



REPUBLIC OF KENYA



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**Korir v Njoki & another (Civil Appeal 34 of 2020)
[2023] KECA 439 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KECA 439 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 34 OF 2020
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
APRIL 14, 2023**

BETWEEN

NELSON RUTO KORIR APPELLANT

AND

EUGINIA NJOKI 1ST RESPONDENT

REGISTRAR OF TITLES 2ND RESPONDENT

*(Being an appeal against the judgement of the Honourable Justice J.O. Olola
delivered on 23rd January 2020 in Malindi ELC Civil Suit 103 of 2015)*

JUDGMENT

1. By his plaint dated June 27, 2015, the appellant herein sued the respondents before the land and environment court sitting in Malindi in ELC Case No 103 of 2015. According to the appellant by a transfer registered as No CR 4286/44, he, on October 14, 2004 became the registered owner of the land measuring 0.0336 ha, being subdivision of plot No 2679 (original No 34/27) section III mainland north as delineated on land survey number 180554, and certificate of title No CR 38322 (hereinafter referred to as the suit property). The 1st respondent, on the other hand, was in possession of certificate of title No CR 57064 as an alleged owner thereof situated in the North Mtwapa Creek in Kilifi District measuring 0.0336 ha being the portion No 2679 (original 3427) section III mainland north as delineated on land survey plan No 180554. The appellant however, contended that the 1st defendant's alleged land is the same parcel belonging to the appellant.
2. It was the appellant's case that the 1st respondent fraudulently acquired interest in the said land on January 8, 2015 notwithstanding the fact that the appellant has always exercised peaceful and quiet occupation thereof through his agent. However, on June 4, 2015, based on the said fraudulent title, the 1st respondent demanded that the appellant gives vacant possession of the said land yet, according to the appellant, he had never transferred his plot to the 1st respondent.



3. On June 13, 2015, the 1st respondent in the company of Kilifi County Government Officials, the police and a gang of youths invaded the appellant's said parcel of land and destroyed all the structures therein and evicted the appellant's said agent therefrom, an action which in the appellant view, was not only illegal but also criminal.
4. In the appellant's evidence, in 2013 after he bought the land and was issued with the title deed on October 14, 2004, he learnt that another title to the same land had been issued in the 1st respondent's name on July 13, 2012. According to the appellant he was unaware of the circumstances under which the new title was issued when he already had the title to the same land. It was his evidence that he purchased the land through an agent and that he never met the purchaser thereof and could not recall having conducted a search thereon.
5. Emily Mwende Makasi, the appellant's neighbour and also the plaintiff's caretaker testified that she took possession of her parcel in 1996 while the appellant became her neighbor in 2004. Both of them purchased their portions from the same person, Salim Kibwana. She supported the appellant's evidence regarding the raid on the appellant's parcel and that she informed the appellant about the same. She was, however, not involved in the appellant's transaction and did not know the circumstances under which the appellant acquired his parcel of land.
6. In his suit, the appellant sought to be declared the rightful owner of the suit property; cancellation of the transfer registered as NoCR 4286/56 and the certificate of title CR No 57064 issued to the 1st respondent on January 8, 2015; a declaration that the same is fraudulent and illegal; General damages and exemplary damages for trespass, malicious destruction of property, flagrant and forcefully takeover of the plaintiff's property without following due process; a permanent Injunction restraining the 1st respondent either by himself, or through his agent, servant, proxies, employee and or accomplices from interfering with the plaintiff's quiet possession and occupation of the suit property; mandatory injunction compelling the 1st respondent to give vacant possession of the same; Costs and Interest.
7. The 1st respondent, while insisting that she was the owner of the parcel of land in question, denied that the same belonged to the appellant. According to her, she bought the said parcel of land from one Abdillahi Kibwana Khamis who inherited the same from his late father, Kibwana Bin Khamis, amongst other dependants of his late father's estate. It was the 1st respondent's case that the said Abdillahi Kibwana Khamis never sold the said land to anyone else including the appellant and denied the fraudulent allegations levelled against her by the appellant. To the contrary, she averred that it was the appellant who obtained his title fraudulently.
8. DW1, the 1st respondent's daughter and the 1st respondent's donee of the power of attorney testified that her mother, the 1st respondent bought the parcel of land on 3rd June, 2011 from Abdillahi Kibwana Khamis the owner hereof and that she was a witness to the said transaction. She was also entrusted to follow up on the process of registration. However, upon going to the Lands Offices, she discovered that the land was already registered in the appellant's name. Upon inquiring from the seller, the seller denied having sold the land to the appellant whom he did not know. Though the matter was reported to the police, the appellant failed to appear and assist in the investigations. Upon approaching the 2nd respondent, the records were rectified and a proper title issued to the 1st respondent who proceeded to take possession of the land but found PW2 in possession thereof on behalf of the appellant. When the demand to vacate the land was issued, the appellant instituted the proceedings the subject of this appeal. The witness was unable to confirm if the appellant's title had been cancelled since the title was taken to them by the vendor following their complaint.



