Yako Supermarket (K) Limited & another v National Land Commission & 4 others (Civil Appeal 14 of 2021) [2023] KECA 602 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 602 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 14 OF 2021

PO KIAGE, M NGUGI & F TUIYOTT, JJA

MAY 26, 2023

BETWEEN

YAKO SUPERMARKET (K) LIMITED ..... 1ST APPELLANT

SUDHIR KHETIA ..... 2ND APPELLANT

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT ..... 2ND RESPONDENT

THE CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

THE BOARD OF MANAGEMENT KAKAMEGA PRIMARY SCHOOL ..... 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 5TH RESPONDENT

(Being an appeal against the judgment and decree of the Environment and Land Court in Kakamega (N. Matheka, J) dated 29th July, 2020 in ELC Petition No. 3 of 2017)

JUDGMENT

1. The dispute from which this appeal arises pitted the appellants against the respondents with regard to whom, between the appellants and the 4th respondent, Kakamega Primary School, was entitled to ownership of land parcel numbers Kakamega Town Block 11/292 and Kakamega Town Block 11/252 (hereafter 'the suit properties').

2. In their Amended Petition dated 24th July, 2019, the appellants alleged violation of their constitutional right to property guaranteed under Article 40 of the *Constitution* in relation to the suit properties. They alleged that the 1st respondent, the National Land Commission, had no jurisdiction to inquire

into the validity of their titles, to hold them as having unlawfully acquired the suit properties, and to hold that the suit properties were public properties which had been allocated to the 4th respondent.

3. In dismissing the Amended Petition, the trial court found that the suit properties were initially public land, reserved as a playing field for the 4th respondent, that were illegally alienated into private property and later acquired by the appellants. The school being a public institution, the land it occupies and utilizes as a playing field is public utility land that was not available for allocation. The trial court therefore found that the allocation to the persons who sold to the appellants was irregular and unlawful. It therefore held that the appellants' right to property under Article 40 as read with Article 60 (1) (b) of the *Constitution* was not infringed in any way by the decision made by the 1st respondent to recommend the revocation of the appellants' titles.

4. The appellants were dissatisfied with the decision and filed the present appeal in which they raise some ten grounds of appeal in their memorandum of appeal dated 7th August 2020. Briefly, these are that the trial judge erred in finding that:

    i. the appellants were not innocent purchasers for value without identifying any fraudulent conduct on their part;

    ii. the National Land Commission had jurisdiction to revoke the title of a bona fide purchaser for value despite the mandatory provisions of section 14(7) of the *National Land Commission Act*;

    iii. the appellants failed to conduct due diligence before acquiring the suit property;

    iv. while conducting due diligence, the appellants failed to note the fact that the 4th respondent had a dispute with the initial allottee, Mr. Michael Odwoma in 2004 in HCC No. 97 of 2004: Michael Odwoma v The Chairperson, Board of Governors, Kakamega Primary School. The Judge failed to appreciate the fact that though the Appellants acquired the properties in the year 2011, the suit was struck out in the year 2004 for being filed against a wrong party and there was no pending dispute in the year 2011

    v. the suit properties were initially reserved for Kakamega Primary School without any evidence whatsoever on the alleged allocation.

5. The appellants further impugn the decision of the trial court on the basis that it required them to conduct due diligence beyond that which is expected in an ordinary conveyancing transaction. Further, that the court failed to appreciate the fact that the appellants, having been issued with valid titles by the 3rd respondent, were the absolute and indefeasible owners of the suit properties, duly protected under Article 40 of the *Constitution*. It also failed to appreciate that from the original survey plans filed in court, the present day Kakamega Primary school, formerly the Indian School, owns Block 11/32 (L.R No. 1407/208), which is intact to date, and for which it has a separate title. They ask this Court to allow their appeal and grant the orders sought in the Amended Petition.

6. The appellants' case as it emerges from the pleadings and proceedings before the trial court is as follows. The 1st appellant had purchased Kakamega Town Block 11/292 from one Michael Odwoma on 5th February 2011. Thereafter, the 2nd appellant, a director of the 1st appellant, purchased Kakamega Town Block 11/252 on 20th August 2011 from Kito Pharmaceuticals Limited.

