



REPUBLIC OF KENYA



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**Koech v Kenya Forest Service (Civil Appeal 39 of 2020)
[2024] KECA 1516 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1516 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 39 OF 2020
FA OCHIENG, MA WARSAME & JM MATIVO, JJA
OCTOBER 25, 2024**

BETWEEN

SAMUEL CHELULE KOECH APPELLANT

AND

KENYA FOREST SERVICE RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya at Kericho (Onyango, J.) dated 12th July, 2019 in ELC Civil Suit No. 50 of 2017)

JUDGMENT

1. A brief account of the factual background which precipitated the litigation before the Environment and Land Court (ELC), Kericho culminating in this appeal 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 5th May, 2015 filed at the ELC Kericho, Samuel Chelule Koech (the appellant) sued the Kenya Forest Service (the respondent) claiming that at all material times he was the legal purchaser of plot number Kericho Municipality L.R.No. 631/1570 having purchased it from one Joel Kipkorir Siele, who was its registered proprietor. His contestation was that the respondent forcefully encroached and illegally trespassed into his said land, denied him entry into the land and blocked him from using it purporting to be the lawful proprietor of the land. He prayed for a permanent injunction against the respondent or its agents preventing them from entering into the said land or in any manner dealing with the land. He also prayed for damages, costs of the suit or any other relief the court could deem just and fit to grant.
3. In its statement of defence dated 7th March, 2018, the respondent denied that the appellant ever occupied the said land. It maintained that it has occupied the said land since 1932, and that the land forms part of its sub-county offices, staff residential houses and a tree nursery. Regarding the sale agreement dated 24th July, 1995 relied upon by the appellant, the respondent averred that the said



- agreement was unenforceable because consent of the Commissioner of Lands was not obtained in accordance with condition number 9 of the special conditions of the Grant. The respondent also averred that the appellant's claim premised on his assertion that he bought the land in 1995 was time barred. It prayed that the appellant's suit be dismissed with costs.
4. Before the trial court, the appellant's evidence was that by a letter dated 30th August, 1986, addressed to the Commissioner of Lands, Mr. Siele applied to be allocated a parcel of land. Subsequently, the Commissioner of Lands allocated him the land in question in 1989, and he was issued with a letter of allotment. He was also issued with a Grant on 5th September, 1995 being L.R. No. 631/1570, I.R. No. 56984. Copies of the said letter and the allotment, the map and the title deed were produced as exhibits. He testified that upon paying for the land, he was issued with a title deed and his surveyor fixed the beacons after which he took possession until 2000 when the respondent obstructed him from accessing the land claiming that it was grabbed and in 2017. Further, the respondent stopped him from developing the land. Upon cross-examination, he stated that he was not aware that Mr. Siele was required to obtain consent from the Commissioner of Lands to sell the land to him.
 5. Fredrick Mirambo, the respondent's officer in charge at Kericho adopted his written statement dated 7th March, 2018. He testified that the respondent's offices, staff quarters and a tree nursery are located on the said land, which measures 3.78 hectares. He stated that the respondent has been in possession since 1970's. He denied that the appellant has ever been in possession, even though he had earlier fenced the land. He disputed the appellant's evidence that a road separates the respondent's land from the suit land and stated that the road to Kericho High School passes through the land and the beacons marking the land are intact.
 6. In the impugned judgment dated 12th July, 2019, the trial judge dismissed the appellant's suit for failure to comply with the conditions of the Grant which required the consent of the Commissioner of Lands to be sought and obtained before inter alia selling the property. The trial court held that the sale was unlawful and therefore the appellant could not base his claim on an illegal agreement. The learned judge also dismissed the appellant's prayer for tress pass on grounds inter alia, that the appellant or Mr. Siele never occupied the land. Lastly, the trial court held that the appellant never produced ownership documents in his name.
 7. Aggrieved by the verdict, the appellant lodged this appeal. In his memorandum of appeal dated 23rd July, 2020, the appellant cited 8 grounds of appeal. However, the said grounds can be reduced to one ground, namely, whether the appellant established by way of evidence that he lawfully acquired an interest in the said property capable of being protected by the law. The appellant prays that his appeal be allowed, the decree and judgment of the trial court dated 12th February, 2019 be set aside and substituted with a judgment allowing his plaint in its entirety. He also prays that the respondent be ordered to bear the costs of this appeal and the proceedings before the trial court.
 8. In his submissions, the appellant cited section 107 of the *Evidence Act* and the High Court decision in *Hardware Trading Stores Limited v Christopher Orina* [2020] eKLR in support of the proposition that the plaintiff must prove his case on a balance of probabilities. He maintained that he proved his case to the required standard and faulted the learned judge for holding that he could not prove proprietary interest because the title was yet to be transferred to him. He maintained that the sale agreement between him and the vendor satisfied the provisions of section 3 (3) of the *Law of Contract Act*, therefore, the agreement was valid and enforceable.
 9. The appellant maintained that in absence of a gazette notice declaring the land to be a forest, it cannot be said to be forestland as alleged by the respondent. He maintained that he was consistent in his assertion that he was in occupation and cited *Kamau James Njendu v Serah Wanjiru & Another* [2018]



eKLR in support of the proposition that the first in time title should prevail. He argued that there was no requirement in the special conditions requiring the Commissioner of Lands to consent to the sale agreement and relied on the High Court decision in *Purple Rose Trading Company Limited v Bhanoo Shashikanti Jai* [2014] eKLR in support of the said argument.