9. The vendor, Abdillahi Kibwana Hamisi, confirmed that he was the one who sold the suit land to the 1st respondent. According to him he obtained proprietorship of the land from the estate of his late father in a succession process. It was his evidence that he entered into a sale agreement with the 1st respondent on June 3, 2011 in which he sold the same for Kshs 800,000.00 and was surprised to find, upon lodging transfer documents, that the land had already been registered in the appellant's name whom he did not know. As a result of his complaint with the 2nd respondent, a new title was issued on January 8, 2015 in the 1st respondent's name. He confirmed that when he visited the land, he found PW2 in occupation thereof and gave her a notice to vacate.
10. It was his evidence that after the death of his father, the estate was administered by the Public Trustee before distribution. While admitting that one of his sisters, Mwanaisha Kibwana Hamisi, was one of the beneficiaries of the estate, he denied that it was the said sister who sold the suit property the appellant.
11. The 1st respondent therefore counterclaimed against the appellant seeking a declaration that parcel number 2679 (Original No34/27) of section III mainland north delineated on land survey plan number 180554, Approximately 0.0336 Ha herein belongs to her; a cancellation of the transfer registered as number 4286/44 and hence cancellation of certificate of Title No CR 38322 issued to the appellant on October 14, 2004 for the suit land herein delineated on survey plan No 180554 and a declaration that the same is fraudulent; a permanent injunction restraining the appellant either by himself, his agents servants or employees or anyone appointed by him from interfering, dealing with or managing the suit property by the 1st respondent as per the certificate of Title CR No57054 on parcel of land N02679 (Original number 354/27) of section III mainland north delineated on land survey plan number 180554 Approximately 0.0336 Ha; costs of the Counter claim and interest thereon at such rates at this court may deem fit to grant; and such further or other reliefs as the Honourable Court may deem appropriate in the circumstances.
12. On behalf of the 2nd respondent, the allegations in the plaint were denied and the 2nd respondent insisted that the documents issued by the 2nd respondent were issued in accordance with the law. In his evidence, the Mombasa Land Registrar confirmed that the dispute was over the same parcel of land which was subjected to subdivision as a result of which fresh titles were issued. According to the records held by the 2nd respondent, the only documents in their possession related to the 1st respondent's title documents but admitted that there was no evidence of the cancellation of the appellant's title. It was however his evidence that their office was unable to trace the documents relating to CR No 38322 hence was unable to confirm if there was a transfer to the appellant.
13. In his judgement, the learned trial Judge noted that neither Mwanaisha Kibwana Hamisi, who was alleged to have sold the land to the appellant nor the appellant's alleged agent, Kenny, who participated in the sale on behalf of the appellant, was called to testify. Further the appellant had no sale agreement or the Deed Plan used in transferring the land. In light of the foregoing, the learned Judge found that the 2nd respondent's act of issuing title to the 1st respondent was not fraudulent and that the 2nd respondent properly exercised the powers bestowed upon him by section 79(2) of the *Land Registration Act* when he rectified the title. Based on the decision of this Court in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, it was held that where a registered proprietor's root of the title is under challenge it is not sufficient to waive the title document but one must prove the legality of the process that gave rise to the said title. In the premises, he found the appellant's case unmerited, dismissed the same with costs while allowing the 1st respondent's counterclaim in the following terms:



- 1) A Declaration that parcel number 2679 (Original no-34/27) of section III mainland North delineated on land survey plan number 180554. Approximately 0.0336 Ha herein belongs to the 1st respondent.
 - 2) An Order for cancellation of the transfer registered as number 4286/44 and hence cancellation of certificate of Title No CR 38322 issued to the appellant on 14th October 2004 for the suit land herein delineated on survey plan No 180554 and a declaration that the same is fraudulent.
 - 3) That an order of permanent injunction be and is hereby issued restraining the appellant either by himself his agents, servants or employees or anyone appointed by him from interfering, dealing with or managing the suit property by the 1st respondent as per the certificate of Title CR No 57054 on parcel of land N02679(Original number 354/27) of section III mainland North delineated on land survey plan number 180554 Approximately 0.0336 Ha.
 4. That Cost of the Counterclaim are awarded to the 1st Defendant.
14. Aggrieved with the said decision, the appellant is before us challenging the decision on the following grounds:
1. That the learned trial judge erred in law and in fact in holding that the appellant had not proved his case against the 1st respondent and in dismissing his suit and allowing the counter claim.
 2. The learned trial judge erred in law and in fact in holding that the appellant committed fraud against the 1st respondent in 2004 when he obtained his title when the 1st respondent interest in plot number Sub-division 2679 (Original No 34/27) Section III Mainland North arose in 2015 and in failing to appreciate that
 3. DW2 had not filed a case on fraud against the appellant.
 4. That the learned trial judge erred in law and in fact in holding that the 2nd respondent had acted under Section 79 (2) of the Land Registration Act No 3 of 2012 and cancelled the appellant's title which was contrary to evidence on record and the legal provisions itself. DWI lodged a complaint on October 22, 2014 and a new title was issued on January 8, 2015.
 5. The learned trial judge failed to analyze the evidence as a whole and misapprehended the same in holding that the only evidence tendered by the appellant was the certificate of title as per the ratio decidendi in *Munyu Maina v Hiram Maina* [2013] eKLR.
 6. The learned trial judge erred in law in failing to appreciate the doctrine of sanctity of title under Section 26 of the Land Registration Act No 3 of 2012 and in holding that a person other than the registered owner can pass proper title to the 1st respondent.
 7. That the learned trial judge erred in law in failing to appreciate that a transfer was an agreement for transmission of proprietary rights in land and in failing to hold that the transfer tendered had not been impugned, by challenging the signatures on it and or its execution.
 8. That the learned trial judge erred in law and in fact by placing too much weight on the failure by the appellant to call Kenny and Mwanaisha Kibwana Hamisi as witnesses while overlooking the failure by the 1st respondent to testify when the execution of the transfer to the appellant by Mwanaisha Kibwana Hamisi had not been challenged and in failing to consider the fact that Mwanaisha Kibwana Hamisi and DWI were siblings and could conspire to defeat the appellant's interest.



