



Dim Properties Limited v Lamu Breeze Investments Limited & 6 others (Civil Appeal E013 of 2021) [2024] KECA 1912 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1912 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E013 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
OCTOBER 11, 2024**

BETWEEN

DIM PROPERTIES LIMITED APPELLANT

AND

LAMU BREEZE INVESTMENTS LIMITED 1ST RESPONDENT

EQUATORIAL COMMERCIAL BANK LIMITED 2ND RESPONDENT

CHARLES MALAKWEN 3RD RESPONDENT

LUCAS CHIMERA KENGA 4TH RESPONDENT

THE SENIOR REGISTRAR OF TITLES 5TH RESPONDENT

COUNTY GOVERNMENT OF KILIFI 6TH RESPONDENT

ATTORNEY GENERAL 7TH RESPONDENT

(Being an appeal against the judgment of the Environment and Land Court at Malindi (Olola, J.) delivered on 22nd November 2019 in ELC Case No. 224 of 2014)

JUDGMENT

1. By a Plaint dated 29th April 2013 and amended on 29th July 2013, Lamu Breeze Investments Ltd and Equatorial Commercial Bank Ltd, the 1st and 2nd respondents, filed a suit against the appellant, Dim Properties Limited, and the 3rd to 7th respondents, seeking a declaration that the 3rd and 4th respondents' registration as proprietors of Plot No. 10159 North of Kilifi township vide title CR. No. 44095 (the subject plot) was obtained through fraud, was illegal, null and void; a declaration that the 3rd and 4th respondents' purported title CR No. 44095 is bad, defective, null and void, and was incapable of conferring any lawful interest to the appellant; a declaration that the consolidation of Plot Nos. 10159 and 10160 and the certificate of consolidation issued was null and void; an order directing the Senior



Registrar of Titles Mombasa to rectify the land register by deleting and/or cancelling the registration of the 3rd and 4th respondent as proprietors of the subject plot; an order of cancellation of the title in respect of LR. No. 28462 Kilifi held by the appellant; a declaration that Certificate of Title No. for CR. 18245 is a valid Title Deed with encumbrance entry No. 5 as a charge in favour of Bullion Bank Ltd; a mandatory order directing the 5th and 6th respondents to restore the beacons of CR No. 18245 as they were in 1994; and a mandatory order directing the appellant by itself, its servants and or agents to demolish the perimeter wall around Plot LR 28462 and remove all the debris thereof from the subject plot.

2. It was the 1st and 2nd respondents' case that the 1st respondent was the registered proprietor as a lessee from the Government of the subject plot measuring 1.036 Ha following a transfer dated 6th September 1994; and that, vide a charge dated the same day, the 1st respondent charged the subject plot to Bullion Bank Ltd which, later on, and by change of name, became the 2nd respondent. The 2nd respondent still has in its possession the original Certificate of title delivered over to it to secure advances paid to the 1st respondent.
3. The 1st respondent stated that sometime in or about January 2012, it discovered that a perimeter wall had been erected round the subject plot by unknown people. After hiring a private surveyor to investigate the matter, they discovered that some beacons marking the subject plot had been interfered with, and that it had been consolidated with LR No. 10160 to create a new Plot No. L.R. 28462 (the consolidated property). Upon further investigations, they established that, on or about 28th June 2007, one Charles Malakwen and Lukas Chimera Kenga, the 3rd and 4th respondents, had illegally and fraudulently caused themselves to be registered as the proprietors of the subject plot, and that on 19th August 2008, they transferred the subject plot to the appellant. It was their case that the registration and certificate of title issued to the 3rd and 4th respondent and the eventual transfer to the appellant was bad in law for being tainted with fraud and illegality.
4. They further accused the Senior Registrar of Titles, the 5th respondent, the officials of the County Government of Kilifi, the 6th respondent, and the Attorney General, the 7th respondent, or their agents, of acting with mala fides in effecting the registration and issuing them with a certificate of title and consolidating the subject plot with other properties.
5. In their defence, the 3rd and 4th respondents denied the claims. They asserted that they were the owners of the subject plot which they sold and transferred to the appellant; that they were duly registered as the proprietors of the subject plot and were issued with a title deed on 15th July 2008; and that they sold the parcel to the appellant as they intended to pay the outstanding rates and pending hospital bills for the 4th respondent's father who passed away in 2006.
6. On its part, the appellant denied the claim in a Statement of Defence in which it averred that the subject plot referred to by the 1st and 2nd respondents as LR No. 10159 was non-existent and unregistered and that, therefore, no cause of action existed as against it, and that the suit should be struck out with costs.
7. The appellant further contended that the 3rd and 4th respondents were registered as joint proprietors of the subject plot, and that, by a Sale Agreement dated 29th July 2008 made between itself and the 3rd and 4th respondents, it purchased the subject plot; that, by a transfer dated 18th August 2008, the 3rd and 4th respondents transferred the subject plot to it, and that it was subsequently registered as the proprietor on 19th August 2008.
8. The appellant claimed that consolidation of the subject plot with LR No. 10160 which also belonged to it occurred in 2010, and that this resulted in the consolidated parcel No. 28462 registered in its name