10. In opposition to the appeal, the respondent submitted that the appellant was not an innocent purchaser for value. It cited this Court's decision in *Weston Gitonda & 10 Others v Peter Rugu Gikanga & Another* [2017] eKLR which described a bona fide purchaser for value as-
 - (a) one who holds a certificate of title;
 - (b) purchased the property in good faith;
 - (c) had no knowledge of the fraud;
 - (d) purchased for valuable consideration;
 - (e) the vendor had apparent a valid title;
 - (f) purchased without notice of any fraud; and,
 - (g) was not party to any fraud. The respondent argued that the failure by the appellant to provide a title deed in his name suggests that he is not an innocent purchaser for value. The respondent also argued that the appellant did not prove his case to the required standard. Lastly, the respondent maintained the appellant did not proof of ownership of the property or possession circumstances.
11. As mentioned earlier, this appeal will stand or fall on one germane issue, which is, whether the appellant established by way of evidence that he lawfully acquired an interest in the said property capable of being protected by the law.
12. The appellant's case is that he purchased the suit property from a Mr. Siele who was the lawful owner. The appellant maintained that Mr. Siele applied for a piece of land in writing to the Commissioner of Lands and subsequently, he was allocated the subject land. It is this land which the appellant claims to have purchased from Mr. Siele pursuant to a written agreement a copy of which is on record. It was his case that Mr. Siele surrendered to him his letter of allotment and a Grant issued to him as the lawful Grantee of the said land. However, the transfer was yet to be registered. No reasons were proffered for the failure to register the transfer in his favour. Therefore, his claim for ownership is based on the sale agreement between him and Mr. Siele.
13. The appellant maintained that no evidence was tendered to demonstrate that the said land was forestland. This argument is narrow and self-defeating because the appellant produced a letter of allotment showing the Commissioner of Lands allocated the land to Mr. Siele. If it was not public land, one wonders what business the Commissioner had in allocating it. The other reason why the appellants reasoning collapses is that in support of his case he produced Grant No. I.R. 66984, L.R. NO. 631/1570. The title is a Grant given to Mr. Siele by the government for a term of 99 years. The Commissioner of Lands on behalf of the President signs it. We fail to understand what other evidence the appellant was expecting to establish that the land was actually public land. Therefore, it is beyond doubt that the land was public land.
14. The questions that beg for answers are: -
 - (a) whether the land was available for allocation.



- (b) whether the land was lawfully and procedurally allocated to Mr. Siele from whom the appellant claimed to have purchased it from. The appellant never called Mr. Siele or a land officer from the lands office as a witness to shed light on how the land was allocated, nor did the appellant adduce evidence to demonstrate that the land was available for allocation and that it was procedurally allocated. These are pertinent questions, which required to be proved by way of evidence for the trial court to satisfy itself that the title the appellant purchased from Mr. Siele was indefeasible. The appellant proceeded on the assumption that he had a sale agreement and a Grant which was yet to be transferred to him, and that the title was indefeasible, and therefore, he acquired an interest which should be protected by the law. He was wrong, as we shall elaborate in the succeeding paragraphs.
15. The Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 others* (Petition No. 8 (E010) of 2021) 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. Therefore, it was not sufficient for the appellant to rely on a sale agreement and an untransferred title and expect to surmount the threshold required to demonstrate that public land was properly allocated. The Supreme Court in the above case held that if the first allocation to the original allottee is irregular, no valid legal interest could pass to another person, as such all the subsequent transfers (or sale) are irregular and illegal. The Supreme Court held 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.
16. In arriving at the decision, the Supreme Court held that a title document is not sufficient proof of ownership of property where the origin of that Title has been challenged. In this case, the respondent maintained that the land in question is public land, that it is used as forestland and on the land stands department of forestry offices and staff houses. Confronted with this information, the appellant ought to have gone beyond the alleged sale agreement and letter of allotment and show that the process of acquisition of the land from inception up to the issuance of the title was legal.
17. The Supreme Court in the above case was categorical that a registered proprietor acquires a valid Title only if the original allocation was legal. Therefore, the onus was on the appellant to carry out the necessary due diligence before purchasing the property, and establish whether the property was available for allotment and whether all the necessary procedures and the law were complied with. In the circumstances, the protection offered to a bona fide purchaser cannot be extended to the appellant unless it is demonstrated by evidence that the allotment was lawful.
18. There is nothing to show that the appellant was an innocent purchaser for value. The Supreme Court in the said case 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.
19. The Supreme Court further held 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 or a person claiming interest in the land 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. The Supreme Court emphasized that 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.

20. This Court (differently constituted) in Telposta Pension Scheme Registered Trustees v Intercontinies 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.
21. It is our finding that the appellant did not demonstrate that he lawfully acquired any interest over the subject property capable of being protected by the law. In fact, the sale agreement upon which he hinged his claim to the land was found by the trial Court to be unenforceable on grounds that the original grantee sold the land to him in total breach of special condition number 9 of the Grant, which prohibited sale or transfer without prior consent of the Commissioner of Lands. Interestingly, the sale agreement though drawn by an advocate did not mention the obligation by the vendor to obtain the consent to transfer.
22. Arising from our analysis of the facts, the submissions, authorities and the conclusions arrived at herein above it is our finding that this appeal is devoid of merit. Accordingly, we dismiss this appeal and affirm the decision of the trial court. We order that the appellant shall pay to the respondent the costs of this appeal and costs of the proceedings before the trial court.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 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.