9. The learned trial judge erred in law and in fact in holding against the appellant the failure by the 2nd respondent to locate the file in respect of CR No 38322 when DW3 was the custodian of the file which would have all the documents inclusive of deed plans and misapprehended DWI evidence under cross examination was that he could not give evidence on the appellant's transfer and deed plan because he didn't trace the file for CR No 38322 and not that the documents did not exist at the lands registry.
10. The learned trial judge erred in law and in failing to assess damages for trespass malicious destruction of property, flagrant and forcefully takeover of the plaintiff's property without following due process even after dismissing the suit.
15. In this appeal it is sought on behalf of the appellant that the appeal be allowed, the judgement of Judge J O Olola dated January 23, 2020 be set aside and be substituted with an order allowing the suit and dismissing the counter-claim with costs.
16. During the virtual hearing of this appeal, Learned Counsel, Miss Julu appeared for the appellant while Mr Denis Kinaro appeared for the 1st respondent. Though served, there was no representation on behalf of the 2nd respondent.
17. In determining this appeal, Miss Julu urged us to follow the decision in the case of *Kenya Ports Authority v Kuston (K) Ltd* [2009] 2 EA 212 which reiterated the factors to be considered by this court on a first appeal. It was submitted that since the appellant had a certificate of title and a transfer, which had not been cancelled by the time the title to the 1st respondent was issued and was in possession of the land, that was sufficient evidence to enable the Court make a finding in favour of the appellant. In support of this submission, reference was made to the case of *Benja Properties Limited v Svedha Mohamed Burbannudin Sabed and 4 Others* [2015] eKLR.
18. In the appellant's submissions, the certificate of title issued to the appellant vested in him absolute ownership of the land rights and privileges thereto pursuant to Sections 20 and 23 of the *Registration of Titles Act* (herein referred to as "the RTA") which proprietorship could not be defeated except as provided under Sections 24, 25 and 26 of the *Land Registration Act* No 3 of 2012 (hereinafter referred to as "the LRA") as read with Section 107 thereof. Since under the Torrens System, there is a presumption that the entries are correct, it was submitted that entry number 44 which confirmed appellant's proprietorship of the suit and had not been cancelled ought to have been upheld by the court. In this regard reference was made to the case of *Embakasi Properties Limited & Another v Commissioner of Lands and Another* [2019] eKLR and it was contended that the evidence proved that the appellant was the legal owner of the land since Sections 34 and 35 of the *RTA* required only the transfer and the mother title to be presented by transferor to effect a transaction. It was therefore submitted that the holding by trial court that for validity of his title to be proved the appellant needed to produce a sale agreement and prove a physical meeting with the vendor, went beyond the requirement of the statute as it disregarded Section 29 of the RTA.
19. According to the appellant, since DW2 was not the proprietor of the subject land, he could not, under Section 37 of the LRA make a transfer to the 1st respondent. Reference was made to the case of *Gibbs v Messer* [1891] AC 248
20. According to the appellant, the issuance of the 1st respondent with a second title over the same land on January 8, 2015 breached Section 30(2)(a) of the LRA which requires that only one title or certificate of lease be issued in respect of each parcel of or lease, a position reiterated in *Embakasi Properties Limited & Another v Commissioner of Lands and Another* (*supra*) and *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR. To the appellant, the 1st respondent having dealt



- with a stranger other than the registered owner, did not acquire any proprietary rights hence the judge misapplied the *ratio decidendi* in [Munvu Maina v Hiram Gathiba Maina](#) [2013] eKLR.
21. It was submitted that since no objection was taken as regards the production of the appellant's transfer documents, pursuant to Section 116 of the [Evidence Act](#) a presumption of ownership was created in favour of the appellant since that amounted to an admission. Reference in this regard was made to [Halsbury's Laws of England Volume 17](#) paragraph 278. Since DW2 who sold the property to the 1st respondent had the same capacity as Mwanaisha Kibwana Hamisi who sold it to the appellant, it was submitted that entry number 44 in favour of the appellant met the requirements of Sections 34 and 35 of the RTA and the judge was wrong on insisting on more.
 22. It was submitted that once the appellant established origin of its ownership, possession and sanctity of title came in, the evidential burden shifted to the respondents to disprove legality of entry 44 and its title so as to justify entry number 55. According to the appellant, since, the respondents pleaded fraud as the basis of attack on the appellant's title and alleged that before entry 55 was done entry 44 had been cancelled, she was bound by the pleading and couldn't shift to any other ground in its submissions without amendment. On what amounts to fraud, reference was made to [Black's Law Dictionary](#).
 23. It was submitted that since the appellant's title was first in time pursuant to Section 37 of the LRA, it should thus have prevailed in the High Court based on the authority in [Benja Properties Limited v Svedha Mohamed Burbannudin Sabed and 4 Others](#) [2015] eKLR.
 24. It was submitted that contrary to the particulars of fraud pleaded against the appellant, there was no evidence to prove that he obtained title knowing the land not been sold to him. To the contrary there was a transfer and the mother title duly endorsed as per Section 34 and 35 of the RTA. There was no proof that he made a false entry at the land registry as DW3 said entry 44 was made by his colleague D G Gachathi. Neither was there evidence that the appellant connived with land registry in Mombasa to fraudulently obtain the grant. Accordingly, the appellant as prior holder of title cannot be said to have engaged in a deceitful practice or device with the intent of causing the 1st respondent any injury.
 25. The appellant invited the court to take notice of the fact that Mwanaisha Kibwana Hamisi being a sister to DW2, DW2 was better placed to call her. However, being siblings, it was the appellant's contention that the possibility of collusion between them could not be ruled out. According to the appellant the failure to produce the file in respect of CR 38322 ought not to have been taken against him since it was DW2 who was the custodian of the same and was, pursuant to Sections 112 and 119 of the [Evidence Act](#) Chapter 80 Laws of Kenya, obligated to produce it. The failure to do so, according to him, should have, on the authority of [Nguku v Republic](#) [1985] KLR 412, invited a negative inference against the respondents and not the appellant.
 26. According to the appellant, Section 79 of the LRA limits the registrar role to rectification of formal matters not affecting proprietorship, changes effected with consent of parties, upon a resurvey and defects being found after notice to parties, updating the register and lastly upon written application by the registered proprietor. Even then the registrar would be required to follow the elaborate procedure set out in Section 79 (2) of the LRA and Article 47 of the [Constitution](#) on Fair Administrative Action on fair hearing. Failure to do that, it was contended, would render the registrar action a nullity as this court held in [Anhait Holdings Limited v Registrar of Titles & 3 Others](#) [2017] eKLR.
 27. According to the appellant, there is no evidence that the circumstances listed in Section 79(1) LRA subsisted to warrant cancellation and the procedure for rectification of the register under Section 79(2) thereof on rectification of register. To the appellant, only a court of law can cancel a title. However, in this case the registrar neither cancelled the appellant's title under Section 79(2) of the LRA nor had the power to do so.



28. Lastly, it was submitted, even after dismissing the case the court should have decided the issue of trespass and assessed damages as held in *Andrew Mwori Kasava vs Kenya Bus Service* [2018] eKLR. According to the appellant, in tort of trespass no actual damage needs to be shown as was held in *M'Mukangg v M'mbiiiwe* 1984 KLR
29. In this case it was contended that there was uncontroverted evidence of a forceful takeover before the suit was filed and also in purported execution of a wrongly extracted decree. Guided by *Adrian Gilbert Muteshi v William Samoei Ruto & 4 Others* [2013] eKLR the appellant proposed an award of Kshs. 300,000/-general damages for trespass. It was prayed that the appeal be allowed with costs, the order dismissing the appellant suit be substituted with an order entering judgement for the appellant as prayed in the plaint with costs.
30. On behalf of the 1st respondent this court was reminded of its duty on a first appeal to reconsider the evidence on record, re-evaluate the same and draw own independent conclusion. In so doing we were urged to find that the trial judge properly considered the evidence before him, properly applied the applicable law and arrived at the correct conclusion that the appellant's case lacked merit and the same was correctly dismissed with costs. According to the 2nd respondent, the learned trial judge properly considered the evidence before him and applied the applicable law correctly and arrived at the correct finding that the 1st respondent's counterclaim had merit and accordingly allowed it as prayed.
31. It was submitted that the transfer relied upon by the appellant was neither signed by the appellant nor witnessed by an advocate since the stamp appearing on the transfer is from a firm of advocates and not an advocate who witnessed the execution by the parties. moreover, the appellant in his testimony before the trial judge denied ever meeting the said Mwanaisha, the transferor, who allegedly drew the transfer in his favour. It was noted that whereas the date on the transfer is September 21, 2004, in his evidence the appellant stated that he bought the land on October 14, 2004 and was registered on the same day raising the issue whether the appellant got the transfer executed in his favour on September 21, 2004 before he bought the land. It was noted that the sale agreement between the vendor and the appellant was not produced and that the vendor or her agent was not called to testify; and that the mother Title did not show that the said Mwanaisha was a registered proprietor of the suit land prior to and/or before selling it to the appellant as alleged. According to the 1st respondent, the Title Deed held by the appellant was unsupported by any evidence hence the same was properly cancelled by the trial Judge.
32. It was further noted that though the title deeds under Cap 281, Laws of Kenya (repealed) such as the one held by the appellant, usually has annexed thereto a deed plan, the appellant's title deed did not have the deed plan which is a serious omission. In the 1st respondent's view, there was no need to embark in an academic exercise of assessing damages after the appellant failed to prove his legal acquisition of the suit property.
33. It was therefore sought that the appeal be dismissed with costs.

