



**Said v Shume & 2 others (Civil Appeal E050 of 2023)
[2024] KECA 866 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 866 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E050 OF 2023
SG KAIRU, AK MURGOR & KI LAIBUTA, JJA
JULY 26, 2024**

BETWEEN

HUSSEIN ABDALLA SAID APPELLANT

AND

YAWA CHOME SHUME 1ST RESPONDENT

PHILOMEN MAKUPE YAWA 2ND RESPONDENT

DISTRICT LAND REGISTRAR –KILIFI 3RD RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Malindi (Olola, J.) delivered on 26th June 2019 in Malindi Environment and Land Court Case No. 52 of 2010)

JUDGMENT

1. By an amended Complaint filed on 31st May 2012, Yawa Chome Shume, the 1st respondent sued the appellant, Hussein Abdalla Said, the 2nd respondent, Philemon Makupe Yawa, and the 3rd respondent, the District Land Registrar Kilifi, seeking a declaration that he is the bonafide owner of the suit property known as Kilifi/Ngerenyi/1075 (the suit property); a declaration that the acquisition of the suit property was illegal, and that the allocation and registration in the 2nd respondent's name and subsequently in the appellant's name was null and void; an order directing the Registrar of Lands Kilifi to cancel title No. Kilifi/Ngerenyi/1075 and re-register him as the owner thereof; and a permanent injunction restraining the appellant and the 2nd respondent by themselves, children, servants and agents from trespassing on, farming and/or disposing or transferring or selling or in any other manner dealing with the suit property.
2. The 1st respondent's case was that he was the original allottee, legal, and registered owner of a parcel of land known as Plot No. 727/Kilifi/Ngerenyi (the original plot) measuring 4.9 Ha. He claimed that



- he was illiterate, and had entrusted his son, the 2nd respondent, to assist him to process a title for the original plot.
3. When the title deed to the original plot was issued in or about 2001, it was not released to him and, upon enquiring, the 2nd respondent continued to misrepresent to him that the title of the original plot was yet to be released. It was the 1st respondent's case that another title was later issued in or about 2002 without his knowledge of the contents, and that the 2nd respondent claimed that this was the title to the original plot.
 4. The 1st respondent contended that, sometime in the year 2002 when he wanted to distribute his property to his family consisting of four wives and 23 children, he came to learn from the local chief that the original parcel of land measuring 4.9 Ha had been sub- divided without his knowledge or consent, and that the only portion that now belonged to him after sub-division was a portion measuring 2.47 Ha; that the 2nd respondent claimed ownership of about half of the original parcel of land being the suit property; that, in or about April 2010, after conducting a search at the Kilifi Land Registry, he found out that the 2nd respondent had sold and transferred the suit property to the appellant.
 5. The 1st respondent asserted that the subdivision of the original plot and subsequent registration of the suit property in the 2nd respondent's name was fraudulent and unlawful. He particularized the 2nd respondent's fraud as directing and taking undue advantage of the 1st respondent's literacy; deceiving him to facilitate the illegal subdivision and transfer; illegally disposing of the suit property to the appellant; misrepresenting to the Land Registrar and causing the subdivision of the original plot without his consent or that of the Land Control Board, and causing the Land Registrar to cancel the title to the original plot and directing him to subdivide and issue other titles; causing and directing the Registrar to cancel a first registration without the existence or any allegation of fraud or illegality or misrepresentation; that the consent to subdivide and transfer had been signed by the 1st respondent and misrepresenting to the Land Registrar that there was a *bonafide* purchase and transfer of the suit property.
 6. The fraud on the appellant's part was particularized as illegally and fraudulently acquiring the suit property while knowing the transaction to be fraudulent.
 7. He further contended that at no point did he intend to dispose of the property by way of sale as it was ancestral land, which he intended to bequeath to his family; and that, by the property having been illegally and fraudulently subdivided and registered in the 2nd respondent's name, the 2nd respondent could not have acquired legitimate title capable of being transferred. He therefore claimed an order of injunction to restrain the appellant from leasing and transferring, or disposing of the suit property.
 8. During the hearing, 9 witnesses, including the 1st respondent, testified. He stated that the 2nd respondent is his son, and that the original plot was allocated to him in 1967 by the Government; that he had settled on the land cultivated, and planted trees on it. Between 1967 and 2002, he tried to get a title deed for the parcel at the Lands registry in Kilifi, but was inhibited by his literacy capabilities. He had asked his son, the 2nd respondent, to assist him and that, after the title was issued, the 2nd respondent refused to give it to him. Years later, when he wanted to distribute his estate, he discovered that the parcel of land was smaller than what had been allocated to him as the appellant claimed ownership of the suit property; and that, when he enquired from his son, he became violent and threatened him. He denied transferring the land to the 2nd respondent and the appellant, or even attending any Land Control Board for this purpose.
 9. PW2, Nazi Yawa Chome, PW3, Nazi Easther Yawa Chome, and PW5, Mbodza Yawa Chome, his wives, confirmed that he was the owner of the original plot, and that the suit property had been sold without