7. Thereafter, on 17th February 2012, the Registrar of Lands in Kakamega issued a gazette notice revoking the titles of the appellants. The appellants filed Judicial Review Application No. 20 of 2012 challenging the revocation on the basis that the Land Registrar had no powers to revoke the titles. In its decision, the court (Chitembwe J) held that the Land Registrar had no powers to revoke the appellants' titles, and his decision was therefore null and void.

8. On 28th June 2013, the appellants received a notice from the 1st respondent that it had received a complaint regarding the suit properties, to the effect that the properties were public properties belonging to the 4th respondent. On 6th January 2014, the 1st respondent wrote to the appellants indicating that it had found that the suit properties and the property on which the 4th respondent was established were distinct properties. However, on 4th April 2014, the 1st respondent again wrote to the appellants indicating that it would carry out a review of the validity of the appellants' title to the suit properties.

9. The 1st respondent carried out the review of the suit properties. The appellants appeared, made representations and were represented by counsel. In its decision dated 8th October 2015, the 1st respondent concluded that the suit properties were public properties which had been allocated to the 4th respondent. Further, that the suit properties had been unlawfully allocated to private individuals when they were not available for allocation. The 1st respondent therefore proceeded to revoke the appellants' title in exercise of powers conferred under section 14 of the *National Land Commission Act*.

10. It is this decision of the 1st respondent that precipitated the filing of the appellants' petition, amended on 24th July 2019. While the Amended Petition sought some fifteen prayers, the appellants essentially sought declarations that:

    a. They are the registered proprietors of Kakamega/Municipality Block II/252 and Kakamega/Municipality Block II/292;

    b. Under section 14 of the *National Land Commission Act*, the 1st respondent can only review grants of public land as defined under Article 62 of the *Constitution* of Kenya and not private land as defined by Article 64 of the *Constitution*;

    c. Since Kakamega/Municipality Block II/252 and Kakamega Town Block II/292 are registered in the names of the appellants, they are private land and the 1st respondent lacks jurisdiction to review the same;

    d. The proceedings, hearing and determination undertaken in respect of the two properties were without jurisdiction and are thus ultra-vires, null and void.

    e. The 1st respondent had violated the appellants' right to fair administrative action and fair hearing protected under Articles 25, 47 and 50 (1) of the *Constitution*, their right to property under Articles 40 as read with Article 60 (1) (b) of the *Constitution*, and their legitimate expectation that they would hold their title to the suit property until such titles were declared unlawful as provided by law;

    f. The 1st respondent's report dated 8th October, 2015 is illegal, irregular, unprocedural and unconstitutional and void for all intents and purposes.

11. In addition to the declaratory orders set out above, the appellants sought orders of judicial review directed against the respondents. They sought, first, an order of certiorari to quash the decision of the 1st respondent dated 8th October, 2015 revoking their title to the suit properties and, secondly, an order prohibiting the 3rd respondent from revoking or lodging any caution or caveat or restriction against the titles to the suit properties.

12. They further prayed for a permanent injunction directed at the respondents, their agents, officers or any person whosoever or howsoever acting on their behalf from interfering in any way with the appellants' proprietorship of the suit properties, general damages against the respondents jointly and severally

for loss and inconvenience suffered; exemplary damages against the 1st respondent for breach of the appellants' fundamental rights, the costs of the petition as well as interest on the damages and costs..

13. The office of the Attorney General, the 5th respondent, filed grounds of opposition dated 13th August, 2018 on behalf of the 2nd, 3rd and 4th respondents. It was contended in these grounds that the petition had no merit as it was based on a misconception of the law and particularly the powers of the 1st respondent under the *National Land Commission Act* and the *Constitution*, and was vexatious and an abuse of the court process. Further, that the actions of the 3rd respondent in revoking the appellants' title to the suit properties were within the law and in accordance with the recommendation of the 1st respondent under section 14 (5) of the *National Land Commission Act*.

14. It was argued, thirdly, that Article 68 (c) (v) of the *Constitution* empowered the 1st respondent, within five years of the commencement of *National Land Commission Act* on its own motion or upon complaint by the national or county government or an individual to review all grants and disposition of public land to establish their propriety or legality. Further, that the suit properties were initially public land reserved for the 4th respondent that were illegally alienated into private property and later acquired by the appellants.