Analysis and Determination

34. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate, as properly appreciated by the parties herein and as re-affirmed in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR
35. The issue for determination in this appeal is substantially which of the parties between the appellant and the 1st respondent proved its case. Both parties claimed that the other party was guilty of fraud.



36. In his evidence, the appellant testified that he bought the land in dispute from Mwanaisha Kibwana Hamisi on October 14, 2004 and was issued with title the same day. According to him, he only met the seller through an agent called Kenny who negotiated the matter. Though it was his evidence that there was an agreement and a deed plan for the land, he did not have any of them. In his evidence the 1st respondent's title could only have been procured by fraud since he was not aware how it was issued when he already had a title to the said land and no due process was followed in cancelling his title, which according to him was valid.
37. The appellant's case is therefore hinged on three factors. First, is the fact that he had title in his name. Secondly, is the fact that he was in possession of the suit land. Thirdly, that his title was cancelled without his knowledge.
38. In this case it is clear that both the appellant and the 1st respondent was contesting the process by which each one of them obtained their titles. Apart from his testimony, the appellant called PW1, his agent who could not testify as to the circumstances under which the appellant obtained the title.
39. On the other hand, the 1st respondent called, as her witness, DW2, the person who sold the land to her. According to the entry 9 in the mother title, after the death of the proprietor thereof, Kibwana Bin Khamis, the said land being part of the deceased's estate was administered by the Public Trustee. However, on September 6, 1994, the same was transmitted to the joint ownership of, *inter alia*, Amina Fidau Khamis, Kibwana Khamis, Oman Kibwana Khamis and Abdullahi Kibwana Khamis. Though the name of Mwanaisha Kibwana Hamisi, the person the appellant claims sold the land to him does not appear, the 1st respondent admitted that she was his sister and a beneficiary to the estate of their deceased father. Accordingly, since the list was not conclusive, it is to be taken that she was one of the names that were not stated but was one of those beneficiary entitled to the estate.
- However, according to the evidence of DW2, which evidence was not controverted, he was the solely appointed trustee and the administrator of the said land and if any sale was to be made, it had to go to him to sign.
40. In this case however, DW2 categorically denied that Mwanaisha sold the land to the appellant. There is no oral or documentary evidence on record as to who sold the land to the appellant since no agreement for sale was exhibited and the seller, whom the appellant never met was called to testify. To make matters worse, the agent who purportedly transacted the sale on behalf of the appellant was, for undisclosed reasons, not called as a witness.
41. On the other hand, the 1st respondent called as his witness, DW2, who was a beneficiary to the said estate and who admitted selling the parcel to the 1st respondent. According to him, the said Mwanaisha denied any knowledge of the sale of land to the appellant. DW2, a land officer confirmed that according to their records, they were unable to trace the file in respect of the transfer to the appellant. The only documents that he could trace were in support of the 1st respondent's title.
42. We agree with the appellant's contention that in the absence of evidence to the contrary, evidence of title is prima facie evidence that the person named therein is the lawful proprietor of the said land. However, that being a legal presumption may be rebutted where the factual evidence reveals that the said registration was fraudulently, unprocedurally or illegally procured or where it was procured by misrepresentation or through a corrupt scheme. That is our understanding of the case of [Embakasi](#)



Properties Limited & Another v Commissioner of Lands. and Another [2019] eKLR where the Court held that; -

“Although it has been held time without end that the certificate of title is...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed *Registration of Titles Act*. Section 26 of the *Land Registration Act*, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired illegally, unprocedurally or through a corrupt scheme.”