- the 1st respondent's knowledge by the 2nd respondent. PW4- Charles Yawa Chome, his son, also stated that the suit property was their home, and that the 2nd respondent had sold it to the appellant without their father's knowledge. PW6, Charles Chai Baya Taura, their neighbour at Tezo, testified that the 1st respondent's land was 12 acres, just like the land belonging to PW6's family.
10. In his written statement of amended Defence of 10th July 2012, the 2nd respondent denied the allegations, claiming that all dealings in the suit property were aboveboard and carried out with the express consent of the 1st respondent. He claimed to have acquired ownership of the suit property being the share and or interest of the 1st respondent's brother, which portion he later purchased with the knowledge of the 1st respondent and the family.
 11. In his amended Defence filed on 30th January 2014, the appellant admitted that he is the registered proprietor of the suit property having purchased it from the 2nd respondent. He however asserted that he was unaware of any relationship between the 1st and 2nd respondent, or the 1st respondent's claim of ownership in the suit property; that he was unaware of any illegal or fraudulent dealings by any person in respect of his title and asserted that he was an innocent purchaser for value without notice.
 12. During the hearing, the 2nd respondent testified that his father, who is over 85 years old, co-owned the original plot with his brother, Ngala Chome Shume, and that, at the time of registration of the land, his brother had gone back to the family's ancestral home in Chonyi; that the 1st respondent was left to participate in adjudication, and was subsequently registered as the owner of the entire piece of land measuring 12 acres; that, although both his father and uncle paid settlement fees, the title deed was issued in the 1st respondent's name; that, thereafter, his father wanted his portion separated from his brother Ngala's portion and, thereafter, Ngala sold his six acre portion to him for Kshs. 300,000; and that a Sale Agreement was executed on 7th February 2001. He claimed to have obtained a Land Control Board consent for sub-division and transfer of Ngala's portion from his father's portion; that the portion sold to him became Plot No. 1075, the suit property; and that it was this portion that he sold to the appellant for Kshs. 1.5 million.
 13. DW2, Justin Jilani Ngala, a cousin to the 2nd respondent, testified that his father, Ngala Chome Shume, sold the suit property to the 2nd respondent for a consideration of Kshs. 300,000, and that the sale was in the presence of all family members.
 14. On his part, the appellant testified that he bought the suit property for Kshs. 1.5 million in 2009 from the 2nd respondent; that he visited that land prior to the purchase, where he found that the 1st respondent was in occupation of the adjacent plot, and not on the portion that he had purchased; and that he conducted a search at the Kilifi Lands Registry, which confirmed that the land was owned by the 2nd respondent. He stated that he was unaware of any illegal or fraudulent dealings by any person in respect of his title, and asserted that he was an innocent purchaser for value.
 15. The 3rd defendant also filed a defence denying all the allegations made against the Lands Registrar, but did not testify or adduce any evidence.
 16. Upon considering the dispute, the trial Judge held that the 1st respondent had proved his case, and that the suit property was the subject of illegality, and allowed the 1st respondent's claims as prayed.
 17. Aggrieved by the decision, the appellant has filed this appeal on the grounds that: the learned Judge was at fault in law and fact when he failed to find that the appellant was not a *bona fide* purchaser for value without notice of the irregularity in the 2nd respondent's title; by failing to address and determine that the appellant purchased the suit property from the 2nd respondent without notice of the illegality or fraud on the 2nd respondent's title, and or for finding that the appellant was a party to the fraud on



- the irregularity of the 2nd respondent title; in failing to take into account that the appellant purchased the suit property in good faith and for valuable consideration based on the evidence and submissions; in failing to address the particulars of illegality against the appellant as pleaded by the 1st respondent; in finding that there was no valid title that was capable of being transferred to the appellant who was not a party to or had knowledge of the fraud perpetrated by the 2nd respondent thereby arriving at an erroneous decision; in failing to take into consideration the appellant's viva voce evidence that he had obtained Land Control Board consent; and in rendering a judgment against the law and the weight of evidence.
18. The appellant and the respondent filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel for the appellant, Mr. Ngure, submitted that the trial Judge failed to appreciate that the appellant purchased the suit property after conducting due diligence on the title, and on establishing that it was registered in the name of the 2nd respondent; that the suit property was registered in the name of the 2nd respondent on 14th January 2002 and the appellant purchased and registered it in his name on 19th May, 2009, which was approximately 7 years and 4 months later; that there was no evidence that he participated in any fraud together with the 2nd respondent or that he intended to defraud the 1st respondent whom he did not know and that, by finding that there was no valid title in the name of the 2nd respondent capable of being transferred to the appellant, the trial Judge arrived at the wrong conclusion.
 19. Counsel submitted that the appellant was a *bona fide* purchaser for value without notice of fraud, and whose title could not be impeached. He invited the Court to consider the case of *Moses Lutomia Washiali v Zephaniah Ngaira Angweye & another*, Civil Appeal No. 139 of 2013 where it was held that a *bona fide* purchaser will not be bound by any interests of which he or she does not have actual, constructive or imputed notice, as long as he or she did reasonable due diligence before purchasing the land. Counsel also relied on the Ugandan cases of *Katende v Haridar & Company Limited* (2008) 2 E.A.173; and *Lawrence Mukiri v Attorney General & 4 Others* [2013] eKLR, which set out the factors to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice; that the 1st respondent neither pleaded nor proved that the appellant obtained registration through fraud or that he had knowledge of or was a party or substantially contributed to the fraud by the 2nd respondent who had an apparent valid title; that he innocently relied on the Land Registry records to acquire the suit property and proved that he lawfully obtained registration; that, as a result, he acquired an indefeasible title.
 20. On behalf of the 1st respondent, learned counsel, Mr. Mkomba, submitted that the fraud perpetrated by the 2nd respondent is uncontested in this appeal, and that the 1st respondent was the sole registered owner of the original plot; that the subsequent subdivision into Plots No. 1074 and 1075 was an illegality; that the root of the appellant's title was as a result of an illegality, and that the trial court rightly held that the 2nd respondent's title was a nullity; and that, this being the case, he could not transmit a valid or legal title to the appellant when he had no title to transfer. Counsel relied on the case of *Samuel Kamere v Land Registrar*, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR in which this Court laid down the principles for acquiring legal title as a *bona fide* purchaser. It was submitted that the trial court rightly held that the root of the appellant's title having been derived from an illegality meant that the appellant did not acquire a proper title.
 21. It was further submitted that the appellant also failed to provide any documentary evidence to support the conduct of the due diligence in respect of the suit property; and that, further, the principle of indefeasibility of title is not absolute and courts are capable of nullifying titles based on illegalities as was stated by this Court in the case of *Kenya National Highway Authority v Shalien Masood Mughal*



- [§ 5 Others](#) [2017] eKLR. Counsel also relied on the Supreme court case of *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] eKLR where the court held that an innocent purchaser for value would also denote one’s awareness of what they are purchasing by inspecting the suit premises.
22. There was no appearance for the 2nd and 3rd respondents despite having been served with the hearing notice.
23. This is a first appeal and, as held by the Court of Appeal for *East Africa in Peters v Sunday Post Limited* [1958] EA page 424:
- “It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
24. Having considered the Record of appeal and the parties’ submissions, the main issues for consideration are whether the appellant was a bona fide purchaser for value, and whether he acquired good title from the 2nd respondent.
25. [Black’s law Dictionary](#) (8th Edition) defines a “*bona fide* purchaser” as:
- “One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”
26. In the case of [Dina Management Limited v County Government of Mombasa & 5 others](#) (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), the Supreme Court stated that, for a court to establish whether a party is a *bona fide* purchaser for value, the court must first establish the root of the title right from the first allotment. The Court upheld the *dicta* in [Samuel Kamere v Lands Registrar](#), Kajjado, (*supra*) and stated that:
- ”...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property”
27. This position has recently been reaffirmed by the Supreme Court of Uganda in *Lwanga v Mubiru and Others* (Civil Appeal 18 of 2022) [2024] UGSC 7, where the court held:
- ’ The principle of *bona fide* purchaser for value without notice is a general defence in any transaction of sale or purchase of any property particularly land.
- The definition of *bona fide* purchaser for value without notice is “that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest”.
- Bona fide* is a Latin word meaning good faith, without fraud, sincere, genuine. See ([Black’s Law Dictionary](#) 9th Edn Page 199)



A *bona fide* purchaser is a buyer who buys without constructive or actual notice of any defects or infirmities against the seller's title. See (page 1355 [Black's Law Dictionary](#) 9th Edn.

It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith.

The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice cover both actual and constructive notice of fraud.

In the case of [Jones v. Smith](#) [1841] I Hare 43, the Chancery Court held: "a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...

then the defence cannot be available to him or her" See [Yakobo M. N Senkungu & Others v. Cresencio Mukasa](#) Civil Appeal No 17 of 2014.

28. The court reaffirmed the law regarding the importance of due diligence in land transactions holding that, "...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase." And as in the Supreme Court decision in [Dina Management Limited v County Government of Mombasa](#) (*supra*), the Court went on to hold that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of *bona fide* purchaser.
29. So, did the appellant acquire a valid and legal title to the suit property? The appellant's case was that he purchased the suit property from the 2nd respondent who was the registered title holder; that he conducted a search at the Kilifi Lands Registry and confirmed that the land was owned by the 2nd respondent. However, of significance is that the appellant made no effort to conduct further inquiry into the 2nd respondent's title. In other words, he did not establish the root of the 2nd respondent's title, which essentially required that he ascertain how it had come into existence, and how the 2nd respondent came to be the registered owner.
30. We say this because a consideration of the Green Card for the suit property disclosed that a title deed for suit parcel No. 727, the original parcel was issued on 12th January 2001 in the 1st respondent's name. It also indicated that the original parcel was subdivided on 4th January 2002 and two titles issued, one in the 1st respondent's name and the other in the 2nd respondent's name on 14th January 2002.
31. The 1st respondent's evidence was that at no time had he authorized or consented to the subdivision of his land, and neither had he transferred any portion to the 2nd respondent. For his part, the 2nd respondent testified that the 1st respondent had authorized the subdivision and signed mutation forms, and that a Government Surveyor had visited and surveyed the land so as to subdivide the original parcel. However, on cross-examination, he admitted that he had not produced any survey or mutation form signed by the 1st respondent and that, therefore, nothing showed that the subdivided portion he held originally belonged to the 1st respondent. Furthermore, the 2nd respondent did not produce any document of transfer evincing from whom the subdivided portion was transferred. In point of fact, though he claimed to have purchased it from his uncle Ngala, he did not produce a transfer as proof. Accordingly, it becomes evident that nothing disclosed how he came to be the title holder of the suit property. The foregoing discrepancies would lead us to conclude, as did the trial Judge, that the distinct lack of cogent transactional documentation that culminated in the appellant's title smacked of illegality.



32. As to whether he was a *bona fide* purchaser for value without notice, we form the view that, had the appellant conducted sufficient enquiry into the 2nd respondent's title, he would have discovered the anomalies aforesaid. At the very least, he ought to have enquired into the history behind the 2nd respondent's title.
33. This is because a title to land is not contrived out of oblivion, and nor is it created from a vacuum. In Kenya, land is classified as either public land, community land or private land. Article 64 of the [Constitution](#) defines private land as any land that has been designated private by an Act of Parliament, as well as land that is registered and held by anyone under a freehold or leasehold tenure. A title to land denotes a registered ownership of land, and every title has a root in one or another of the classifications. A good root of title means that a title to land is traceable back to its origins.
34. In the case of [Kukan & another \(Administrators of the Estate of the Late Jason Kukan Lila\) v Kibutha](#) (Civil Appeal 339 of 2018) [2023] KECA 742 (KLR) this Court affirmed the standards of due diligence laid out by Mutungi, J in the case of [Esther Ndegi Njiru & Another v Leonard Gatei](#) [2014] eKLR where the learned ude held as follows:
- “The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of the [Constitution](#) removes protection of title to property that is found to have been unlawfully acquired. This provision of the [Constitution](#) coupled with the provision of section 26(1) (a) and (b) of the [Land Registration Act](#) in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the title. (emphasis ours)
35. In the instant case, had the appellant interrogated the root of the 2nd respondent's title, he would have found that it emanated from a subdivision of land parcel No. 727 that belonged to the 1st respondent, which parcel was allotted to him by the Settlement Fund Trustees. Further enquiry would have led him to ascertain whether or not a legitimate process of subdivision was undertaken, whether or not the owner of the original portion had consented to its subdivision by signing the relevant mutation forms, and recording such consent with the Land Control Board. He would have come to the realization that no proper documentation existed that was supportive of a lawful process of subdivision having been undertaken, or that a proper transfer to the 2nd respondent was effected, and that ultimately, he could not have obtained a valid title to the subdivided portion that he sought to purchase.
36. The result is that the appellant would have appreciated that the 2nd respondent could not transfer a property based on illegalities. The unprocedural and unauthorised subdivision and transfer of title by the 2nd respondent was of no legal effect as the owner continued to hold the title to the property while the person who received the invalid title only acquired an illegality.
37. We have said enough to show that, the appellant having failed to undertake sufficient due diligence into the title to the suit property, turned a blind eye to all the extant irregularities and, as a consequence, was not by any standard a *bona fide* purchaser for value of the suit property without notice.
38. Accordingly, we find that the appeal lacks merit and is hereby dismissed with costs to the 1st respondent. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF JULY, 2024.



S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