15. The respondents contended further that the fact that public property is changed to private property and registered does not prevent the National Land Commission from investigating the legality of how it was acquired. The 3rd respondent could not be faulted for acting upon the recommendation of the 1st respondent to revoke the title to the suit properties as provided for under section 14 (5) of the *National Land Commission Act* and such revocation does not amount to violations of the appellants' constitutional rights. Pursuant to section 14 (3) of the Act, the 1st respondent had given the appellants notice to appear before the hearing concerning the suit properties commenced and there is therefore no breach of Article 47 of the *Constitution*.

16. It was argued for the respondents, further, that Article 40 (6) of the *Constitution* does not protect property that is found to have been unlawfully acquired, and the appellants were not entitled to the protection of the law. Finally, it was contended that the petition does not disclose any violation of the appellants' rights. The 3rd respondent was only acting upon the recommendation of the 1st respondent as provided for under section 14 (5) of the *Act* and its actions should therefore not be faulted.

17. On its part, the 4th respondent filed a replying affidavit sworn on 4th July 2019 by Dickson Wanyangu, its then Head Teacher and Secretary to the Board of Management. It was his averment that the 1st respondent had carried out a just, open, inclusive and fair process following a formal complaint regarding the ownership and registration of the suit properties. The complaint had been brought to the attention of the appellants, and they had been accorded a fair hearing and due process by the 1st respondent at its hearings conducted on three separate occasions prior to its decision. The 1st respondent had found the properties to have been irregularly and illegally made in favour of the appellants.

18. Regarding the claim of the 4th respondent to the suit properties, it was averred on its behalf that the suit properties were previously comprised in land parcel No Kakamega Township/Block II/32, and were all reserved as public land as a playing field for the 4th respondent. They were therefore not available for allocation or grant from which the appellants could benefit or derive a registrable interest. It was the 4th respondent's averment that the amalgamations, remapping and allocation of the suit properties and others previously comprised in the parent title, Kakamega Township/Block II/32 were in its favour as demonstrated by copies of formal correspondence in recognition of its entitlement and interest.

19. The 4th respondent averred further that the appellants were reasonably expected to carry out due diligence in respect of the subject parcels of land; that in view of the circumstances prevailing, they were expected to go beyond a mere search at the Lands Registry. Had they undertaken due diligence, they would have taken cognizance of and established the multiple litigation then ongoing over the suit properties pitting the 4th respondent against different third parties.

20. The 4th respondent averred that there had been several ongoing judicial proceedings over the suit properties, among them Kakamega CMCC No. 281 of 2004 and Kisumu High Court Civil Case No. 97 of 2004-Michael Odwoma v The Board of Governors, all of which were in the public domain. The 4th respondent annexed to its affidavit a ruling ("DI 4") by B. K. Tanui J. in the latter suit in which the court declined to issue an injunction in an application by Michael Odwoma in which he claimed that he was being harassed by the pupils and employees of the 4th respondent.

21. It was the 4th respondent's case that it had at all times occupied, used and asserted ownership over the suit properties, which have always been inseparable on the ground. Its occupation of the suit property was uninterrupted and unchallenged, a fact which the appellants could have easily established through physical inspection or a visit to the site.

22. In support of their appeal, the appellants filed written submissions dated 6th May, 2022 which were highlighted by their counsel, Mr. Ochieng Oduol, SC at the hearing of the appeal. Rather disturbingly the respondents, all of whom were represented by counsel, did not file submissions, nor did they appear at the hearing of the appeal despite service having been effected upon them.

23. In their submissions, the appellants argue that they were third purchasers of the properties since the issue of titles to the properties in 1994 and 1991 respectively. They contended that section 14(7) of the *National Lands Commission Act* prohibits the 1st respondent from revoking a title of a *bona fide* purchaser for value without notice of defect in title. It is their contention that they purchased the properties for valuable consideration and were duly issued with certificates of title; that they have heavily invested in the properties; and they have partly developed structures for a commercial complex and a three-star hotel.