- and that, therefore, the 1st and 2nd respondent did not have any right, title or interest over the subject plot that was no longer in existence. Consequently, they were not entitled to any of the reliefs sought.
9. On their part, the 5th and 6th respondents filed a joint Statement of Defence in which they denied any claims of fraud and/or illegality attributed to them. The 7th respondent also filed a Statement of defence generally denying the allegations. It was their case that there was no reasonable or proper cause of action against them and urged the court to strike out the suit in so far as it related to the County Government of Kilifi.
 10. PW1 Bhupinder Singh Dogra relied on his statement and produced various documents to the court, including a letter of allotment marked for identification. Among the documents produced were the 1st respondent's title CR number 18245 and Deed Plan No. 72857 dated 21st July 1987 a survey plan comprising LR Nos. 10160, 10159 and 10158 with corresponding Deed Plans sequenced as Nos. 72858, 72857 and 72856 respectively. The witness stated that the third defendants plan comprises the Deed Plan No. 209673 and is dated in 1996.
 11. Next was PW2, Brian Otieno Asiri, the representative of the 2nd respondent who produced the original title of the subject plot belonging to the 1st respondent. He stated that the 3rd respondent' title was a replica of the 1st respondents title, save that the CR number was indicated as No. 44095 and the Deed Plan number was indicated as No. 209673.
 12. Mr. Mwanyungu (PW3) was the land surveyor who conducted investigations of the subject plot and provided a report which was submitted in evidence. According to the report, LR No. 10159 and LR No. 10160 comprising Deed Plans No. 72857 and 72858 were consolidated into the new plot. After consolidation, they became LR No. 28462 comprising Deed Plan No. 310179. The property was described as a sand beach plot.
 13. In his evidence, DW1, the 4th respondent, stated that his late father and stepmother resided on the subject plot; that the 4th respondent, who was his father's friend, assisted him to pursue the title document for the subject plot. He stated that he had nothing to show how the 4th respondent acquired the land, but that he was issued with the title in 2008 and sold it the same year; that he needed the money to pay the land rates and treatment for his father, who died in 2006. He stated that various searches were conducted on the title, which showed that it was owned by himself and the 4th respondent, and that he was aware of complaints of irregular dealings with the title by the 1st respondent, and that the police had carried out investigations and found the complaints to be invalid.
 14. Ashok Doshi (DW2) stated that he was a director of the appellant; that he purchased LR. No. 10160, which was adjacent to the subject plot. He thereafter purchased the subject plot and amalgamated both plots when he received the necessary authorization from the Ministry of Lands and from the County Council of Kilifi on 14th May 2010; that the consolidated plot was issued with Title No. 28462. Thereafter, he built a boundary wall around the consolidated plots.
 15. Having considered the evidence, the learned Judge of the Environment and Land Court found that the 1st and 2nd respondents had proved their case on a balance of probabilities and upheld their claim; that the registration of 3rd and 4th respondents as proprietors of the property was fraudulent; and that their transfer to the appellant was therefore invalid. The court concluded that:

“In a matter such as this one where the 1st and 2nd defendants are being accused of fraudulently and illegally causing themselves to be registered as the proprietors of a parcel of land for which another title already existed, it was of paramount importance for the said



defendants to clearly and succinctly demonstrate to the court how they came to be the beneficiaries of that parcel of land.

It is otherwise common knowledge that if the 1st and 2nd defendants did not have a proper title to the suit property, there was nothing capable of being transferred to the 3rd defendant in terms of their interest or rights over the property. Indeed, I note that while the 3rd defendant purports to have acquired the property as aforesaid from the two defendants, a copy of the title it purportedly acquired after the purchase was not produced before this court.”

