**Kukan & another (Administrators of the Estate of the Late Jason Kukan Lila) v Kibutha (Civil Appeal 339 of 2018) [2023] KECA 742 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 742 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 339 OF 2018**

**DK MUSINGA, HA OMONDI & PM GACHOKA, JJA**

**JUNE 22, 2023**

**BETWEEN**

**JANE NGINA KUKAN ..... 1ST APPELLANT**

**ANTHONY PARMERES LELIAH ..... 2ND APPELLANT**

**ADMINISTRATORS OF THE ESTATE OF THE LATE JASON KUKAN LILA**

**AND**

**NJENGA KIBUTHA ..... RESPONDENT**

***(Appeal from the Ruling of the Environment and Land Court of Kenya at Nairobi (S. Okongo, J.) delivered on 3rd November 2017 in ELC Civil Suit No. 224 of 1990)***

## JUDGMENT

1. The appellants in these two related appeals seek, inter alia, orders setting aside the ruling and orders of the Environment & Land Court at Nairobi (Okongo, J) dated November 3, 2017 in ELC Case No. 224 of 1990. For good order in the related appeals, we shall refer to Jane Ngina Kukan and Anthony Parmeres Leliah (administrators of the estate of the late Jason Kukan Lila) as the appellants, while Njenga Kibutha shall hereinafter be referred to as the respondent. Bemwa Realtors Limited shall be referred herein as Bemwa.

2. The two related appeals came before this Court for hearing on November 16, 2022. Although the parties did not seek a consolidation order, they were nonetheless in agreement with the Court that the appeals arise from the same judgment and the orders sought were more or less similar. It was therefore prudent for us to prepare one judgment in respect of the two appeals, which would apply to each of the appeals mutatis mutandis.

3. The genesis of the dispute between the parties herein is a sale of land transaction captured in an Agreement for Sale dated June 6, 1988. The respondent had entered into a sale agreement with Jason

Kukan Lila (the defendant in the suit before the ELC and hereinafter referred to as "the deceased") for the sale of 40 acres of land belonging to the deceased, and which land was comprised in Kitengela Farm L.R 10029/33 and now known as L.R 14760/4 (hereinafter referred to as "the suit land"). The entire consideration was Kshs 140,000.00 for which the respondent paid a deposit of Kshs 20,000.00 and the parties agreed that the balance thereof would be paid in instalments pending consent to sub-divide and transfer, which was to be issued by the then Masaku/Donyo Sabuk Land Control Board.

4. In the plaint dated January 16, 1990, the respondent stated that upon payment of the deposit, he took possession of the suit land, fenced it off, constructed a house thereon and began rearing animals. This was done in the full knowledge and approval of the deceased.

5. The respondent and the deceased in the company of their spouses appeared before the Masaku/Donyo Sabuk Land Control Board on October 3, 1989 on an application by the deceased for consent to subdivide the suit land. According to the respondent, the consent and/or approval to subdivide was given and he paid the deceased the last instalment on the purchase price, Ksh 4,600.00, in the presence of the Board Members.

6. The approval for subdivision was forwarded to the Central Authority Board but surprisingly, the deceased informed the Central Authority Board that he had not applied for the consent, despite the minutes of the Masaku/Donyo Sabuk Land Control Board dated October 3, 1989 clearly showing that he appeared before the Land Board together with his wife and informed the Land Board of his intention to sub-divide the land. The allegations by the deceased led to the rejection of the application for consent to subdivide by the Central Authority Board.

7. The rejection of the application for consent to subdivide set in motion the filing of Nairobi HCCC No 224 of 1990 by the respondent. According to the respondent, the deceased had devised a plan where he would sell land to various people with the intention of reneging on the sale with a view to raising the sale price.

8. The respondent sought various orders, which included an order for the deceased to withdraw the objection he had filed with the Central Authority Board; an order of specific performance against the deceased in the terms consented at the Land Control Board; as well as costs of the suit.