24. The appellants rely on the case of *Republic v National Land Commission ex parte Holborn Properties Ltd* [2016] eKLR in which the court observed that:

> " The recommendation to the Registrar by the Respondent to revoke title which it finds was illegally issued is only in respect to the initial allottee. However, where the initial allottee of public land has transferred land to a *bona fide* purchaser for value without notice of defect in the title, the Registrar does not have the jurisdiction to revoke such a title (see Section 14(7) of the *National Land Commission Act*). The issue of whether the parcel of land under review by the Commission was initially public land has to be established first by the Respondent before it can make a recommendation for or against revocation."

25. The appellants submit that the revocation of a title can only be done by a court of law and not by the 1st respondent which is explicitly barred by statute from revoking the title of a *bona fide* purchaser for value without notice of a defect in title.

26. The appellants submit that the 4th respondent, Kakamega Primary School, formerly the Indian School, owns block 11/32 (L.R No. 1407/208) which is intact to date and for which it has a separate title. Further, that the school has a registered lease over Kakamega Town Block 11/31 which remains intact to date. It is the appellants case that the suit properties comprised in Block 11/292 (originally L.R No.

1407/208 - plot No. 32 and Block 11/252 (originally L.R No. 1407/208 - Plot No. 32 do not belong to the 4th respondent.

27. The appellants further contend that no evidence was tendered to show that the suit properties were earmarked for public utility. They rely on the case of *Lawrence Sese & 6 others v Jeremiah Otieno Okenye & Another* [2017] eKLR.

28. It is submitted further that before acquiring the suit properties, the appellants conducted due diligence. They argue that the trial court erred in finding that while conducting due diligence, the appellants failed to note the fact that the 4th respondent had a dispute with the initial allottee, one Michael Odwoma. They submit that the case of Michael Odwoma -vs- The Chairperson, Board of Governors, Kakamega Primary School suit was struck out in 2004 for being filed against a wrong party. There was thus no pending dispute in 2011. The appellants cite the case of *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR in which the Court of Appeal held that:

> "It was, with respect, a grave misdirection on the part of the learned Judge to burden the appellant to prove that the Ngaruiyai's title to the original property was regularly obtained. Fraud must be pleaded with a great degree of particularity and to be proved by evidence on a standard heavier than on a balance of probabilities generally applied in civil matters. There was no scintilla of evidence before the learned Judge to warrant his conclusion that the original title was doubtful. The learned Judge was clearly misled by the statement of this Court sitting at Nyeri in Munyu Mama (*Supra*) in the passage reproduced earlier, which, in effect erroneously suggests that a document of title is worthless without further supporting evidence. Due diligence expected of a purchaser does not extend beyond the title of the vendor and, so long as the vendor's name is contained in the certificate of title, section 26 of the *Land Registration Act* enjoins "all courts" to take that certificate of title as *prima facie* evidence that he is the absolute and indefeasible owner, subject only to encumbrances and conditions endorsed on the certificate. In the absence of evidence in rebuttal, it was in grave error for the learned Judge to impeach the appellant's title in the manner he did."

29. In his oral submissions before us, Mr. Oduol contended that the trial court erred with respect to the jurisdiction of the National Lands Commission to review a grant pursuant to section 14(7) of the *National Land Commission Act*. He submitted that the suit properties were registered in favor of the original allottees as early as 1st December 1991 while the appellants purchased them 20 years later. Before the purchase, there was neither a caveat nor an inhibition against the title. Mr. Ochieng reiterated that the title held by the school is separate and distinct from the title held by the appellants.

30. To the question whether the land was public utility land, counsel submitted that the suit properties having been registered in favour of private individuals as early as 1991 and having been in existence for 20 years, the issue of a public utility in favour of the school was not proved. In his view, the burden of proving that the suit properties were public land was on the respondents, and they had not placed such evidence before the court.

31. Regarding the question whether the appellants had exercised due diligence before purchasing the suit properties, Mr. Oduol submitted that the appellants were guided by the register which indicated that the suit land was private. It was his submission that if the school or the government wanted to acquire the suit land as a school play field, in light of the doctrine of eminent domain, they could do so through the proper method.

32. This is a first appeal and, as provided under Rule 31 of this *Court's Rules*, we are empowered to re-appraise the evidence and draw inferences of fact. See also the holding in *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123 with respect to the duty of the court on a first appeal.