16. In so finding, the Judge proceeded to enter Judgment against the appellant, the 3rd, 4th, 5th, 6th and 7th respondents as prayed in the Plaint.
17. Aggrieved by the trial Judge’s decision, the appellant filed an appeal to this Court on the grounds: that the learned Judge was in error in entering judgment in favor of the 1st and 2nd respondents as against the appellant; in failing to take into account and hold that the appellant’s title to the consolidated property was guaranteed and indefeasible in law as an innocent purchaser for value unless it was proven that the appellant was party to any fraud alleged to have been perpetrated by it; in failing to hold that the appellant’s title, having been acquired as an innocent purchaser for value, was protected in law, and that the 1st and 2nd respondents’ remedy, if any, was in damages against the perpetrators of the alleged fraud against them; in holding that the 1st and 2nd respondents’ title notwithstanding that it did not exist following the consolidation of L.R. Nos. 10159 and 10160 into the consolidated property; in holding that the copy of the Title the appellant acquired upon purchase of the subject plot from the 3rd and 4th respondents was not produced before the Court when it was in fact produced; in failing to appreciate that the 5th, 6th and 7th respondents conceded in evidence that they followed due process in registering the appellant as the registered owner of the subject plot, and in having the two titles consolidated, which effectively validated the appellant’s title as good in law; in failing to appreciate that, since acquiring the subject plot, the appellant had not only settled its rents and rates, but had also undertaken substantial developments without any notice of any alleged defect in Title whereas the 1st and 2nd respondents had not adduced any evidence whatsoever for the payment of rates; and that the learned Judge wholly misapplied the principle in the case of *West End Butchery Ltd -Vs- Arthi Highway Developers Ltd & 6 Others* (2012) eKLR on the existence of two different titles.
18. When the appeal came up for hearing on a virtual platform, learned Counsel Mr. Khargram appeared for the appellant and orally submitted. With respect to the issue of whether the appellant was a bona fide purchaser for value, it was contended that the appellant purchased the subject plot from the 3rd and 4th respondents for value; that, since the appellant was a bona fide purchaser, under section 80 (2) of the *Land Registration Act*, it ought to have been statutorily protected, and that the trial court ought not to have ordered the rectification of the register; and that the appellant was in possession and had acquired the property without notice of any omission, fraud or mistake that was sought under rectification. It was submitted that the appellant had produced all the prerequisites set out in the case of *Katende vs Haridas & Company Limited* [2008] 2 EA 173; that the appellant had produced to evidence all the necessary documents to satisfy the court that it purchased the subject plot without knowledge of fraud, and in reliance on the Torrens system of registration; and that the appellant had since invested in the properties and stood to suffer substantial loss.
19. It was further submitted that the appellant undertook the necessary due diligence in obtaining title to the subject plot, which included searches of the Land Registry which did not disclose the existence of the 1st respondent’s title; that the learned judge was therefore wrong in concluding that two titles existed in respect of the subject plot.