43. We agree with the decision in *Gibbs v Messer* [1891] AC 248 that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's right. However, that decision, itself, qualifies that right by stating that the protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal not with the registered proprietor, but with a stranger who uses his name, do not transact on the faith of the register; and they cannot by registration of an improper instrument acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration. In this case the evidence was that the appellant allegedly acquired title from one Mwanaisha Kibwana Hamisi, through the appellant's agent, one Kenny. There was no evidence that she was the registered proprietor or that she had authority to dispose of the same. Accordingly, the title of the appellant could be properly impeached.

44. It is now law that the mere fact of issuance of a title deed does not confer the status of indefeasibility of title. Courts of this country have therefore held that they would not hesitate to nullify titles held by those who stare at the court and wave a title of a grabbed land by merely and pleading loudly the principle of the indefeasibility of title deed. In cases where the very process of acquisition of the land in question is under challenge, it is not enough to simply rely on the title. It was therefore held by this Court in *Munyu Maina v Hiram Gathina Maina* [2013] eKLR 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. It is this instrument that is under challenge and the registered proprietor must go beyond the instrument and prove 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 need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.”

45. In this case, the appellant's title was being challenged on the ground that the proprietors of the suit land were not aware of the circumstances under which he allegedly acquired interest thereunder. It was that very title whose authenticity was in dispute. In those circumstances he could not just come to court and place the very same title before the court and claim that the evidence was sufficient. He ought to have gone further and explained the process by which he obtained the said title. In this case



- there was no such evidence and since he was not physically involved in the transaction, he ought to have called the person who transacted on his behalf even if he could not call the alleged seller.
46. In those circumstances we find that the evidence of title was not sufficient to prove legality of how the appellant acquired the title and show that the acquisition was legal. In light of the evidence adduced by the respondents, the presumption of indefeasibility of title was dislodged.
47. It follows that possession as factor could not confer title in light of our finding above.
48. As regards the issue of cancellation of the appellant's title by the Registrar, section 79(1) and (2) of the [Land Registration Act](#) provides as follows:
- (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—
 - (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
 - (b) in any case and at any time with the consent of all affected parties; or
 - (c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.
 - (2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.
49. It is therefore clear that under section 79(2) above, the registrar has the power to rectify a register where the same has been procured by fraud. Contrary to the position taken by the appellant, that provision does not require that before the rectification is done, the cancellation of the previous entry be made. Though the section does not require the proprietor whose interests is to be affected by such action to be heard, it is our view and we so hold that such action must be subjected to the provisions of section 4(3) of the [Fair Administrative Action Act](#). That person must be given prior notice of the intended action and an opportunity to be heard before the action is taken. We do not have any evidence before us that the said provision was complied with before register was rectified.
50. However, in light of our findings hereinabove regarding the validity of the appellant's title, nothing turns on that issue.
51. It was submitted that the Learned Trial Judge ought to have assessed the damages it would have awarded had the suit succeeded. It is true that the usual practice is that where a suit for damages is dismissed, the trial court ought to, nevertheless, assess the damages it would have awarded had the case succeeded. This is to obviate the necessity of having to assess the damages in the event that an appellate court overturns the findings of the trial court. The failure to do so is, however, not a ground for overturning the decision particularly where, as in this case, the decision of the trial court is affirmed.
52. Having considered the material placed before us in this appeal, there is no merit in this appeal which we dismiss in its entirety.
53. On costs, as there is no evidence that the appellant was notified before the register was rectified we direct that each party bears the costs of this appeal.



54. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