33. I have considered the averments and pleadings of the parties before the trial court, which I have also briefly set out. In their submissions and grounds of appeal as highlighted by their counsel, the appellants raise three main issues. The first is whether the 1st respondent had the mandate to review the grants in respect of the suit property. If it did not, then its act of reviewing and recommending the revocation of the titles was unconstitutional, null and void. The second issue, should I find the first in the affirmative, is whether the appellants exercised due diligence in purchasing the suit properties, and, a third and related issue, whether they were innocent purchasers for value. Should these last two issues be answered in the affirmative, then the 1st respondent had no jurisdiction to review their grants, and the trial court erred in upholding its decision.

34. Established under Article 67 of the *Constitution*, the 1st respondent has the constitutional mandate under Article 67(2)(e) 'to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.'

35. The 1st respondent's enabling legislation is provided for under Article 68 (c) (v) which provides for the enactment of legislation to enable the 'review of all grants or dispositions of public land to establish their propriety or legality.'

36. The *National Land Commission Act*, No. 5 of 2012, is the legislation enacted to implement the review powers of the 1st respondent. Under section 14 thereof titled "Review of grants and dispositions" it is provided as follows:

    1. Subject to Article 68(c)(v) of the *Constitution*, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

    2. Subject to Articles 40, 47 and 60 of the *Constitution*, the Commission shall make rules for the better carrying out of its functions under subsection (1).

    3. In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

    4. After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

    5. Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

    6. Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

    7. No revocation of title shall be effected against a *bona fide* purchaser for value without notice of a defect in the title.

    8. In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of *Constitution*.

37. The appellants have argued that the 1st respondent had no jurisdiction to review the grant of the suit properties, their contention being that the land was private, not public land, and was therefore not subject to review under the said section. This however, is a somewhat disingenuous argument. In reaching the decision that the 1st respondent had the jurisdiction to review the titles to the suit properties, the trial court relied on the persuasive decision in *Republic v National Land Commission Ex-parte Holborn Properties Limited* [2016] eKLR in which the ELC (Angote, J.) held as follows:

> "Although the *Constitution* has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14(1) of the *National Land Commission Act* gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted from public land to private land.
>
> I say so because the Respondent cannot review what is still, according to the records, public land. One must have acquired land that was initially public land and issued with a title document, either as a freehold or leasehold, for a review to be done.
>
> It is therefore not true that once land falls under the purview of the definition of "private land", the same cannot be reviewed. Indeed, it is only such parcels of land that can be reviewed by the Respondent with a view of recommending to the Registrar to revoke the title." (Emphasis added)

38. The trial court also relied on the case of *Compar Investments Limited v National Land Commission & 3 others* (2016) eKLR in which Lenaola J (as he then was) held as follows:

> 56. Despite the fact that the Petitioner's land is currently classified as private land because it holds a 99 years' leasehold tenure over the same, I do not think that fact alone bars the 1st Respondent from inquiring into its propriety. I say so because, all land in Kenya belongs to the Republic hence the leasehold title held by the Petitioner. The suit property has a history which history tells the procedure of its alienation and hence its legality or otherwise. The Government has powers to alienate its land and grant it to private individuals in forms of grants or leases.
>
> ...
>
> 58. But suppose I am wrong in making that finding, I would still arrive at the same conclusion given the provisions of Section 14(1) of NLC *Act* which allows the 1st Respondent, on its own motion or through a complaint lodged by an individual or a community, to review a grant."

39. I agree with the reasoning in these decisions, and the conclusion reached by the trial court in this matter. Were the mere fact of registration as private land, in and of itself, sufficient to take a public property outside the constitutional mandate of the 1st respondent, regardless of the manner of conversion into private property, it would create great difficulties, if not render impossible, the protection of public land, which falls within the jurisdiction of the 1st respondent.

40. I hold the view that the 1st respondent had the jurisdiction to undertake a review of the suit properties, and to consider the legality and propriety of their conversion into private property. It is not contested that the properties were initially public land- the contestation is whether, as the 4th respondent argued and the 1st respondent concluded, the property was set aside as a playing field for the pupils in the 4th respondent, or, as the appellants contend, it was set aside as a municipal yard. Whether set aside as a playing field or as a municipal yard, the suit properties were initially public land. My response on the

first issue, then, is that the 1st respondent had the jurisdiction to review the grants in respect of the two properties, and the ELC cannot be faulted for affirming this conclusion.