9. In a judgment dated November 27, 2001, Phillip J Ransley, Commissioner of Assize, ordered the deceased to execute valid transfers in favour of the respondent within 30 days of the judgment, and in default, the Registrar of the Court to execute the necessary transfer documents. The Registrar of Titles was also ordered to register the said transfer and issue new title to the respondent.

10. This judgment gave rise to various applications. One of these applications which on the face of it was a rather straightforward application was one dated October 26, 2012 by the appellants, wherein they sought to have the deceased substituted by virtue of his demise on March 29, 2006. However, the application had another separate prayer which would set the stage for the filing of a fresh application. The appellants in their application had sought that a Court order which had been issued on December 27, 1996 preserving the suit land and which had been marked as entry No 10 on the title to the suit land be vacated.

11. Vide a consent dated March 8, 2013 and filed on March 12, 2013, which was subsequently contested, the appellants and the respondent herein agreed to have the prayers sought in the application dated October 26, 2012 allowed as prayed. The consent was signed by the firm of S N Thuku & Co Advocates on behalf of the appellants and Okatch & Co Advocates on behalf of the respondent. The consent was adopted as an order of the Court before Waweru, J on April 16, 2013.

12. Subsequent to the recording of the above consent, the appellants filed a fresh application dated September 3, 2013 which was brought under the provisions of section 1A & 1B, 3A of the *Civil Procedure Act*. The appellants sought to have the suit (Nairobi HCCC No. 224 of 1990) marked as settled by virtue of the fact that the decree which had been issued by the trial Court in the year 2001 was more than 12 years old and therefore past the time limit for execution as per the relevant provisions of the *Limitation of Actions Act*.

13. The respondent on his part filed a separate application by way of a notice of motion dated August 29, 2014. The application was filed by the firm of Munyalo Muli & Co Advocates. The respondent argued that the appellants had unlawfully through fraud, deceit and concealment of material facts obtained an order dated April 16, 2013 and went ahead to transfer the suit land to a third party known as Bemwa Realtors Ltd. The respondent denied having instructed his then advocate on record, one Mr Okatch of Okatch & Co Advocates, to record the said consent. Further, that the said advocate did not have in force a valid practicing certificate therefore rendering the alleged consent which he had signed void ab initio. The respondent sought an order of temporary injunction against the appellants and Bemwa Realtors Ltd or their agents/servants/representatives from alienating, transferring, charging or disposing of the suit land or any part thereof; an order joining Bemwa Realtors Ltd to the suit; that the order dated April 16, 2013 be vacated; that the entries in the title document which were premised on the orders dated April 16, 2013 be annulled, nullified, cancelled and/or be voided altogether.

14. The appellants through grounds of opposition and replying affidavit dated September 12, 2014 and January 14, 2015 respectively argued and maintained that the consent dated March 8, 2013 was proper and valid. According to the appellants, the signature appearing on the consent was that of Mr Okatch,advocate for the respondent, and was not in any way a forgery. It was further argued that at the time of entering into the consent, the judgment was more than 12 years old and therefore the same had abated under Cap 22 Laws of Kenya.

15. On February 13, 2015, the trial Court (Mutungi, J) issued orders directing Bemwa to be joined in the suit as an interested party. Subsequently, Bemwa filed a replying affidavit on November 30, 2015 stating, inter alia, that it was an innocent purchaser for value without notice.

16. The trial court on November 3, 2017 delivered a ruling in the matter. The court made several findings including, that the burden to prove that the consent was not signed by Mr Okatch lay with the respondent herein; that in light of the different affidavit evidence from the appellants and the respondent on whether the signature belonged to Mr Okatch or not, the respondent ought to have called expert evidence to demonstrate that indeed the signature did not belong to Mr Okatch. In the absence of such evidence, the respondent had not discharged this burden to the required standard.

17. With regard to whether the respondent had instructed Mr. Okatch to record the consent, and whether he acted within the instructions, the trial court was of the view that he acted against the respondent's interest. According to the learned judge, Mr Okatch had the conduct of the suit all through and was well aware of the order dated December 27, 1996 which was issued in preservation of the suit land. Signing the consent meant that the appellants could proceed to alienate and transfer the property to third parties. This obviously was against the spirit and intent of the said court order and according to the court, Mr Okatch signed the consent at the instance of the appellants. The court was satisfied that the consent entered into conferred a benefit/advantage upon the appellants as against the respondent and negated the interest that the court had conferred upon the respondent.

18. On the issue of the practicing certificate which Mr Okatch was said not to hold at the time of signing the consent, the court was guided by the Supreme Court decision in *National Bank of Kenya Ltd vs.*

*Anaj Warehousing Ltd*, Supreme Court Petition No. 36 of 2014 where the Court held that failure to hold a Practicing Certificate did not invalidate documents drawn by such an advocate.

19. The court also held that the deceased failed to execute the instrument of transfer in favour of the respondent and the same was executed by the Deputy Registrar of the High Court in the year 2002. Therefore, as at the time of the deceased's demise on March 29, 2006, the suit land had already been decreed in favour of the respondent and he was already in possession of an instrument of transfer that was only awaiting registration. The respondent had already paid stamp duty on the transfer and presented a deed plan for the suit land to the Director of Surveys. What was remaining was for the transfer to be registered so that the respondent could be issued with a certificate of title. In the premises therefore, the suit land did not form part of the deceased's estate capable of being distributed to his beneficiaries. His beneficiaries did not acquire any good title which they could pass to third parties. According to the court, the transaction between the appellants and the Interested Party was also defeated by the common law doctrine of lis pendens.

20. With regards to the 12 years' period, the court held that judgment having been entered on November 27, 2001, the last date within which it could have been executed was November 27, 2013. The appellant's application dated September 3, 2013 was therefore brought within the execution period.

21. The trial Court issued the following orders:

    i. That the court order given on December 27, 1996 and registered on L.R No Kitengela 14760 as entry No 10 to the title be and is hereby vacated,

    ii. That the Registrar of Lands is ordered to rectify the register to restore the status of the suit land i.e. L.R. No. Kitengela 14760/4 obtaining as at December 31, 1996,

    iii. That all the entries in respect of L.R. No Kitengela 14760/4 entered pursuant to the orders granted on April 16, 2013 by Waweru, J and the resultant Title No. 14760/4 be and are hereby annulled, nullified, cancelled and / or voided forthwith and the Registrar of Lands (Nairobi-Registry) Ardhi House,is ordered to register the respondent herein as the proprietor thereof with immediate effect.

22. The appellants and Bemwa were aggrieved by the said ruling and order appealed to this Court. The cross-cutting grounds of appeal as contained in the Memorandums of Appeal dated March 2, 2018 and September 13, 2018 are that the learned judge erred in law and in fact by holding that the appellants and the beneficiaries of the estate of the deceased set to dispose of the suit land without regard to the decree issued in the year 1996, and failed to consider the order extracted on April 23, 2013 lifting the caveat placed against the title of the suit land on December 27, 1996; in failing to take into account the appellant's application dated September 3, 2013 which sought to have the suit marked as settled since 12 years had elapsed from the date of judgment; in failing to appreciate that the appellants and other beneficiaries had transferred the suit land at a consideration of Kshs 25,000,000.00, thereby completely extinguishing the interest of the respondent thereon; in holding that the firm of Okatch & Co did not have legal capacity to act for the respondent when there was no evidence on record from the said firm; by agreeing with the respondent's contention that the appellants did not acquire any title to the suit land which they could pass to third parties when in fact title had not passed to the respondent; by failing to consider that the suit land had been sold to Bemwa, an innocent purchaser for value and who was not a party to the suit from the onset; in failing to consider that the orders dated December 27, 1996 complained of by the respondent were interim and as such lapsed when judgment was given

on November 27, 2001; in failing to consider that the judgment made in favour of the respondent was more than 12 years old and as such had abated as at the time the said consent order was made; by holding that the sale transaction between the appellants and Bemwa was defeated by the doctrine of lis pendens.

23. At the hearing of these appeals, learned counsel Mr Mugambi appeared for Bemwa, while learned counsel Mr Mugu was present for the respondent. Ms Khamala Roselyn held Mr Amendi's brief on behalf of the appellants. All counsel present indicated that they would be relying on the respective written submissions without any oral highlights.

24. The appellants vide their written submissions dated April 26, 2019, submit that there was no pending suit between them and the respondent at the time of transfer of the suit land to the Bemwa, as the same had been settled. The doctrine of lis pendens therefore does not apply, they contend. With regard to limitation of time, it is argued that judgment in favour of the respondent was made on November 26, 2001, and the decree pursuant to the judgment issued on the February 11, 2002. According to the appellants, time for execution of the judgment started running against the respondent on the date of judgment, and given that the order was granted on November 26, 2001, the respondent had up to November 2012 to execute the judgment in his favour. This was not done by the respondent and therefore the judgment could not be executed due to the effluxion of time; that by the time of filing suit by the appellants on February 5, 2013 and the time of filing the consent dated March 8, 2013 on April 12, 2013, a period of 12 years had lapsed. In support, the appellants cited the decision of this Court in *Willis Onditi Odhiambo v Gateway lnsurance Co. Ltd* , [2014] eKLR where the Court was said to be emphatic on the provisions of section 4(4) of the *Limitation of Actions Act* regarding the time limit within which to execute decrees after delivery of judgment. The decision of *M'ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe* [2007] eKLR was also cited in support.

25. On the validity of the consent entered into, the appellants submit that it is binding unless it can be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court, or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside on agreement. Reliance was placed on the case of *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485. It is submitted that no evidence was placed before the trial court to show that the consent was not entered into freely and without the knowledge and instructions of the respondent.

26. Bemwa through written submissions dated October 3, 2018 submits that the trial court failed to assert the indefeasibility of the appellant's title. It is submitted that the sale transaction between the appellants and Bemwa was regular and further, that Bemwa, being an innocent purchaser for value without notice, its rights in the suit land are protected under the law. The decisions of this Court in *Charles Karaithe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others* [2013] eKLR and *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR were cited in supported of this argument.

27. The respondent on its part, vide the written submissions dated April 29, 2019 submits that the learned judge made sound analysis of all the relevant issues and therefore arrived at a correct finding. It is submitted that as at the time the appellants entered into a sale agreement with Bemwa, they were aware that the suit before the trial court had not run its course since registration and issuance of title in the respondent's name had not been finalized. In the circumstances, therefore, the learned judge was correct in applying the doctrine of lis pendens to the transaction in question. It is also submitted that appellant obtained title to the suit land irregularly and had no good title which they could pass to Bemwa. On the issue of bona fide purchaser for value without notice, it is submitted that Bemwa did

not exercise due diligence while purchasing the suit land and cannot therefore be described as a bona fide or innocent purchaser.

28. The mandate of this Court on a first appeal as set out in rule 31(1) of this Court's Rules requires the Court to re-appraise the evidence and draw its own conclusion. In *Peters v Sunday Post Limited* [1958], EA 424, the Court of Appeal for Eastern Africa stated that:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or approved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

29. The following two issues commend themselves to us for determination in this appeal:

    i. Whether the appellants had good title on the suit land which they could pass to Bemwa, and

    ii. Whether Bemwa was an innocent purchaser for value without notice.

30. This Court in *Munyu Maina v Hiram Gathiha Maina,* Civil Appeal number 239 of 2009 held as follows:

> " We state 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 of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which would not be noted in the register."

31. It is an indisputable fact that vide judgment dated November 27, 2001, Phillip J Ransley, Commissioner of Assize, issued an order directing the deceased to execute valid transfers in favour of the respondent within 30 days of the judgment and in default, the Registrar of the Court to execute the necessary transfer documents. The Registrar of Title was also ordered to register the said transfer and issue new title to the respondent. The deceased did not execute the instrument of transfer as ordered by the court and the same was executed by the Deputy Registrar of the High Court in the year 2002.

32. The deceased passed on sometime in the year 2006. As a result, whereof, the appellants herein took out letters of administration in respect of his estate and proceeded to distribute his estate. It is our view that as of the year 2013 when the suit premises was sold to Bemwa by some of the beneficiaries of the deceased's estate, it did not form part of the deceased's estate. A transfer had already been executed in favour of the respondent as per the orders of the trial court.

33. Although the title document was yet to be processed in favour of the respondent, sufficient evidence was produced before the trial court to show that the respondent had taken the necessary steps towards the acquisition of the certificate of title. These steps included the payment of stamp duty, preparation of a Deed Plan and presentation thereof to the Director of Surveys for Registration. The delay in issuance of the certificate of title was attributable to the disappearance of the file at the Lands Registry. The delay was, therefore, in our view, due to factors which were far beyond the respondent's control.

34. The common law principle, nemo dat non habet (no one can give a better title than he himself has), applies equally to the sale of land. In other words, no one can purport to have and/or pass good title or

interest to what legally belongs to another. In the circumstances, therefore, Bemwa acquired no good title over the suit land which this Court can be called upon to protect.

35. Having noted as above, what then should we make of the consent order which lifted the caveat that was registered against the suit land and which enabled the registration of the suit land in the beneficiaries' names and the eventual sale and transfer thereof to Bemwa? The trial court on December 27, 1996 made an order on an interlocutory application which had been filed by the respondent. The order of the court was:

> " That the Commissioner of Lands be and is hereby ordered not to register any changes in subdivision or ownership of LR No Kitengela 14760/4"

36. The trial court, in our view, addressed itself succinctly on the issue of the consent in the impugned ruling. We reproduce the relevant paragraphs as hereunder:

> " There is no doubt in this case that the firm of Okach & Company Advocates acted against the plaintiff's interest. The said firm of advocates conducted the hearing of this case on behalf of the plaintiff and obtained judgment in favour of the plaintiff. In the said judgment, the court directed the deceased to transfer the suit land to the plaintiff. The deceased refused to execute the instrument of transfer in favour of the plaintiff and the said firm of Okach & Company Advocates prepared an instrument of transfer of the suit land from the deceased to the plaintiff and presented the same to the Deputy Registrar for execution. It is the same firm of advocates who collected the instrument of transfer for registration by the Registrar of Titles in favour of the plaintiff.
>
> The said firm of advocates was aware that the order of December 27, 1996 was made by the court to preserve the suit land pending the determination of the dispute between the plaintiff and the deceased over the said property. The said firm of advocates was aware that if the order was lifted, the suit land stood the risk of being alienated by the deceased or the defendants. When the said firm of advocates signed the consent lifting the said order, it did so at the instance of the defendants. The said firm of advocates must have been aware that the plaintiff had not managed to have the transfer that was executed by the court in his favour registered. Even if he was not aware, he had an obligation to inquire from the plaintiff if at all the Registrar of Titles had registered the said transfer. By agreeing to lift the said order at the instance of the defendants before the transfer of the suit land in favour of the plaintiff had been registered, the firm of Okach & Company Advocates acted against the interest of the plaintiff and in the interest of the defendants who had planned to dispose of the suit land the judgment of the court in favour of the plaintiff notwithstanding."

37. There can be no doubt in our minds that the consent allegedly entered into between the appellant and respondent through their respective advocates on record was issued without the express instructions of the respondent. It beats logic as to why the respondent in whose favour the caution had been registered would consent to its lifting. What did he stand to gain? What had changed suddenly to warrant the abrupt change of mind? In our view, nothing had changed, and the logical conclusion is that the consent was entered into without the instructions, express or otherwise and the knowledge of the respondent. The law firm of Okatch & Co Advocates, in our view, could have connived with the appellant's advocate on record at the time to record the consent. As the trial court noted, and correctly so, the consent conferred a benefit and an advantage on the appellants over the respondent and negated the interest that the trial court had conferred upon the respondent.

38. Section 24 of the *Land Registration Act*, 2012 provides that:

> " Subject to this Act-
>
> (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."

39. Section 26 of the *Land Registration Act*, 2012 on the other hand provides that: -

> "(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge except-
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> a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
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> b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme." [Emphasis added]

40. This Court in *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others,* Civil Appeal No. 246 of 2013 while dealing with the issue of indefeasibility of title cited with approval the Court's holding in the case of *Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others* [1997] eKLR, Civil Application No 60 of 1997, where the Court categorically declared that:

> " Section 23(1) of the Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the *Land Registration Act*) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misinterpretation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy." [Emphasis added]

41. It is our view that the title held by Bemwa was not acquired in a regular or lawful manner as at the time it purchased the land from the appellants, title thereto was no longer with the deceased or available for distribution under his estate. The beneficiaries had not title and could pass none. The circumstances through which Bemwa acquired title to the suit land takes away the indefeasibility right of the title making it subject to challenge pursuant to the provisions of section 26 of the *Land Registration Act*, 2012.

42. As regards the issue whether Bemwa was an innocent purchaser for value without notice, *Black's Law Dictionary 11th Edition* at page 1491 defines bona fide purchaser for value as:

> " someone 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."

43. The test for a bonafide purchaser was laid down in the Ugandan case of *Katende v Haridar & Company Limited* [2008] 2 EA 173, where the Court of Appeal Uganda held thus:

> " ... a bona fide purchase for value is 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 the following:
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> a. He holds a certificate of Title;
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> b. He purchased the Property in good faith;
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> c. He had no knowledge of the fraud;
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> d. The vendors had apparent valid title;
>
> e. He purchased without notice of any fraud;
>
> f. He was not party to any fraud.
>
> A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."

See also *Lawrence Mukiri v Attorney General & 4 Others* [2013] eKLR.

44. Bemwa states that it purchased the suit land after conducting due diligence thereon. In *Black's Law Dictionary, 11th Edition* at page 573, due diligence is defined as:

> " The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation."

45. The standard of due diligence was, in our view, aptly laid down by Mutungi, J in the case *Esther Ndegi Njiru & Another v Leonard Gatei* [2014] eKLR. The learned judge held as follows:

> " The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of the *Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of the *constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as "grabbed public lands" it is essential to endeavour to ascertain the history and/or root of the tile. [Emphasis added]

We respectfully affirm the above holding.

46. In the present case, Bemwa stated in its replying affidavit dated November 30, 2019 that it conducted due diligence and ascertained that the suit land was registered in the name of the vendors (the beneficiaries of the estate of the deceased) and produced copy of the certificate of title in their names. It did not produce any certificate of official search, nor did it demonstrate any other efforts it took to ascertain the ownership of the suit land. The purchase price in question of Kshs 25,000,00.00 was, in our view, colossal and would have motivated a diligent purchaser to examine the history or the root

of the title. If this had been undertaken, Bemwa could have become aware of the court order dated December 27, 1996 and of the fact that there had been long litigation over the ownership of the suit land.

47. In the circumstances of this case, we are not satisfied that Bemwa conducted proper due diligence before purchasing the suit land. We, just like the trial court sympathize with Bemwa, especially in light of the huge sums of money it expended to acquire the suit land. The circumstances of this case, however, puts Bemwa's title on the suit land in conflict with the law and therefore not capable of legal protection. We agree with the view expressed by the learned judge that any claim by Bemwa lies as against the appellants and/or the beneficiaries of the estate of the deceased from whom it purchased the suit land and not the respondent.

48. In the upshot, the two related appeals are without any merit and each of them are accordingly dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY JUNE, 2023.**

**D. K. MUSINGA, (P.)**

**.....**

**JUDGE OF APPEAL**

**H. A. OMONDI**

**.....**

**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**