



Makau & 2 others & 2 others (Suing as the Administrators of the Estate of the Late Thomas Makau Musyoki - Deceased) v Syokimau Farm Limited & 2 others (Environment & Land Case E028 of 2022) [2024] KEELC 3981 (KLR) (29 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3981 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E028 OF 2022**

**A NYUKURI, J
APRIL 29, 2024**

BETWEEN

**MARTIN MUTISYA MAKAU 1ST PLAINTIFF
ANNE MAKAU 2ND PLAINTIFF
DIANA MUMBUA MAKAU 3RD PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE THOMAS
MAKAU MUSYOKI - DECEASED**

AND

**SYOKIMAU FARM LIMITED 1ST DEFENDANT
THE ADMINISTRATOR SYOKIMAU FARM LIMITED 2ND DEFENDANT
THE CHIEF LAND REGISTRAR, MINISTRY OF LANDS AND PHYSICAL
PLANNING 3RD DEFENDANT**

JUDGMENT

Introduction

1. By a plaint dated 20th April, 2022 the plaintiffs in this case sought against the defendants, jointly and severally, the following orders;
 - a. An order directed at the defendants, jointly and severally, to vacate the plaintiffs' suit property known as L.R No. 12715/491 (Grant No. I.R 45955) with immediate effect and to hand over vacant possession of the said property to the plaintiff.
 - b. A permanent injunction against the defendants jointly and severally by themselves, their servants and/or agents and/or any other person or body of persons from entering upon



occupying, trespassing and/or otherwise meddling in the plaintiffs' suit property known as L.R No. 12715/491 (Grant No. I.R 45955).

- c. An order directed at the 3rd defendant to correct the records held at the Lands Registry and reinstate the deceased Thomas Makau Musyoki as the Registered Proprietor over L.R No. 12715/491 (Grant No. I.R 45955) and issue the plaintiffs with a corrected official search result.
 - d. Damages against the defendants jointly and severally for trespass.
 - e. Costs of this suit.
 - f. Such other or further relief that the Honourable Court may deem fit to give in the circumstances.
2. The plaintiffs who are Administrators of the estate of Thomas Makau Musyoki, (deceased), averred that the deceased is the registered owner as lessee of all that parcel of land situate in Machakos containing by measurement Two Decimal Nought Two Four (2.024) Hectares or thereabouts and known as L.R No. 12715/491 (Grant No I.R 45955) (hereinafter referred to as "the Suit Property").
 3. The plaintiff further averred that they purchased the suit property from the then allotted owner, Beatrice Mwongeli Kawinzi which purchase was perfected by the registration and transfer of the title on 8th December, 1988.
 4. They stated that sometime on or about October, 2020, when the plaintiffs intended to commence succession proceedings, it came to their notice that certain persons including the defendants herein had trespassed on the suit property as well as tampered with the records of the property held at the land registry.
 5. He stated that the defendants' aforesaid acts of invasion and trespass on the plaintiffs' land are an affront to the doctrine of sanctity of title to land and violates the plaintiff's Constitutional right to ownership and despite numerous attempts by the plaintiffs to have the defendants vacate suit property, the defendants have remained unmoved.
 6. The suit was opposed. The 1st and 2nd defendants filed a defence dated 6th may 2022. They denied the plaintiffs' claim and averred that Paul Masila Kimeu is the liquidator of Syokimau Farm Limited, the first defendant having been appointed in a resolution of the company on 26th June 2013. They further stated that the first defendant was granted a 99 years lease on 1983 in regard to the suit property. They also stated that the company had a total of 713 members and only the members that complied with the terms of the letters of allotment became shareholders and were issued with share certificates for the plots allotted to them.
 7. The defendants further stated that the first defendant had by the year 2022 been in quiet possession and uninterrupted ownership, proprietorship, and active occupation of the suit property of the suit property and that the said title is still owned by the 1st defendant. They stated that the suit property is one of the properties belonging to the first defendant which had been intended to be allocated to Mrs. Kawinzi Makau who had expressed interest to acquire the suit property from the 1st defendant, but failed to comply with the rules of the first defendant on allotment and issuance of the share certificates by refusing to pay the required share subscription fee and survey fees. That it is this non compliance that caused the suit property to revert to the first defendant.
 8. They also stated that on 12th January 2021 while in the process of building a wall over the suit property some goons attempted to trespass on the same and that it is the plaintiff who is interfering and trespassing on the suit property owned by the 1st defendant leading to a report at Athi River police



station. Further that the Directorate of Criminal Investigations wrote a letter to the Ministry of Lands to ascertain ownership of the suit property, and that in a letter dated 20th January 2021, the Chief Land Registrar responded that the suit property is registered in the name of the 1st defendant.

9. They maintained that Thomas Makau Musyoki has never owned the suit property and that Beatrice Mwangeli Kawinzi has never been a shareholder in the 1st defendant company and could not therefore have sold the suit property which does not belong to her. They stated that for anyone to process a title deed from the first defendant he or she must possess a genuine share certificate, subscription fees and a letter of allotment hence no title deed would be issued without those documents. They also stated that the letter of allotment produced by the plaintiff being number 691 belongs to one Philip Villi Makau and not Kawinzi Makau Musyoki and therefore that the plaintiff's letter of allotment is not from the 1st defendant. They maintained that the plaintiff was holding a title obtained by fraud and gave particulars of fraud as colluding with corrupt staff at the ministry of lands and presenting documents that did not originate from the first defendant.
10. The 3rd defendant did not enter appearance or file defence despite service. The matter proceeded to hearing by way of viva voce evidence.

Plaintiffs' Evidence

11. PW1, was Martin Mutisya Makau, the deceased's son and the 1st plaintiff herein who testified on 20th April, 2023. He adopted his witness statement dated 3rd February 2023 as his evidence in chief. He also produced the documents attached to his list of documents dated 3rd February 2023 as Pexb-1-22. It was his evidence that he is one of the administrators of the estate of Thomas Makau Musyoki having authority of his co-plaintiffs to give the testimony herein. He stated that his late father passed on on 12th October 2020 and therefore they obtained grant of letters of administration for the estate of the deceased. That his father was the registered owner as a lessee of the suit property having purchased it from one Beatrice Mwangeli Kawinzi wife of Kawinzi Makau, who are both deceased, for a sum of Kenya shillings 165,000/= . That this transaction was reduced into a sale agreement dated 20th August 1988 which was done in the presence of two witnesses namely David Ngati Nzioka and S. Paul Kathilu. That the purchase price was paid in four installments and the last payment was made on 6th January 1989.
12. He stated that he was aware that Kawinzi Makau paid the 1st defendant all the requisite fees at the point of purchasing the suit property. He stated that on 5th April 1978, Peter Kawinzi paid Kshs. 900/= on account of 10 shares and was issued receipts serial number 3014. In addition, that via a receipt serial number 3306 he made a payment of Kshs. 100/= on account of share subscription. Further that on 7th October 1981 he made a payment of Kshs. 1000/= towards survey and the same was receipted via receipt serial number 6091. Subsequently via receipt serial numbers 4921 and 6345 he made further payments of Kenya shillings 100 and 400 respectively towards survey fees. Further that via receipt serial number 29 he made a payment of Kenya shillings 5/= on account of shares.
13. It was his testimony that he was aware that on 3rd September 1988 his late father made a payment of Kshs. 1,500/= to Waki and Company Advocates as deposit for processing of the title deed. He stated that the suit property was not the only property his father owned that emanated from Syokimau Farm Limited. He stated that his father applied and filled Syokimau Farm Limited's application form for a commercial plot on 13th December 1988 and that the said company responded to his father's application by provisionally allocating him a commercial plot vide its letter dated 8th February 1989. That Syokimau Farm Limited acknowledged the fact that his late father was a shareholder and land owner of the said company by writing a letter on 12th September 1993, informing him that the



commercial plots had been marked for identification purposes and that he should visit the site to be shown his plot. Further that on 3rd May 1994 they also wrote to his father inviting him to a meeting of the shareholders. That subsequently his father was issued with the title deed to the aforementioned commercial plot and that he dutifully paid rates and rent over the suit property over the years which are up to date.

14. He also informed court that he was aware that his father never sold any of his properties including the suit property. That after the death of his father, himself together with his siblings decided to follow up on his father's estate only to notice that the defendants had entered on the suit property without any right and had put up a structure. That he found two persons on the suit property and on asking them why they were putting up a structure thereon, they remained adamant. Also that when he visited the suit property on 13th December 2020, he found a board thereon indicating that the land had been sold to Ubora Housing Cooperative Society with phone numbers indicated. But when he called those numbers he was told that their society bought the suit property from one Martin Wambua Kakumbi.
15. He stated that Ubora Housing Society organized for a meeting on 11th January 2021, at their lawyers offices but Martin Wambua Kakumbi did not show up although he had been asked to attend the meeting. That several meetings were arranged to ensure that the said Martin Wambua attends but he never showed up. That it was on 15th January 2021 that one Josephine Katunga Wambua who indicated to be the wife of Martin Wambua Kakumbi attended and produced a photocopy of their purported title deed indicating that the plaintiff's father had transferred the suit property to Chalan Consultants Limited on 4th November 1990. That he told them that his father had never sold his land and demanded that they produce a sale agreement but that was not done. That they also refused to give him a copy of the purported title deed.
16. He further stated that in February 2021 his advocate Bobby Otieno received a call from one June Rienye indicating that her client Martin Wambua Kakumbi dad died and therefore they have never heard from them again. He stated that on 3rd March 2021, he received a call from his neighbour informing him that several people were on the suit property with building materials. That he immediately called the area chief who advised him to report to Mlolongo police station which he did vide OB 48 of 3rd March 2021. That he was accompanied by police officers to the suit property where they found 15 men with an excavation truck but the men left the property to avoid being arrested. He stated that at around 4:00 pm, a man identified as Mr. Nderitu showed up claiming that he was from the defendants' office and had been sent by one Paul Masila Kimeu and he claimed that they were reclaiming land from grabbers and reverting the same to the owners.
17. The witness stated that when he later conducted a search on the property he found that the defendants had tampered with the records held at the Ministry of Lands and caused Syokimau Farm Limited to be indicated as being the registered proprietor yet it had sold and allotted the property to Kawinzi Makau on 9th September 1983, whose wife subsequently sold it to the plaintiff's father and that his father up to his death had not sold the property. He stated that he was aware that the Directorate of Criminal Investigations was conducting investigations over fraudulent activities of the defendant concerning the suit property. According to him, the defendant had signed several misleading affidavits touching on the suit property as well as forged transfer of share forms which are under investigations.
18. The witness stated that on 21st December 2021, his advocates applied for a caution to be registered on the suit property, but despite several visits to the Land Registry the Chief Land Registrar had failed to register the same. He further stated that on 11th may 2022, following the orders of this court his advocate sought for them to be registered at the Land Registry but unfortunately the same had never been registered. He stated that the minutes produced by the defendant dated Saturday 26th June 2013



were forged because that date was not a Saturday and from a perusal of that calendar 26th of June 2013 fell on a Wednesday. Further that the defendant annexed to his pleadings a Kenya Gazette Notice dated 8 August 2013 which clearly states that the resolution to wind up the defendant was passed on 26th July 2013 and not 26th June 2013 as alleged by the defendant in his questionable minutes. He stated that he was apprehensive that the defendants and their agents were intent on unlawfully and fraudulently grabbing and wasting the suit property and that those acts are an affront to the doctrine of sanctity of title and constitute a grievous violation of the deceased constitutional right as the registered proprietor of the property to enjoy quiet possession of his property. He sought to be confirmed as the owner of the suit property and the defendants to vacate the same.

19. The witness produced copy of grant of letters of administration; certificate of title for the suit property; sale agreement dated 20th August 1988 plus its English translation; agreement dated 2nd September 1988; letter of allotment and share certificate released by Beatrice Mwangeli to Thomas Makau; deed of acknowledgement dated 6th December 1988 with its translation; deed of acknowledgement dated 6th December 1989 with its translation; copies of receipts for the 10 shares, share subscription and survey fees; receipt issued by Waki and Company Advocates for the conveyance; application form for a commercial plot dated 13th December 1988; letter dated 8th February 1989; letter dated 12th September 1993; letter dated 3rd May 1994; application for official search plus the results thereof for commercial plot; rates and rent receipts for the period between 2012 to 2020; copy of official search; statement given to the DCI; letter from the DCI; bundle of documents obtained from the DCI; caution application lodged with the Ministry of Lands; application to register this court's orders dated 28th April 2022; and calendar for June 2013.
20. On cross-examination, he stated that he is the administrator of the estate of the deceased. He stated that the suit property is among the properties of the deceased. He stated that the deceased was a shareholder of Syokimau Farm Limited and bought property from Mrs. Beatrice Kawinzi and has a share certificate share No. 243 in the name of Mrs. Kawinzi. He stated that they also have a letter of allotment No. 671. PW1 stated that he was not sure whether there were L.R. Numbers in 1988. He said he is not aware of a document called transfer of shares. He stated that his father paid the purchase price and a balance of Kshs. 60,000/= was left however the vendor still agreed to transfer. He stated that he has always been in possession of the suit property. He stated that his father died on 12th October, 2020 and on 13th December, 2020 he was informed that the suit property had been sold to Ubora Co-operative. He stated that the society refused to give him a copy of the title.
21. On re-examination he stated that when this suit was filed, they had not confirmed grant. That marked the close of the plaintiffs' case.

1st and 2nd defendants' case

22. DW1 Paul Masila Kimeu, adopted his witness statement dated 6th May, 2022 as his evidence in chief. He also produced documents attached to the list of documents dated 8th March, 2022 and produced them as D Exhibit 1-17. His evidence was that he is a liquidator of Syokimau Farm Limited and continuous in office as an administrator thereof. He stated that in 1983, the 1st defendant was granted a lease of 99 years over the suit property and that it had a total of 713 members and only members who adhered to the terms of the letters of allotment became shareholders and were issued with the share certificate for the plots allocated to them indicating plot number and the owner.
23. It was his evidence that the company passed a unanimous resolution to appoint him as administrator of the voluntary winding up process of the company and that because of that position, he had been representing the company in court proceedings and processing titles not yet issued to shareholders and



members. He stated that he had been appointed as caretaker and or administrator of the 1st defendant on condition that he is supposed to appear in court when required on behalf of members of Syokimau Farm Limited; make sure members who have not collected their title deeds have received them as soon as possible; ensure the surveyor is appointed by surveyors board to handle matters left pending by the late surveyor Mr. Maeke to prepare and file the remaining deed plans. He stated that the term and work of the caretaker would expire upon all members receiving their titles or through a court process; that the allowance of the caretaker/administrator will be covered by any remaining plots which have not been allocated to anyone; and that the caretaker/administrator will keep the membership record book company seals and any records and documents previously held by the chairman, secretary and treasurer and produce in court in case of ownership dispute or in any other place if need be.

24. He stated at that vide minute 05/013 Of the shareholders meeting held on 26th June 2013, the members voted and agreed that as administrator he should appear before court for any upcoming, present or past wrangles, questions and or litigation concerning ownership of the property of the company and the shareholders. He alleged that the company, its members or shareholders collectively jointly or severally had by the year 2022 been in quiet possession, enjoyment and uninterrupted ownership and active occupation over the suit property which is still owned by the 1st defendant with an official search over the property confirming the same. He stated further that the suit property is one of the properties which belong to the 1st defendant and which had been intended to be allocated to Mrs. Kawinzi Makau.
25. DW1 further alleged that Mrs. Kawinzi Makau expressed interest to acquire the suit property from the company and her name entered in the register, but contrary to the company policy and procedures on allotment, she deliberately ignored the terms of the allotment despite various notices as she refused to pay the required share subscription fee and survey fees. That due to her failure aforesaid, the land reverted to Syokimau Farm Limited and the company is duly indicated as proprietor and owner of the suit property. He maintained that the official search of the suit property still indicate that the same belongs to the 1st defendant. He further stated that as a caretaker, he had paid up all the land rates and rent. He alleged that at the time of winding up of the company, the suit property had already reverted to Syokimau Farm Limited and was supposed to take care of the expenses that he incurs to run the company as per the minutes which led to the winding up.
26. He further alleged that on 12th January 2021, goons attempted to trespass on the suit property and that the plaintiffs interfered and trespassed thereon leading to him reporting the matter to Athi River and Mlolongo police stations. That due to the above, the Chief Land Registrar in a letter dated 20th January 2021 wrote to the Athi River police station confirming that the land is now registered in the name of Syokimau Farm Limited. He insisted that Thomas Makau Musyoki has never owned the suit property and that Beatrice Mwangelli Kawinzi has never been a shareholder in Syokimau Farm Limited. He stated that the sale agreement by the plaintiff of 20th August 1988 is a forgery. He stated that the plaintiff had not annexed the share subscription receipts to justify purchase of shares. He further claimed that the plaintiff had not annexed transfer of share document. He stated that it was not true that Beatrice transferred shares to Thomas. He further alleged that the application for commercial plots in Syokimau Farm Limited was only done in relation to L.R. Number 12715/267 and that the suit property has never been a commercial property. He faulted the letter of allotment that the serial number did not match the serial number on the share certificate and stated that the allotment letter number 691 belonged to Philip Villi Makau and not Kawinzi Makau. He maintained that Beatrice Mwangoli Kawinzi and Thomas Makau Musyoki were not shareholders in Syokimau Farm Limited and therefore they could not have transferred the suit property to anybody. He accused the plaintiff of fraudulently obtaining the title documents by colluding with corrupt staff at the Ministry of Lands and presenting documents that did not originate from Syokimau Farm Limited. He insisted that it was



representatives of Syokimau Farm Limited who were the ones in possession and occupation of the suit property and that they have indefeasible rights thereto.

27. On Cross-examination, he stated that his education level was high school in form two. He stated that it was not true that Syokimau Farm Limited completed selling its land which was the reason why it was wound up. He stated that the reason for winding up was because there was no income for the company and that it could not meet its own expenses. He stated that the serial numbers of the share certificates and letters of allotment should be the same and the number of the member in the register should match the share certificate. Having been referred to his exhibit no. 8, he stated that Kawinzi Makau was member number 243 in the list of shareholders. He stated that he could not recall when he began paying rates and rent. He stated that Makau did not pay share certificate and allotment fees therefore never became a member of the society. He stated that there was no evidence to show that the notice for payment addressed to Kawinzi Makau dated 14th September 1985 was ever received. He stated that in 1985 Syokimau Farm Limited was using computers.
28. On re-examination, he stated that he joined the board of Syokimau Farm Limited but did not recall when that happened. He stated that the 1st defendant is still in the process of winding up. He stated that he has been paying rates for the suit property.
29. DW2, Benedict Mackenzie Mutuku, testified that he was a former director of Syokimau Farm Limited. He adopted his witness statement dated 6th May, 2022 as his evidence in chief. He echoed DW1's evidence and stated that Paul Masila Kimeu was appointed as administrator of Syokimau Farm Limited in the resolution of the company dated 26th June 2013 where 665 shareholders including himself as a director were present. He stated that Syokimau Farm Limited was registered in 1965 but wound up on 26th June 2013. Further that the suit property was granted to the first defendant in 1983 for a 99 year lease. He restated the duties of the administrator as alleged by DW1 above and alleged that the suit property belong to the 1st defendant which was intended to be allocated to Mrs. Kawinzi Makau but that the said Kawinzi Makau failed to comply with the terms of the allotment letter. According to the witness, the serial number in the allotment letter was the same as that in the share certificate for their shareholders. He added that the first defendant was the one in actual possession of the suit property and has never ceded any occupation to the plaintiff who is a trespasser.
30. On cross-examination, the witness stated that the title of the suit property is in the name of Syokimau Farm Limited. Further that the official search at page 29 of the defendant's bundle shows the date of title to be on 11th December, 2020, the lands office shows the 1st Defendant got the land in 1983 and title in 2019 because of people who failed to pay. He stated that the first time the suit property was registered under Kenyan law was in 2019 and that the lands office was issuing digital searches as of 1st December 2020. That marked the close of the defence case.
31. Parties filed submissions in support of their case. On the record are the plaintiff's submissions filed on 15th June 2023 and the 1st and 2nd defendants' submissions filed on 12th September 2023. No submissions were filed by the 3rd defendant

Plaintiff's Submissions

32. Counsel for the plaintiff referred to Section 24 (a) and Section 26 of the [Land Registration Act](#) on the issue of ownership and submitted that in the instant case, both parties are in possession of a title document in respect to the suit property therefore the dispute is whose title is superior. Counsel argued that it was incumbent upon the parties to produce documents in support of their respective claim on the suit property.



33. Counsel submitted that the plaintiff had given a chronological account of how he acquired the suit property and that contrary to the 2nd defendant's assertion, Kawinzi Makau was a paid up member of the first defendant and prior to his demise he had satisfied all the requirements of the 1st defendant as pertains to the purchase of shares of the 1st defendant and allotment to him of the suit property. That therefore Beatrice Kawinzi as a beneficial owner of Makau Kawinzi's shares was in a position to sell and pass the latter's interest in the property to Thomas Makau Musyoki. Counsel therefore submitted that therefore Thomas Makau Musyoki took the place of Kawinzi Makau in the company and they enjoyed the benefits that had accrued. Counsel observed that Thomas Makau Musyoki on 13th December 1988 having become a member of the first defendant following the purchase of Makau Kawinzi's shares in the company applied and purchased a commercial plot from the first defendant in his capacity as a member of the company as shown in plaintiff's exhibit 10. That therefore the letter of the first defendant dated 8th February 1989 shows that Thomas Makau Musyoki was allocated a commercial plot and therefore the 2nd defendant's allegation that Thomas Makau Musyoki was never a member of the first defendant when in the letter dated that may 1994, the latter was invited for a shareholders general meeting as per exhibit 13, is not correct. Counsel observed that it is evident that the transaction between Beatrice Kawinzi Makau and Thomas Makau Musyoki was indeed recognized by the 1st defendant who acknowledged Thomas Makau Musyoki as its member.
34. Counsel submitted that whereas the 2nd Defendant herein obtained their fictitious title on 28th November, 2019, the deceased was registered as proprietor of the suit properties on 8th December, 1988. He stated that its trite law that when there are two competing titles, the first in time will prevail as was seen in the cases of *Wreck Motors Enterprises v The Commissioner of Lands & others* Civil Appeal No. 71 of 1997; *Gitwany Investment Ltd v Tajmal Ltd & 3 Others* [2006] eKLR and *Joseph Kiprotich Bor v Tabutany Chepkoech Chebusit* [2021] eKLR.
35. On whether the documents produced in court by the 2nd Defendant are legitimate, counsel submitted that perusal of documents produced by the 2nd defendant leads to questions on their legitimacy. He referred to the minutes of the annual general meeting which are stated to be on Saturday June 26th 2013 at 10:00 AM and argued that 26th June 2013 fell on a Wednesday and not a Saturday as indicated. He argued that the 1st and 2nd defendants worked together and their testimonies were inconsistent. Its contended that the documents produced in court also do not give a clear picture of the real events owing to the fact that it also came up at some point that the 1st Defendant's title was generated by a computer in 1981 which appears fraudulent going by the time. Counsel argued that it was inconceivable that a land selling company with unsold plots would be unable to meet its expenses as alleged by the 2nd defendant who stated that the 1st defendant was wound up because it could not meet its expenses and that this is contrary to clause 5 of minute 4/13.
36. In conclusion, Counsel implored the court not to split the baby into two as suggested by counsel for the defendant but to exercise Solomonian wisdom and hand over the baby to its rightful owner the plaintiffs herein.

1st and 2nd Defendants' Submissions

37. Counsel for the defendant while citing the case of *Alberta Mae Gacie v The Attorney General & 4 others* HCCC No. 522 of 200 submitted that the existence of two different titles with respect to the same property and with all the necessary endorsements made thereon is itself evidence of participation in a forgery by the plaintiffs as no single parcel can have more than one title.
38. It was further submitted for the defendants that the plaintiff acquired the title to the suit property fraudulently and illegally and that the said title is therefore null and void and cannot confer a valid



interest in land. He relied on the cases of *Macfoy v United Africa Ltd* [1961] 3 All E.R. 1169; *West End Butchery v Arthi Highway Developers Ltd & 6 Others* [2012] eKLR for the proposition that it is unjust and inequitable that an innocent proprietor can be dispossessed of his or her legal right to land through fraudsters as was affirmed in the case of *Iqbal Singh Rai v Mark Lecchini and The Registrar of Titles*, Civil Case No. 1054 of 2001.

39. It was further contended for the defendants that the defendants meet the definition of bona fide purchasers as described in the case of *Katende v Haridas & Company Ltd* [2008] 2 EA 174 and therefore the courts have a duty to cancel the fraudulently acquired title insisting that there was no evidence that shows their title had been fraudulently acquired. Counsel argued that it therefore follows that even if the plaintiffs were innocent purchasers for value their interest could not prevail over that of the defendants.

Analysis and determination

40. I have carefully considered the pleadings, evidence and rival submissions. In my considered view, the issues that arise for determination are;
- i. Whether the plaintiffs have a good title to the suit property
 - ii. Whether the plaintiffs are entitled to the prayers sought.
41. Article 40 (1) and (6) of the *Constitution* of Kenya 2010 provide that protection of the right to property is only accorded lawfully acquired property.
42. Section 26 of the *Land Registration Act* provides as follows;
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 that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
43. In *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR, the Court of Appeal upheld the decision of the High Court where it was held as follows;

“It is in my view unjust and inequitable that an innocent proprietor can be dispossessed of his or her legal title to land through the acts of a fraudster, and this cannot have been the intention of section 23 of the *Registration of Titles Act*. I am persuaded by the statement made in *Alberta Mae Gacii v Attorney General and 4 Others* [2006] eKLR where the court (Hon. Justice Onyancha stated as follows;

Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery deceit or any kind of fraud would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed cursed would be



the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks has not come and shall never come."

44. Similarly, in the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, the court held as follows;

"A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."

45. In the instant suit, both the plaintiff and the 1st defendant have title to the suit property. The plaintiff testified that their late father Thomas Makau Musyoki bought the suit property from Beatrice Mwangeli Kawinzi, the wife of Kazinzi Makau, the original allottee of the suit property having been a shareholder of Syokimau Farm Limited. He produced a copy of title registered in the name of Thomas Makau Musyoka on 8th December 1988; an agreement dated 20th August 1988; letter of allotment for plot 653 in the name of Kawinzi Makau which was collected on 20th November 1984 by Mrs. Beatrice Mwangeli Kawinzi of Identity Card Number 14xxx 18/64; share certificate dated 3rd November 1980; two other agreements; several receipts from Syokimau Farm Limited from 1976 to 1984 in the name of Kawinzi Makau; application for commercial plot by the deceased; a letter dated 8th February 1989 by Syokimau Farm Limited to Thomas Makau Musyoka for allocation of a commercial plot; letter dated 3rd May 1994 inviting the deceased to a shareholders general meeting of 28th May 1994 by the 1st defendant; payment of rates from 2012 to 2020; official search showing the suit property in the name of Syokimau Farm Limited; affidavit by Paul Masila Kimeu to the effect that the suit property was owned by Mrs. Kawinzi Makau, who was a shareholder of the 1st defendant; caution instrument and a calendar for June 2013.
46. From the evidence of the plaintiffs, it is clear that in 1988 their late father purchased the suit property from Beatrice Mwangeli Kawinzi, the widow of Kawinzi Makau. The suit property having been allotted to Kawinzi Makau, a shareholder of the 1st defendant. The fact that the suit property originally plot no. 653 was held by Kawinzi Makau as a shareholder of Syokimau Farm Limited is confirmed by the shareholder list/register produced by the 1st and 2nd defendants. In addition, the letter dated 3rd May 1994 from the 1st defendant shows that the deceased was its shareholder. Therefore, the plaintiff by its clear evidence has given a chronological chain of transactions from the holding of the suit property to the sale to the deceased and registration thereof in the deceased's name. It is my view and finding that the plaintiff has demonstrated that the root of their title is clean.
47. Reverting to documents presented by the 1st and 2nd defendants, their case was that the suit property was intended to be allocated to Mrs. Kawinzi Makau but as she never paid the share subscriptions the same reverted to the 1st defendant. They also stated that the 1st defendant was voluntarily wound up



on 26th June 2013 where Paul Masila Kimeu was appointed liquidator/administrator/caretaker. They produced minutes of 26th June 2013; Kenya Gazette Notice No. 11485 dated 26th July 2013 published on 8th August 2013; a title for the suit property dated 28th November 2019; several letters from several government offices; clearance certificate for 2020; search certificate; letter of allotment for plot 61 in the name of Philip Villi Makau; shareholder list; share certificate; settlement agreement; reminder to Kawinzi Makau; dated 14th September 1985 and minutes of the 1st defendant.

48. Having considered the evidence of the 1st and 2nd defendant, it is clear that Syokimau Farm Limited was voluntarily wound up on 26th July 2013 by the shareholders vide Gazette Notice No. 11485. In that Gazette notice no administrator/ caretaker/liquidator was appointed at the time of winding up. Therefore, the allegation that the winding up of the 1st defendant was done on 26th June 2013 involving the appointment of Paul Masila Kimeu as administrator /caretaker/shareholder is not true as the winding up was in July and not in June 2013. In addition, although the 1st and 2nd defendant's minutes dated 26th June 2013, indicate that that date was a Saturday, that is not the position as that date was a Wednesday. Besides, in the Gazette Notice No. 11485 there was no provision that an administrator / caretaker/liquidator was appointed, therefore the allegation that the Paul Masila Kimeu holds such office is baseless and not correct. Therefore, it is my finding that the minutes of 26th June 2013 are a forgery of DW1 and DW2 as there is no evidence that such meeting took place. Syokimau Farm Limited having been wound up on 26th July 2013, with no appointment of a liquidator and having no accounts or assets, was dead and buried and therefore the same is not in existence and ceased to be in existence after 26th July 2013.
49. The 1st and 2nd defendant's evidence showed that Kawinzi Makau was a shareholder. A person becomes a shareholder after subscribing to shares of a company. There is nothing in the register produced by the 1st and 2nd defendants to show that those listed as shareholders had not paid for their shares. It is illogical that the defendants would refer to Kawinzi Makau as a shareholder and ironically allege that he did not pay for his share. In addition, although the 1st and 2nd defendants produced a title in the name of the 1st defendant alleging that the suit property reverted from Kawinzi Makau to the 1st defendant, they did not present the process leading to the alleged reversion. In any event, the 1st defendant having been wound up in 2013, could not be registered as owner of the suit property in 2020 as shown in the search as Syokimau Farm Limited was not in existence in the year 2020. Therefore, the registration of the 1st defendant as proprietor of the suit property is null and void for nonexistence of the purported registered proprietor. It is clear that DW1 and DW2 were merely registering the suit property in a non-existent company for purposes of unjust enrichment. It is therefore my finding that Syokimau Farm Limited stopped to exist after 26th July 2013, and Paul Masila Kimeu has never been and neither is he now the administrator or liquidator or caretaker of Syokimau Farm Limited. I also find that the title exhibited by the 1st and 2nd defendants has no supporting documents on its root and therefore the same was procured irregularly, unprocedurally and illegally.
50. As the plaintiffs have shown to have lawfully acquired the suit property, they have indefeasible rights therein and are entitled to the protection of the law provided for in sections 24 and 25 of the *Land Registration Act*. The plaintiffs sought for eviction, injunction and damages for trespass. Having demonstrated indefeasible ownership, the plaintiffs are entitled to quiet possession of the suit property and therefore it is proper that the defendants are enjoined and evicted as sought by the plaintiffs. Therefore, anyone acting in the name of Syokimau Farm Limited or referring to themselves as administrator/liquidator/caretaker of Syokimau Farm Limited ought to vacate the suit property and be enjoined from trespassing thereon. Regarding damages for trespass, it is trite that once trespass is proved, a plaintiff need not prove actual loss or damage for the court to award damages. (see *Ajit Bhogal v Kenya Power and Lighting Company Limited* [2020] eKLR). In this case, the suit property which



measures about 2 hectares was purchased in 1988 at Kshs. 165,000/=. Obviously, its value has increased with the passage of time, which is over three decades now. The trespass herein involved construction of structures on the suit property. Although the plaintiff would have been entitled to damages for trespass, he only named the two defendants, who, although non-existent are decoys for the fraudulent activities of Paul Masila Kimeu and Mackenzie Mutuku. While it is clear that Syokimau Farm Limited ceased existing from 26th July 2013, having been wound up without appointment of a liquidator; DW1 and DW2 (Paul Masila Kimeu and Mackenzie Mutuku respectively) have been representing themselves as administrator and director respectively of Syokimau Farm Limited. However these two persons were not sued in their personal capacities, as they only appeared in this suit as witnesses; therefore it would be futile to make orders for payment of damages for trespass against the defendants named in the suit. However, for avoidance of doubt, since the two persons (DW1 and DW2 herein) present themselves as agents and administrator of Syokimau Farm Limited, the orders of permanent injunction, vacation of the suit property and eviction apply to and bind them as they operate and conduct their fraudulent activities in the name of, and as agents of Syokimau Farm Limited.

51. In the premises, I find and hold that the plaintiffs have proved their claim against the defendants on the required standard. I therefore allow the plaintiffs' claim as follows;
- a. An order is hereby issued directed at the defendants their servants, agents, or persons representing themselves in the names of Syokimau Farm Limited and Administrator Syokimau Farm Limited jointly and severally to vacate the plaintiff's property known as L.R No. 12715/491 (Grant No. I.R 45955) within ninety days of this judgement and in default eviction orders to issue.
 - b. A permanent injunction be and is hereby issued restraining the defendants jointly and severally by themselves, their servants and/or agents and/or any other person or body of persons claiming through them or under their names, from entering upon, occupying, trespassing and/or otherwise meddling in the plaintiffs' property known as L.R No. 12715/491 (Grant No. I.R 45955).
 - c. An order is hereby issued directed at the 3rd defendant to correct the records held at the Lands Registry and reinstate the deceased Thomas Makau Musyoki as the registered proprietor of L.R No. 12715/491 (Grant No. I.R 45955) and issue the plaintiffs with a corrected Official Search result.
52. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

No appearance for the plaintiffs

No appearance for the defendants

Court assistant – Abdisalam**