41. A subsidiary issue that arises in respect to the question of jurisdiction is whether the 1st respondent violated the appellants' constitutional rights in undertaking the review. It is beyond contestation that in carrying out its mandate as provided under section 14 of the *National Land Commission Act*, the 1st respondent is required to observe the constitutional guarantee of the right to fair administrative action under Articles 47 of the *Constitution*.

42. The evidence on record indicates that the 1st respondent gave the appellants notice on 4th April 2014 that it intended to review the legality and propriety of the grants to the suit properties pursuant to a complaint that it had received. It further published a notice in the media on 14th April 2014 inviting members of the public to share information regarding the properties. It held hearings on three occasions in relation to the properties, commencing on 21st April 2014 and concluding on 21st November 2014. The appellants have deposed that they received these notices and that they participated in the hearings. They were represented by counsel at the hearings. The 1st respondent therefore complied with the constitutional and statutory requirement that a party whose property was the subject of review should be accorded fair administrative action and a fair hearing. Accordingly, I find that the trial court was not in error in finding no violation of the appellants' constitutional rights with respect to the review of the grants.

43. The second issue relates to whether or not the appellants conducted due diligence in the transactions leading to their registration as the proprietors of the suit properties, and whether the trial court erred in finding that they did not. I will address this issue alongside the third issue raised by the appellants- whether they were *bona fide* purchasers for value, in order to place them within the exception provided under section 14(7) of the *National Land Commission Act*.

44. The appellants argue that they purchased the two properties for valuable consideration. They contend that they exercised all due diligence and established that the suit properties were available for sale or allocation, and that they were free of any encumbrances. They further contend that they carried out searches in the Land Registry, and they found that one Michael Odwoma and Kito Pharmaceuticals Limited respectively were the registered proprietors of the suit properties. The 1st appellant therefore entered into a sale agreement for parcel number Kakamega/Municipality Block II/292 with Mr. Odwoma, while the 2nd appellant entered into a sale agreement with Kito Pharmaceuticals for the purchase of Kakamega/Municipality Block II/252.

45. I have examined the documents presented to the trial court relating to the sale and transfer of the suit properties. I note that there is a sale agreement between the 1st appellant and Michael Odwoma dated 5th February 2011. The agreement refers to an earlier agreement made in 2010 by which the 1st appellant intended to purchase a different property from Odwoma, then subsequently decided to purchase parcel number Kakamega/Municipality Block II/292. There is a transfer of the said parcel, drawn by the 1st appellant, purportedly transferring the property to it. There was no document before the trial court that indicated that Michael Odwoma ever held title to the suit property. There was also no transfer of lease, certificate of lease or certificate of official search showing if, and when, he was registered as the proprietor of parcel number Kakamega/Municipality Block II/ 292.

46. With respect to parcel number Kakamega/Municipality Block II/252, the evidence before the trial court shows that there was a sale agreement between the 1st appellant and Kito Pharmaceuticals Limited dated 20th August 2011. There are two certificates of lease in respect of the land parcel, one issued to the 1st appellant on 12th June 2013, and a second one in respect of the same parcel issued to the 2nd

appellant on 9th April 2014. There is nothing before the court that shows that the property was initially registered in the name of Kito Pharmaceuticals Limited, and when it was so registered.

47. The converse argument regarding ownership of the suit properties from the 1st and 4th respondents is that the suit properties were initially public land, reserved for the 4th respondent as a playing field. Since the 4th respondent is a public institution, the land reserved for it is a public utility and therefore not available for allocation. It was their case, further, that the suit properties were unlawfully acquired, and the 1st respondent was correct in so finding and in revoking the grants.

48. The evidence from the 4th respondent is that the land it is situated on, Kakamega/Municipality/31 and the subject properties, excised from Kakamega/Municipality/32 were all part of the land initially allocated to the Indian School in the 1950s. It is noteworthy that the suit properties and the land on which the 4th respondent is situated have the same parcel number, L.R. No. 1407/208.

49. The 4th respondent produced evidence that it had been involved in litigation with the purported seller of one of the suit properties, Kakamega Block II/292, Michael Odwoma, as far back as 2004. I note from the evidence that in that civil dispute, High Court Civil Case No. 97 of 2004, Michael Odwoma had sought orders against the 4th respondent because of alleged harassment by, among others, the pupils at the 4th respondent.

50. It is evident that as far back as 2004, seven years prior to the purchase by the appellants, the 4th respondent and the pupils within it were using the property as a playing field. Had the appellants carried out due diligence, and it is expected that such due diligence would have involved a visit to the suit properties, which would have disclosed the use of the suit properties as a playing field by the pupils in the 4th respondent, they would have known that the suit properties were public land and were not available for alienation.

51. In its decision, the trial court noted that:

> "I have carefully perused the proceedings of the 1st respondent during the review proceedings of the suit land in which the petitioners were represented by their advocate. The complainant submitted that the suit parcels of land were illegally hived off land meant for the school playground by the petitioners. The plots in question were excised from plot number Kakamega Town Block II/32. They stated that they were allocated Kakamega Town Block II/31 and Kakamega Town Block II/32 respectively. The school was originally owned by the Hindu Community. Since the setup of the school they have been using Kakamega Town Block II/32 as a playground. The school has a population of 3000 children and has a section for special education.
>
> Counsel for the petitioners submitted before the 1st respondent that the schools stood on land parcel number Kakamega Town Block II/31 formerly L.R No. 1407/322 whose boundaries were clearly demarcated. The petitioners parcels of land were initially part of Kakamega Town Block II/32 which was a municipal yard which was later subdivided to create the suit parcels. That the school has never used the suit land."

52. The trial court went on to find that:

> "I find no reason to fault the decision of the 1st respondent. The petitioners were not *bona fide* purchasers as it was not apparent that the vendors they acquired the titles from had valid titles. The 1st petitioner herein avers that on 5th February, 2011, it purchased Kakamega/Municipality Block II/292 for valuable consideration from one Michael Odwoma. The

4th respondent produced documentary evidence that they had a civil dispute with the said Michael Odwoma from way back in 2004 in High Court Civil Case No. 97 of 2004. The petitioners ought to have conducted due diligence before purchasing the said suit land."

53. *Black's Law Dictionary* 9th 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."

54. In its decision in *Katende v Haridar & Company Limited* [2008] 2 EA 173 cited with approval by this Court in *Mohamed v Duba & another* (Civil Appeal 83 of 2019) [2022] KECA 442 (KLR) (18 March 2022) (Judgment) it was held as follows:

> " For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, (he) must prove that:
>
> a. he holds a certificate of title;
>
> b. he purchased the property in good faith;
>
> c. he had no knowledge of the fraud;
>
> d. he purchased for valuable consideration;
>
> e. the vendors had apparent valid title;
>
> f. he purchased without notice of any fraud;
>
> g. he was not party to any fraud.
>
> (Emphasis added).

55. Further, in its decision in *Samuel Kamere v Lands Registrar, Kajiado* [2015] eKLR this Court stated that:

> " Since the appellant's title is under challenge, in order to be considered a *bona fide* purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property."

56. In my view, the onus was on the appellants to prove that they were *bona fide* purchasers for value, without notice. To do so, they needed to show, inter alia, that the vendors had apparent valid title. There was no evidence presented before the trial court regarding the vendors' titles. In particular, no evidence was presented to show how the suit properties were allocated to the vendors or the initial allottees of the suit properties; whether they had applied for the allotment; and whether the procedural requirements for allocation of public land were complied with before a grant was issued.

57. The procedural requirement in the disposition of public land have recently been restated by the Supreme Court in its decision in *Dina Management Limited v County Government of Mombasa Petition* No. 8 (E010) of 2021 (the Dina Management Limited case) in which the apex court stated:

[104] The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 Others v Pwani University* [2014] eKLR as follows:

> "...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for Lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees.
>
> 131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. ... The process was also reinstated (*sic*) in the case of African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013 where Njagi J. held as follows: "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.
>
> 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."""

