



**Galaxy Realtors Limited v Kenya Forest Service (Civil Appeal  
41 of 2020) [2024] KECA 1304 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1304 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL 41 OF 2020  
FA OCHIENG, MA WARSAME & JM MATIVO, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**GALAXY REALTORS LIMITED ..... APPELLANT**

**AND**

**KENYA FOREST SERVICE ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Environment  
and Land Court of Kenya at Nakuru (D. O. Obungo, J.) dated 11th  
June 2020 in ELC No. 159 of 2013 (formerly HCCC No. 307 of 2010))*

**JUDGMENT**

1. A brief account of the history of this litigation as we gather it from the record is necessary so as to properly contextualize and determine the issues urged by the parties in this appeal in support of their respective positions.
2. By a plaint dated 17<sup>th</sup> November 2010 filed at the High Court at Nakuru, Galaxy Realtors Limited, (the appellant) sued the Kenya Forest Service (the respondent) claiming that it was at all the material times the owner of land parcel number Nakuru Municipality Block 19/186 having purchased the same from one Kipkoech Tallam at a consideration of Kshs.5,000,000/=. The appellant accused the respondent of threatening to take over the said land. The appellant contended that the respondent forcefully encroached and illegally trespassed into the said land and denied him entry. It accused the respondent of refusing to vacate from the said land, blocking him from using the plot and pretending to be the lawful owner of the plot. The appellant urged that the trial court to declare him the lawful owner of the said land. It also prayed for a permanent injunction restraining the respondent or its agents from claiming or in any manner interfering with the said land. Lastly, it prayed for damages, costs of the suit or any other relief the court could deem just and fit to grant.



3. In its undated defence and counter-claim filed before the trial court, the respondent disputed the appellant's claim and maintained that the property in question forms part of the Menengai forest and it has never been legally allocated to any person. It contended that if any title was issued in respect of the said land to a Mr. Tallam who allegedly sold the land to the appellant as alleged, the same was illegally acquired, therefore, he could not pass a good title to any person. In its counter-claim, it prayed for the cancellation of the said title and the appellant's eviction from the said premises and costs of the suit.
4. During the hearing, Mr. Everton Ezekiel Terigin, the appellant's director testified that the appellant was the registered proprietor of the said land, that the vendor Mr. Tallam gave him copies of the title, the letter of allotment, title deed and lease between himself and the government. It was his evidence that a search revealed that Mr. Tallam owned the title. However, he had lost the original title and had applied for a replacement. On 18<sup>th</sup> June 2010, a transfer was registered in the appellant's favour and a title deed issued. He claimed that the appellant bought the property for Kshs.5,000,000/= and took possession.
5. Evans Kagode, the respondent's head of survey and mapping testified that the suit property was gazetted public land, and it was part of a gazetted forest and the use of the land has never changed from forestland. Further, it remains un-alienated government land for forestry development. He produced in evidence Legal Notice number 152 dated 8<sup>th</sup> October 2001 published by the Ministry of Environment whose intention was to de-gazette 270.5 hectares of the forest land and stated that the said gazette notice was successfully challenged in court therefore the land remained gazetted forest land. Upon being shown the appellant's lease document, he pointed out that the term of the lease was 99 years with effect from 1<sup>st</sup> March 1998 yet the register for the parcel was opened on 28<sup>th</sup> January 2000 prior to the issuance of the legal notice in 2001.
6. After evaluating the evidence presented by the parties and their submissions, the learned judge in the impugned judgment stated:

"15. "...I see nothing which suggests that the President had authorized the Commissioner of Lands to alienate the suit property."
7. The learned judge held that the suit property was forestland as at the date of allotment to Mr. Tallam, and also as at the time he purported to sell it to the appellant. Further, the said Mr. Tallam had no good title to pass to the appellant and therefore the appellant's title was invalid. The learned judge also held that a title obtained fraudulently or illegally is not sacrosanct and proceeded to dismiss the suit, cancelled the title and ordered the appellant to vacate the premises within 45 days from the date of the judgment. The appellant was condemned to pay the costs of the suit.
8. Aggrieved by the above finding, the appellant in his memorandum of appeal dated 5<sup>th</sup> August 2020 has cited a whopping 18 grounds of appeal which are essentially repetitive. However, the 18 grounds can be condensed into one ground which is whether the appellant's title was indefeasible. The appellant prays that this Court sets aside the judgment and substitute it with an order allowing his claim as pleaded in his plaint. He also prays for costs of this appeal and the proceedings before the trial court.
9. In support of the appeal, the appellant submitted that it was an innocent and bona fide purchaser for value. It cited this Court's definitions of a bona fide purchaser for value in *Weston Gitonga & 10 Others vs. Peter Rugu Gikanga & Another* [2017] and *Lawrence P. Mukiri vs. Attorney General & 4 Others* [2013] eKLR which is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly



10. The appellant also relied on the ELC decision in *Shimoni Resort vs. Registrar of Titles & 5 Others* [2016] that the property in the hands of a bona fide purchaser would be protected even if it is shown that at some point in the past before the bona fide purchaser acquired the property it was fraudulently acquired. In addition, the appellant relied on the Court of Appeal decision in *Wambui vs. Mwangi & 3 Others* [2021] KECA 144 which held that the sanctity of title takes precedence over all other equitable rights but it is also absolute and indefeasible challengeable only on grounds of fraud or misrepresentation to which the owner is proved to be a party.
11. In opposition to the appeal, the respondent submitted that the suit property is forestland within the meaning of section 2 of the Forest Conservation and Management Act. Further, [Legal Notice No. 152 of 2001](#), which purported to de-gazette 270.5 hectares of the forestland, relied upon by the appellant was quashed by the High Court in Nairobi Judicial Review No. 421 of 2002 and no appeal was preferred against the said decision. It was also contended that if at all Mr. Tallam held a title, it was invalid.
12. The respondent maintained that the appellant was not a bona fide purchaser for value within the meaning of section 26 of the [Land Registration Act](#) and Article 40 (6) of [the Constitution](#) and therefore his title is bad in law. Further, under section 26 of the [Land Registration Act](#), a title can be challenged on grounds of fraud or misrepresentation, to which the person is proved to be a party or where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme.
13. The respondent maintained that the appellant was not a bona fide purchaser for value and cited the ELC in *Samuel D. Omwega Angwenyi vs. National Land Commission & 2 Others* [2019] eKLR in support of the holding that- (a) in order to be considered a bona fide purchaser for value, there must be proof that the title is valid and legal. (b) the purchaser must have carried out the necessary due diligence to determine the lawful owner. (c) he must have paid valuable consideration for the purchase price. The respondent maintained that the appellant's title was acquired illegally and un procedurally and cited the High Court decision in *Elijah Makeri Nyangwara vs. Stephen Mungai & Another* [2013] eKLR which held that for section 26 of the [Land Registration Act](#) to be operative, it is not necessary for the title holder to be a party to the vitiating factors. Lastly, the respondent urged this Court to uphold the decision of the ELC dismissing the appellant's case and upholding the counter-claim and condemn the appellant to bear the costs of this appeal and the proceedings before the ELC.
14. As alluded to earlier, this appeal will stand or fall on question whether or not the appellant's title was indefeasible. Section 26 of the [Land Registration Act](#), 2012 fortifies the doctrine of sanctity of title as follows:-
  26. Certificate of title to be held as conclusive evidence of proprietorship.
    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.



15. The doctrine of sanctity of title is derived from the Torrens System of Registration. This system provides that all Courts shall take a title document issued by a land registrar (the State) as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained in the Title. This essentially means that an innocent buyer who purchased a property, and was legally issued with a title deed by a land registrar is the rightful owner even if there were irregularities or illegalities in the initial allocation process.
16. However, even though the law provides for the indefeasibility of a title, the said principle is not absolute. The law regarding the indefeasibility of a title to land was settled with finality by the Supreme Court in *Dina Management Limited vs. County Government of Mombasa & 5 Others* (Petition No. 8 (E010) of 2021). In this landmark decision, the Supreme Court departed from the Torrens System of Registration and held that a title document can be invalidated if it is proven that the initial allocation process was illegal or unprocedural. This simply means possession of a registered title document by a property owner is not conclusive proof of ownership.
17. The above case revolved around the irregular allocation of a parcel of land in Nyali Beach, Mombasa. Over time, the property changed hands through subsequent transfers until Dina Management Limited acquired it. The County Government of Mombasa forcibly entered into the property, asserting that the land was irregularly allocated as it formed part of public land. On the other hand, Dina Management Limited argued that it acquired the land lawfully and was issued with a title document to that effect. The dispute led to litigation at the Environment and Land Court, followed by an appeal to the Court of Appeal, and eventually, a petition to the Supreme Court.
18. The Apex Court held that since the first allocation to the original allottee was irregular, no valid legal interest could pass, as such all the subsequent transfers including the allocation to Dina Management Limited were irregular and illegal. Therefore, the title held by Dina Management Limited could not be held to be indefeasible. The principle laid down in the said case was that the protection offered to a bona fide purchaser for value without notice does not apply where the Title to the property was obtained irregularly or illegally. According to the said decision, a title document is not sufficient proof of ownership of property where the origin of that Title has been challenged. The holder of the Title document must go beyond the instrument itself and show that the process of acquisition from inception was legal. The critical finding that formed the basis of the said decision was that no documents were produced to show that the property in question was lawfully allocated to the first owner. Important documents such the Part Development Plan (PDP) and a letter of allotment based on the approved PDP were absent. The absence of such critical documents led to the Court's conclusion that the allocation of the suit property to the first owner was illegal and as a result, either the first owner, or subsequent purchasers acquired no good title capable of transfer.
19. The rationale for the said reasoning is that a registered proprietor acquires a valid Title only if the original allocation was legal. Therefore, the onus is on the purchaser to carry out the necessary due diligence before purchasing property. Such due diligence, if conducted would enable a prospective purchaser discover any defects in the Title. For example, absence of the critical documents such as the PDP and a valid letter of allotment should signal an illegal process. In such circumstances, as was held by the Apex Court, the protection offered to a bona fide purchaser does not apply, and the ensuing Title would be invalid.
20. The Supreme Court in the said decision resolved earlier conflicting decisions by the Court of Appeal, which essentially pulled in different directions with regard to the bona fide purchaser which include those decisions cited by the appellant. Others include this Court's decision in *Tarabana Company*



Limited vs. Sehmi & 7 Others [2021] eKLR, where it determined the appellant to be a bona fide purchaser deserving of protection, as the Title to the suit property, though acquired illegally, was acquired before the appellant came into the picture i.e., the appellant was not involved in the illegality. However, in Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR, this Court determined the appellant not to be a bona fide purchaser, as it knew about the challenge relating to the Title to the suit property. Fraudsters sold the suit property to the appellant who in turn sub-divided it into various parcels for sale. The Court of Appeal held that no valid Title passed to the appellant, which in turn meant that Titles acquired by the subsequent purchasers of the subdivisions were also null and void.

21. The Supreme Court in Dina Management Limited (*supra*) outlined the elements of a bona fide purchaser for value to include:

- (a) the acquisition of a valid and legal title;
- (b) conducting the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title; and,
- (c) payment of valuable consideration for the purchase of the suit property.

22. Another important principle from the above decision is that where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the title that is under challenge, 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. It is important to recall that the dispute in Dina Management Limited related to land that was originally designated as an open space for public use and could not be described as unalienated public land. It was therefore not available for alienation to the original allottee. From the said decision, it is manifestly clear that irregularities and illegalities in the allocation of public land cannot be sanctioned based on indefeasibility of title and although Article 40 of *the Constitution* grants the right to property, such rights are limited when the property is found to have been unlawfully acquired.

23. This Court (differently constituted) recently in Telposta Pension Scheme Registered Trustees vs. Intercountries Importers and Exporters Limited and 5 Others, Civil Appeal No. 293 of 2016 culled the following principles from decided cases on the question of indefeasibility of a title:-

- i. When a registered proprietor's root of title is under challenge, the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title, and 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.
- ii. A registered proprietor only acquires an absolute and indefeasible title "if and only if" the allotment was legal, proper, and regular, and a court of law cannot on the basis of indefeasibility of title, sanction illegality or give its seal of approval to an illegal or irregularly obtained title.
- iii. Courts will not recognize or protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor.

24. The above position is consistent with section 26 (1) of the *Land Registration Act*. The said section not only retained the language of section 23 of Registration of Titles Act (repealed), but at the same time, it provides exceptions upon which a title can be defeated. These are fraud or misrepresentation



to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

25. We will now apply the principles enunciated by the Supreme Court to this case. We note that there is uncontroverted evidence by the respondent's witnesses and the documents on record clearly showing that the suit property was gazetted public land. The land was part of a gazetted forest and the use of the land has never changed from forestland. There is unchallenged evidence showing that Legal Notice No. 152 dated 8<sup>th</sup> October 2001 published by the Ministry of Environment whose intention was to de-gazette 270.5 hectares of the forest land was nullified by the High Court in Nairobi Judicial Review No. 421 of 2002 and no appeal was ever preferred against the said decision. Therefore, the said land remained gazetted forestland. Regarding the appellant's lease, the respondent's witness made a critical revelation, which was not challenged. He pointed out that the term of the lease was 99 years with effect from 1<sup>st</sup> March 1998. However, the register for the parcel was opened on 28<sup>th</sup> January 2000 prior to the issuance of the legal notice in 2001. These inconsistencies cast serious doubts on the validity of the appellant's title raising pertinent questions on the legality of its acquisition both in terms of compliance with the law and procedure. The appellant cannot hide behind the doctrine of bona fide purchaser for value.

26. Accordingly, we find that this appeal is devoid of merit.

Consequently, we dismiss this appeal and uphold the decision of the Environment and Land Court, Nakuru dated 11<sup>th</sup> July 2020 (Ohungo, J.) delivered in ELC 159 of 2013 (formerly HCCC No. 307 of 2010). The appellant shall pay the respondent the costs of this appeal and the costs of the proceedings before the ELC.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