20. With regard to the allegation of fraud, the appellant submitted that the 1st and 2nd respondents did not prove fraud by the appellant and neither did they prove the existence of fraud on the part of the 3rd and 4th, 5th 6th and 7th respondents and relied on the case of *Kuria Kiarie & 2 others vs Sammy Magera* [2018] eKLR for the proposition that fraud must be specifically pleaded and proved.
21. Turning to the 1st respondent's copy of the letter of allotment, it was submitted that the learned judge wrongly relied on a non-existent letter of allocation to find that the 1st respondent's title in the subject plot was properly established because, during the proceedings, a copy of the letter of allotment was marked for identification, but that the maker was not called to testify as to its veracity. The case of *Ken Nyaga Mwigie vs Austin Kiguta & 2 others* [2015] eKLR was relied on for the proposition that a document marked for identification and not admitted to evidence was of no evidentiary value, and merely amounted to hearsay evidence.
22. The appellant also faulted the learned Judge for finding that the appellant had failed to produce the title to the subject plot when, in fact, the title was produced in evidence as proof of the appellant's ownership of the subject plot.
23. In concluding the submissions, the appellant distinguished the case of *Arthi Highway Developers Limited vs West End Butchery Limited* [2015] eKLR as being different from the instant suit as it involved two competing titles while, in this case, only the appellant's title was produced in evidence.
24. On their part, learned counsel Mr. Munyi submitted that the 1st and 2nd respondents had proved their case to the required standard as they properly established the fraudulent manner of acquisition of the subject plot. It was further submitted that the court dealt with the root of the two different grants of the title to the subject plot, one being the 1st respondent's grant which was CR No. 18245, and the other being the appellant's grant of CR No. 44095. It was submitted that the fact that the maker did not produce the letter of allotment was not fatal since it was not the 1st and 2nd respondent's grant that was in contention; that they produced a copy of the sale agreement with Justus Kalewa Ndeto, copies of receipt showing payments of stand premium, and a copy of memorandum showing how the subject plot had changed hands.
25. On the other hand, it was submitted that no documents were produced by the appellant to show how the grant was issued to the 3rd and 4th respondents or how they acquired the subject plot; that the root of title they claimed to have acquired was not established; and that, according to the appellant's evidence, their property was situated in Mtwapa along the Mombasa -Malindi Road while the subject plot belonging to the 1st and 2nd respondents is a beach plot situated in the Town Council of Kilifi. In other words, counsel submitted that the properties are different. It was also submitted that a survey plan FR 87/20 also showed that Deed Plan No. 209673 of the appellant's title did not conform to the numbering sequence specified in the survey scheme. In other words, counsel submitted that the root of the appellant's title was a product of fraud and that, for this reason, the appellant did not acquire good title; that, furthermore, prior to consolidation, the original deed plan was required to be surrendered but, that it was of significance that the original plan and title were in the custody of the 2nd respondent; and that this meant that, the consolidation having been based on a fraudulent document, no proper consolidation had occurred. Consequently, it was submitted that fraud on the appellant's part was proved in the process of consolidation of the appellant's property with the subject plot.
26. Learned counsel Mr. Gikandi for the 3rd and 4th respondents supported the appeal and the appellant's counsel's submissions. It was submitted that the judgment lacked credibility as the learned Judge relied on the copy of the letter of allotment produced by the 1st and 2nd respondents, yet it was marked for identification, but that the maker was not called to produce it; and that, therefore, the root of the 1st



and 2nd respondents title lacked foundation. Counsel asserted that the suit should be remitted to the trial court for rehearing.

27. On behalf of the 4th and 5th respondents, Mr. Makuto, learned counsel for the State, informed the Court that they would not be submitting, and would instead leave the matter for the Court's determination.
28. Learned counsel, Ms. Jabi for the 6th respondent also informed us that she would not be submitting, and that she would also leave the determination of the appeal to the Court.
29. This is a first appeal, and the duty of this Court is well settled. The Court is required to re-evaluate, reassess and re-analyse the evidence and reach its own independent conclusion. An appellate Court will nevertheless not ordinarily interfere with the findings of fact by the trial court unless such finding was based on no evidence at all, or on a misapprehension of the facts, or if the Court has shown demonstrably to have acted on wrong principles in reaching its findings. See *Selle vs Associated Motor Boat Co Ltd* [1968] EA 123.
30. Given the foregoing, and having considered the Record of appeal and the parties' submissions, the main issues for consideration are: i) whether fraud on the part of the 3rd and 4th respondent was proved and if so, whether the appellant acquired a good title; ii) whether the appellant was a bona fide purchaser for value without notice of the defect in the title to the subject plot; iii) whether the 1st respondent's failure to produce the letter of allotment was fatal; and iv) whether the learned judge was in error in finding that the appellant had not produced its title to the subject plot.
31. With respect to the issue as to whether fraud on the part of the 3rd and 4th respondents was proved, the 1st and 2nd respondents alleged that the certificate of title issued to the 3rd and 4th respondents, and eventually transferred to the appellant, was bad in law having been tainted with fraud and illegality. The particulars of fraud were that the 5th respondent registered the 3rd and 4th respondents as proprietors of the subject plot with the full knowledge that the 1st and 2nd respondents held valid title to the subject plot; that they used Certificates of Title No. 44095 to issue a title to the 3rd and 4th respondents with the intention of defeating the 1st respondent's title; that the 3rd and 4th respondents held themselves out as the proprietors of the subject plot with the intention to transfer the subject plot to the appellant; that the consolidation of the subject plot with the appellant's property was unlawful and illegal and intended to deprive the 1st respondent of the subject plot; and that the appellant, without their consent, consolidated the subject plot with title to LR No. 10160 and Deed Plan No. 72858 and create the consolidated property with Deed Plan No. 310179.
32. According to the 1st and 2nd respondents, in view of the illegality and fraud on which their title was contrived, the 3rd and 4th respondents could not convey any rights or interest in the subject plot to the appellant and that, without such authority, the subject plot did not transfer or vest in the 3rd and 4th respondents, and neither did it vest in the appellant.
33. The learned judge found that the title to the subject plot as held by the 3rd and 4th respondent was not properly acquired since its registration resulted from fraud perpetuated at the Land registry; and that, therefore, the 1st respondent's title continued to prevail. In so finding, the learned judge had this to say:

The date shown for the endorsement of the grant issued to the Defendants was 15th July 2008 while that for the Plaintiff was endorsed on 27th August 1987. That necessarily means that the Grant issued to the Plaintiffs was the first in time to be registered and in the absence of any irregularity thereon it must be allowed to prevail. As I understand it, the 1st Plaintiff's title was not cancelled by the titles issued to the 1st 2nd and 3rd Defendants. It remains in the custody of the 2nd Plaintiff Bank protected under the provisions of Section 23 (4) of the



Registration of Titles Act (repealed) which gave the owner of such property absolute and indefeasible title to his property.”

34. The record discloses that the 1st respondent’s title was derived from a sale agreement between Justus Kalewa Ndoto and the 1st respondent’s nominee Bhupinder Singh Dogra’s, as purchaser. He also produced documents showing how the subject plot was sold and transferred to the 1st respondent. The original title to the subject plot was indicated as CR. No. 44094 in respect of LR No. 10159, which comprised the property demarcated on Deed Plan No. 72857. Thereafter, a charge in favour of the 2nd respondent was registered over the title to the subject plot
35. By contrast, the 3rd and 4th respondents claim that their title to the subject plot arose following a request made by the 4th respondent’s father, who was alleged to be residing on the subject plot, for registration of the title in his name. When the title was subsequently issued, it was registered in the 3rd and 4th respondents’ name. No letter of allotment was produced evidencing allocation of the subject plot to the 4th respondent’s father. When asked, the 4th respondent was unable to explain how the title they possessed had come into existence, or how they came to acquire the subject plot.
36. This Court in the case of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR regarding the obligation of a registered proprietor of land whose title is under challenge on the grounds of fraud or other illegalities held that:
- “...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... 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....”
37. Like the learned Judge, we are not satisfied that the 3rd and 4th respondents demonstrated how they came to be registered as the proprietors of the subject plot, or prove that they were the lawful and legitimate proprietors. Given that the entire process of acquisition of the subject plot by the 3rd and 4th respondents were without basis, and fraught with illegalities so that the root of their title was not capable of being ascertained, it followed that their title to the subject plot was of no effect and a nullity.
38. The appellant’s grievance at this juncture is that the learned Judge granted orders which included the cancellation in the land register of the 3rd and 4th respondents’ title, that is CR No. 44095, the appellant’s title in respect of the subject plot, the consolidation of the subject plot and LR No. 10160 and the resultant Title No. 28462 registered in the appellant’s name, yet fraud on its part was not established. Challenging the decision, the appellant argues that it was a bona fide purchaser for value and, as such, acquired an indefeasible title following consolidation and registration in its name; and that, since the 1st respondent’s title ceased to exist, there was no basis for cancellation of its title in respect of LR No. 28462.
39. Having found that the 3rd and 4th respondents’ title was fraudulently acquired, the central issue for determination is the question as to whether the appellant was a bona fide purchaser for value without notice. In this regard, what should be borne in mind is that, at all times, the 1st and 2nd respondents’ challenged not only the 3rd and 4th respondents’ title for want of legality on account of fraud but that, in view of the appellant’s title having been derived from the 3rd and 4th respondents’ fraudulent title, the appellant’s title was similarly under challenge. This is because, when the entire transaction beginning with the purchase of the subject plot is examined, what stands out is that, ultimately, it was the appellant that stood to benefit from the purchase and subsequent consolidation of the two parcels.



It is also not lost on us that it is the appellant that owned the parcel adjacent to the subject plot, and that it is the appellant that sought to purchase the subject plot and thereafter consolidated the two plots.

40. In the face of the challenge to its title, what the appellant must demonstrate is that, notwithstanding the defect in the 3rd and 4th respondents' title, it was a bona fide purchaser for value having acquired a valid and legal title to the subject plot and the consolidated property without notice of any defect.