58. The appellants did not produce any documents to show that the process of alienation and allocation of government land was followed before the suit properties were registered in the names of the persons who sold it to them. All they presented before the trial court was the certificate of lease in their names. In the *Dina Management Limited case*, the Supreme Court further observed that:

> " [108] As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of *Funzi Development Ltd & Others v County Council of Kwale, Mombasa* Civil Appeal No.252 of 2005 [2014] eKLR the Court of Appeal, which decision this Court affirmed, stated that:
>
> "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title."" (Emphasis added)

59. The proceedings before the 1st respondent were a challenge to the appellants' titles, the complaint being that the land was irregularly acquired and was set aside for a public purpose, a playing field for the 4th respondent. That being the case, the 1st respondent properly found that the properties were public lands, and properly issued orders for the revocation of the appellants' titles. For the same reasons, the trial court found that the appellants were not *bona fide* purchasers, and I find no reason to fault this finding.

60. Regarding the issue of due diligence, the evidence before the trial court was that at the time of the purchase, there was a dispute in court between the vendor, Michael Odwoma, and the 4th respondent. The appellants have argued that the suit between Odwoma and the 4th respondent had been dismissed.

61. A perusal of the record indicates that the suit had been filed by Odwoma against the 4th respondent, or what Odwoma deemed to be its management board. The High Court declined to issue an injunction

against the 4th respondent in an application in which Odwoma alleged harassment by the 4th respondent and pupils of the 4th respondent. The dismissal of the suit, lodged by Odwoma claiming to be entitled to the land, was on the basis that he had sued the wrong party. At the time the appellants purported to purchase the suit properties, there were questions relating to the ownership of the suit properties. It is expected that a prospective purchaser, in conducting due diligence, would have visited the suit property.

62. In the circumstances of this case, had the appellants conducted a more thorough due diligence, they would have found that the suit properties were in use by the school, and therefore gone a little further in investigating the title of the vendors. I have noted the appellants' argument that the trial court erred in requiring them to conduct due diligence beyond that which is expected in an ordinary conveyancing transaction. I find, however, that I am in agreement with the position taken by the trial court.

Regrettably, the lack of integrity in our land transactions means that we can no longer, in many circumstances, speak of 'ordinary conveyancing transactions,' and the possession of a title by a person is not, of itself, enough to show that the person named therein is the true owner.

63. I am aware that this view is contrary to the position taken by this Court in *Peter Kamau Njau v Emmanuel Charo Tinga* (*Supra*) relied on by the appellants. In this decision, in a judgment diametrically opposed to the decision of a different bench of the Court, sitting in Nyeri, in *Munyu Maina v Hiram Gathiha Maina* eKLR this Court sitting in Malindi took the view that:

> " Due diligence expected of a purchaser does not extend beyond the title of the vendor and, so long as the vendor's name is contained in the certificate of title, section 26 of the *Land Registration Act* enjoins "all courts" to take that certificate of title as prima facie evidence that he is the absolute and indefeasible owner, subject only to encumbrances and conditions endorsed on the certificate."

64. In its decision in the *Dina Management Limited case*, the Supreme Court has upheld the position taken in the *Munyu Maina case*. It stated at paragraph 93 of its judgment that:

> "(93) As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR, 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 instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register." (Emphasis added)

65. In the circumstances, I find that the trial court was correct in finding that the appellants did not do their due diligence as they ought to have done.

66. In my view, therefore, the 1st respondent properly exercised its mandate in finding that the suit properties were public property reserved as a playing field for the 4th respondent. It was not available for allocation. The trial court properly found that the appellants did not exercise due diligence before entering into transactions in respect of the properties, and they were not bona fide purchasers for value who would get protection under section 14(7) of the *National Land Commission Act*. I would therefore dismiss the present appeal, but with an order that each party bears its own costs of the appeal.

Judgment of Kiage, JA

I have had the benefit of reading in draft the judgment of Mumbi Ngugi, J.A. I entirely agree with it and have nothing useful to add.

As Tuiyott, J.A is in agreement, the appeal shall be dismissed along the lines proposed by Mumbi Ngugi, J.A.

Judgement of Tuiyott, JA

I have had the benefit of reading in draft the judgment of Mumbi Ngugi, J.A. I entirely agree with it and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF MAY, 2023

MUMBI NGUGI

.....

JUDGE OF APPEAL

P.O KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR