellant adopted his written submissions and list and bundle of authorities dated 25th January, 2024 while the respondent relied on his written submissions dated 26th January, 2024, which were highlighted orally.
 12. The appellant argued that: the respondent failed to adduce documentary evidence that indicated the suit land reference number; that the respondent manufactured the sale agreement after the death of Teresia Wambui Gitahi as it was not executed by any of the parties; and that in the absence of a signed sale agreement, nothing could confer title or locus standi to sue to the respondent.
 13. The respondent on the other hand contended that the findings of the trial court were faultless, lawful and proper; that the Judge was right in holding that the appellants title was obtained fraudulently; and that Article 40 (6) of *the Constitution* and section 26 of the *Land Registration Act* CAP 300 could not cure an illegality.
 14. We have considered the parties' rival submissions, examined the record of appeal and analyzed the law. As a first appellate court, an appeal is by way of a 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 and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and thus should make due allowances in this respect. [See *Gitobu Imanyara & 2 others vs. Attorney General* [2016] eKLR].
 15. The rightful and lawful proprietor of the suit land remains the crux of this appeal. All the grounds of appeal revolve around this issue. Therefore, it is our view that main the issue for determination is



- whether the learned Judge arrived at a just or correct decision as to who the rightful owner of the suit land is. This means that all the grounds of appeal will succeed or fail once we determine this issue.
16. We are alive to the provision of section 26 (1) of the *Land Registration Act* which provides that the certificate of title issued upon registration shall be taken as prima facie evidence that the person named as the proprietor is the absolute and indefeasible owner. However, the rider clause is that the title can be challenged if it is demonstrated that it was obtained through fraud, misrepresentation, illegally, unprocedurally or by way of a corrupt scheme.
 17. It is not gainsaid that the appellant is the registered proprietor of the suit land. However, both parties lay credence as to ownership of it. The learned Judge distilled the evidence that had been adduced by the parties by assessing the historical background each party had submitted to establish who was the rightful owner.
 18. What we have observed from the record is that on one hand, the appellant maintained that he purchased the suit land from the original shareholder of Githunguri Constituency Ranching Company Limited. In his testimony at trial however, he testified that he was the first allottee of the suit land. The question that begs for an answer is whether he was the original allottee or did he purchase the same from another?
 19. Additionally, as rightly observed by the learned Judge, the appellant did not disclose who this original shareholder was. He also did not adduce evidence to demonstrate how he obtained the necessary documents by consent from the original owner and thus demonstrate that he obtained the title through a lawful process. Interestingly, not even a sale agreement, which is as rudimentary as it gets on transfer of ownership, was tabled before the trial court to explain the transfer. It is common knowledge that a title arising from a land-buying company is a part of a process. The said process is supported by evidence of payment receipts, ballot paper, sale agreement, stamp duty receipts, registration fees, and finally the title. Waving a title that is not backed by these documents is certainly not good proof, or at all, of ownership in a contest like this.
 20. It was also ostensible that the appellant was not aware of the location of the suit land. He first admitted that he never met the original shareholder and owner of the suit land. He also did not pay a visit to the suit land at that time. Secondly, though he allegedly participated in the transaction in 1993, there was a lull of about 16 years where no activities took place towards the acquisition of the suit land. It was only after those 16 years had lapsed that the appellant descended on the suit land and discovered that the respondent and his wife were in active occupation of it. Thirdly, according to his plaint, the property is situated in Eastern Bypass; a sharp contrast of where he said it is located in his adopted witness statement in Northern Bypass.
 21. During the hearing of the dispute, the respondent adduced several documents in support of his case. Those documents were, by consent (emphasis ours), admitted as the evidence of the respondent. Amongst those documents were the written statements taken from CID offices at Ruiru of Teresia (Telesia) Wambui Gatahi, the appellant himself and Boniface Njuguna. The appellant cannot thus be heard to complain that since those witnesses were never subjected to cross examination, their evidence was unreliable.
 22. The appellant, who was present and represented by Counsel at the hearing, did not object to an admission of those documents in evidence. He did not challenge the contents either. He cannot therefore be heard to say that since they were never questioned, their evidence was for the pitfall. Certainly so, as you make your bed, so you must lie in it. He cannot approbate and reprobate on this issue.



23. The salient features of the appellant's statement were that the suit land was sold to him by one Boniface Njuguna Kimani whom he described as the secretary of Githunguri Constituency Ranching Company Limited. It is instructive to note that he referred to him as a volunteer clerk of the said company when he testified in court. In the penultimate paragraph of his statement, he stated that when he purchased the plot, he was shown by the said Boniface alone and never met the exact and real owners.
24. Boniface Njuguna Kimani's statement was that he was co-opted as the director of the said company between 1988 and 1998. When his friend, the appellant, approached him looking to purchase a parcel of land, the appellant gave him Kshs. 35,000.00 which was handed over to his colleague Josephine Njeri Muthama, director of the company. She told Boniface that she had purchased the land, on the appellant's behalf, in 1989. According to Boniface, the appellant was at this juncture placed in the list of shareholders. The said list was forwarded to Kiambu Land's office and that he prepared the lease that was typed by one Wanjiku, the secretary of the company.
25. Pretty much the entire evidence of the appellant was at loggerheads with each other. At trial he testified that Boniface was a voluntary clerk. In his pleadings, he stated that he was the secretary of the company yet the same person indicated that he was a co-opted director. Secondly, Boniface stated that the process was conducted by Josephine Njeri Muthama, a person who though appears instrumental in the transaction, was not mentioned by the appellant in his testimony. Importantly, the process of acquisition by way of documentary proof was not chronologically explicated.
26. Furthermore, how did Josephine acquire the suit land? Did she purchase on his behalf from an original shareholder or did she allot the suit land to the appellant first in time? What donated her powers to act on behalf of the appellant and what evidence supported her instructions to act for the appellant? Was the said Josephine authorized by law to transact on behalf of the appellant? Was she acting as an agent, donee or in any other capacity to justify her actions?
27. Nothing and absolutely nothing was presented before this Court and the trial court to demonstrate that the process of obtaining the certificate of title was lawful. The appellant could not decipher the root of the title. Suffice to add that it was certainly not a coincidence that the search certificates from the company, together with the certificate of lease were obtained in the very same year that the appellant filed suit against the respondent. In our considered view, the appellant was only galvanized to file the present suit owing to criminal case in Thika Chief Magistrate's Court Criminal Case No. 5622 of 2013 against him following the complaint lodged by the respondent two months before the suit was filed.
28. The appellant, for reasons only known to him, further failed to call Boniface Njuguna Kimani, Josephine Njeri Muthama and/or any person working in the said Githunguri Constituency Ranching Company Limited that may have shed light on this process.
29. We do find that in the circumstances, the certificate of lease issued to the appellant ought to be defeated since it was obtained unprocedurally and the history of the title as enumerated by the trial Judge was full of gaps and contradictions. Accordingly, we are satisfied that the learned Judge properly canceled the entry declaring the appellant as the registered proprietor of the suit land.
30. On the part of the respondent, we have observed that as enumerated by the trial court aptly, he demonstrated sequentially that Teresia (Telesia) Wambui Gitahi (the respondent's aunt) was the original allottee and shareholder of the suit land. That she was the bona fide shareholder as per the share certificates no. 2421 and B-1676 adduced in evidence. The respondent also relied on receipts no. 11998, Y800821, Y800869 and 724 in respect to the subsistence of her shareholding and the suit land, issued in the name of his aunt, to prove that indeed she was the proprietor of the suit land.



31. According to the document entitled ‘sale agreement’ dated 14th March, 2008, the respondent’s aunt received Kshs. 120,000.00 as the purchase price. The said transaction was attested to by three independent witnesses. It was indicative that ballot no. 673 was originally issued to the respondent’s aunt. Following this transaction, the respondent was issued with share certificate no. B-2001 in his name by the company. It indicated that it was a transfer arising from certificate no. B-1676.
32. Rightfully so, the trial court observed that all those documents bore Teresia (Telesia) Wambui Gitahi’s I.D. number and postal code. Using the above documents and having effected transfer, the respondent applied for electricity supply from Kenya Power and Lighting Company on 22nd October, 2010.
33. The transactional facts were furthermore corroborated by the vendor’s statement recorded at the CID offices in Ruiru which as we have already observed, was admitted by consent. In it, she categorically stated that she sold the property to her nephew, the respondent herein.
34. In conclusion, taking into account that the appellant never met the vendor(s) of the suit land and never called the persons he interacted with directly or indirectly in the acquisition of the suit land, coupled with the fact that he did not know where the suit land was located, we are satisfied that the trial court properly held that the appellant’s title was obtained unprocedurally and illegally.
35. This Court in *Jacob Wekesa Bokoko Balongo vs. Kincho Olokio Adeya & another* [2020] eKLR held as follows on the importance of deciphering the historical acquisition of title:

“The historical background to the acquisition of the title is as good as the title itself. How else, for example, can a person seeking to impugn or impeach the title on the grounds of fraud, misrepresentation or it having been obtained unprocedurally or through corrupt means do so without placing the title in its historical context? On the ground of indefeasibility of title, it was urged that the trial judge erred in failing to find that the appellant’s title to the suit land was indefeasible... In the persuasive case of *Fahiye & 2 others – v- Omar & 4 others* [201] 2KLR, 224, it was held that indefeasibility of title is not absolute particularly where the whole transaction was void. In *Milankumar Shah and 2 Others vs. City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05))*, it was correctly pointed out that: “The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of *Champaklal Ramji Shah & 3 Anors –v- AG & Anor*, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.”

36. Our apex court also shed light on the relevance of a historical background analysis insofar as acquisition of title is concerned restating that the ownership of land whose title was not acquired regularly is not protected under Article 40 of *the Constitution* on the protection of right to property. It held as follows in *Dina Management Limited vs. County Government of Mombasa & 5 others* (supra):

“Where the registered proprietor’s root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”



- 37. We cannot emphasize further to state that the trial court ably applied the law with the facts laid before it to arrive at a just conclusion. In our view, the trial court’s findings are beyond reproach. We have done a thorough and independent analysis of the evidence and we are satisfied that the learned Judge made the correct decision as to the rightful owner of the land. This answers all the grounds of appeal, which are without merit and must fail.
- 38. Consequently, we find that the appellant’s appeal lacks merit and it is hereby dismissed in its entirety with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