41. 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."

42. In the case of *Dina Management Limited vs 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 the case of *Samuel Kamere vs Land Registrar, Kajiado Civil Appeal No 28 of 2005* [2015] eKLR 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..."

43. This position has recently been reaffirmed by the Supreme Court of Uganda in *Lwanga vs Mubiru and Others* (Civil Appeal 18 of 2022) [2024] UGSC 7, where the court held:

"The principle of bonafide purchaser for value without notice is a general defence in any transaction of sale or purchase of any property particularly land.

The definition of bonafide 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 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 covers both actual and constructive notice of fraud.

In the case of *Jones v. Smith* [1841] 1 Hare 43, the Chancery Court held: "a purchaser has constructive notice of fraud if he had actual notice, that there was some incumbrance 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*.



44. 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 like the Supreme Court in *Dina Management Limited vs 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.
45. Turning first to whether the appellant acquired a valid and legal title to the subject plot and the consolidated title. The appellant's case was that it purchased the subject plot from the 3rd and 4th respondents who were the registered title holders; and that it conducted several searches at the Kilifi Lands Registry that confirmed that the parcel was owned by the 3rd and 4th respondents. However, it is significant that, even though the appellant alleges that searches of the Lands registry were conducted, the record shows that no real effort was made to undertake the necessary due diligence into the root of the 3rd and 4th respondents' title. As rightly observed by the learned judge, the 1st and 2nd respondents lodged a complaint way back in August 2008 complaining of fraudulent dealings with the title to the subject plot. Further, the Record discloses that A.A. Said and Company Advocates acted on behalf of the vendors, the 3rd and 4th respondents and the purchaser, the appellant in the purchase and transfer of the subject plot; that, regarding the 1st respondent's complaint, a letter addressed to the advocate dated 16th March 2009 from the Provincial CID Officer, one Mr. Otieno is instructive. It reads:
- This office is investigating a case of two titles once said to be of Lamu Breeze and the other one from AA said advocates and company of Charles Malakwen and Lukas Chimera Kenga.
- We could only find the document of the two (Malakwen and Lukas) but could not get that of Lamu Breeze at the Lands office. So this office find the complain (sic) by Lamu Breeze to be invalid and cannot make a case against the two groups, and if any let them go through Lands. For this office let A.A. Said continue with his work as planned".
46. The letter is clearly indicative of the complaint lodged by Lamu Breeze Investment Limited, the 1st respondent, regarding fraudulent dealings with its title. On the strength of the serious allegations, the appellant ought to have undertaken further interrogations into the possible existence of a title in the 1st respondent's name. Having neglected to make further inquiries, such as Companies searches to establish the existence or not of Lamu Breeze Investment Limited, or delve into the history of the 3rd and 4th respondent's title, including interrogation of the area survey plan, as will be evident here below, we are left with no doubt that the appellant failed to undertake the necessary due diligence into the legitimacy of the 3rd and 4th respondents' title. It merely took the title at face value and turned a blind eye to the notifications and the significance thereof that pointed to the existence of another title which, as it turns out, was the 1st respondent's title.
47. But of pertinence is the Deed Plan No. 209673 that was attached to the 3rd and 4th respondents' title to the subject plot. A similar deed plan also appears in the appellant's title to the subject plot following the alleged transfer from the 3rd and 4th respondents. When the Deed Plan No. 209673 is considered alongside the Deed Plan No. 72857 attached to 1st respondent's title to the subject plot, it becomes apparent that the two deed plans in respect of the same parcel of land bear distinctly different numbers. In seeking to answer which of the two is the legitimate deed plan and title, a consideration of the Record discloses that the evidence of PW1 and PW3 and the area Survey plan indicated that LR Nos. 10159 and 10160 were demarcated by Deed Plans Nos. 72857 and 72858 respectively. This means that, in so far as LR No. 10159, the subject plot was concerned, the 1st respondent's Deed Plan No. 72857



corresponded to the particulars of the area survey records. Nowhere in the area survey records is there any mention of Deed Plan No. 209673.

48. In our view, a thorough search by the appellant of the survey records for the specific area in which the subject plot was located would have revealed the glaring defect in the Deed Plan number indicated on the 3rd and 4th respondents' title to the subject plot that it purchased. This is more so because, the appellant being the holder of the title to LR No. 10160 for the adjacent plot, demarcated by Deed Plan No. 72858, and which it later sought to consolidate with the subject plot, ought to have appreciated the anomaly in the 3rd and 4th respondents' deed plan. Had it done so, it would have noticed that it did not bear a number corresponding to the sequence indicated in the Survey plan or its title to LR No. 10160, which pointed to the fatal defect in the title they sought to acquire.
49. But the matter does not end there. The defect in the title was further perpetuated at the point of consolidation of the appellant's title to LR No. 10160 with the title to the subject plot acquired from the 3rd and 4th respondent. This occurred when the Deed Plan No. 209673 attached to the 3rd and 4th respondents' title was subsequently discarded and replaced with the Deed Plan No. 72857 specified in the 1st respondent's title of the subject plot held under charge by the 2nd respondent. This irregularity in the process of consolidation was evident from the conclusion of PW3's report where it stated that:

“Survey records vide datum plan FR No. 500/130 show that the Plots LR No's 10159 and 10160 of deed plan no's 72857 and 72858 are consolidated”.
50. What is patently clear from the above is that the defective Deed Plan No. 209673 attached to the 3rd and 4th respondent's title was irregularly substituted for the 1st respondent's Deed Plan number during consolidation with the appellant's LR No. 10160 thereby perpetuating further illegality in the appellant's consolidated title. In effect, it is difficult to perceive how a defect in the title of such great magnitude could have gone unnoticed. Once again, had the appellant carried out the basic, but crucial due diligence in establishing the 3rd and 4th respondent's root of title, it would have had notice of the blatant defect in the title.
51. On the question as to whether any valuable consideration was paid for purchase of the subject plot, we have scrupulously considered the Record and cannot find any evidence of payment by the appellant of the purchase price of Kshs. 13,500,000 specified in the sale agreement. The record does not disclose that any amount was paid. Besides seeking to show documentation alluding to the transfer and consolidation of the subject plot, the appellant has not provided receipts evidencing payment, and nor did the 3rd and 4th respondents provide any acknowledgements of receipt of part or all of the purchase price. Without such evidence, we are not satisfied that the purchase price was paid at all.
52. Indeed, we have said enough. The appellant having failed to carry out the indispensable due diligence on the 3rd and 4th respondent's legitimate ownership of the subject plot, and having had sufficient notice of the existence of the 1st respondent's title, and considering that nothing demonstrated that valuable consideration was exchanged for purchase of the subject plot, its claim that it was a bona fide purchaser of the subject plot without notice is unfounded and consequently fails, and we so find.
53. Concerning the complaint that its title was indefeasible, although Article 40 guarantees the right of every person to acquire property, Article 40 (6) qualifies this right to exclude “...any property that has been found to be unlawfully acquired.”



54. In the case of Chemey Investment Limited vs Attorney General & 2 Others [2018] eKLR, this Court rendered itself on this subject thus:

“Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v. County Council of Kwale (supra); Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v. Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumar Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.”

55. Notwithstanding the appellant’s registration as proprietor of the consolidated property comprising the subject plot, this Court has variously and consistently declined to recognize and protect title to land which has been obtained illegally or fraudulently merely because a person is entered in the register as proprietor. This position was recently reiterated in the case of Wambui vs Mwangi & 3 others (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) where this court emphasized that:

...no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurally or otherwise a product of a corrupt scheme...” (emphasis ours).

See also Bandi vs Dzomo & 76 others (Civil Appeal 16 of 2020) [2022] KECA 584 (KLR).

56. As concerns the complaint that the learned judge wrongly relied on an inadmissible letter of allocation to find that the 1st respondent held good title, we have considered the judgment and, having found that the 3rd and 4th respondents’ title was fraudulent, nothing turns on the existence or non-existence of the letter of allocation in respect of the 1st respondent’s title since the pleadings did not allege any illegality in the 1st respondent’s acquisition of its title. This ground is unmerited and fails.

57. Finally, regarding the learned Judge’s observation that the appellant did not produce its title to the subject plot, we consider this statement to have been made in error. In point of fact, the appellant’s title over the subject plot was produced, and it is this title that indicated the fraudulent Deed Plan No. 209673 that was replaced by the 1st respondent’s Deed Plan No. 72857 during consolidation. That said, notwithstanding the error, the learned judge came to the correct conclusion and was right in upholding the 1st and 2nd respondent’s case. This ground also fails.

58. Accordingly, the appeal lacks merit and fails, and is hereby dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF OCTOBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

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

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR

