Ambiance Holdings Limited v Iha & 3 others; Simone (Interested Party) (Environment & Land Case 31 of 2020) [2024] KEELC 3936 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3936 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 31 OF 2020

EK MAKORI, J

APRIL 25, 2024

BETWEEN

AMBIANCE HOLDINGS LIMITED ..... PLAINTIFF

AND

JACOB KENGA IHA ..... 1ST DEFENDANT

DANIEL THOYA KATANA ..... 2ND DEFENDANT

LAND REGISTRAR KILIFI ..... 3RD DEFENDANT

ATTORNEY GENERAL ..... 4TH DEFENDANT

AND

RUGIATA SIMONE ..... INTERESTED PARTY

JUDGMENT

1. The plaintiff vide plaint dated 16th March 2020 sued the defendants seeking the following prayers:

    a. A declaration that the plaintiff is the actual/legal owner of the suit property known as Kilifi/Madeteni/390.

    b. A declaration that the title registered in the name of the 1st defendant on 18th April 2019 was obtained through fraud.

    c. An order that the transaction obtained and registered on the Green Card opened on 18th April 2019 is null and void.

    d. An order compelling the 3rd defendant to cancel the Green Card opened on 18th April 2019.

    e. Costs of the suit.

2. The defendants, save for the 2nd defendant who never filed a defence, through their respective defences have denied the plaintiff's claim.

3. On 10th November 2021 the interested party was joined in this suit and counterclaim on the even date seeking among other relief(s):

   a. A declaration that the interested party is the rightful owner of property known as Kilifi/Madeteni/798 curved from Kilifi/Madeteni/390.

   b. A permanent injunction restraining the plaintiff and or anyone claiming under his title from in any way dealing with the interested party's possession of the suit property Kilifi/Madeteni/390.

   c. That the plaintiff's purported title over the suit property be cancelled and declared invalid.

   d. Costs of the suit and counterclaim.

4. The plaintiff through one Khalid Gulmuh'd Shapi who testified as PWI stated that its director Jaideep Sigh Vohra had expressed interest in the purchase of land parcel Kilifi/Madeteni/390, which was a freehold. After due diligence and obtaining a search from the Kilifi Land Registry, which confirmed that the 2nd defendant - Daniel Katana Thoya was the lawful registered owner, an agreement was entered on 22nd December 2009, Jaideep Sigh Vohra bought the land from the 2nd defendant for a consideration of Kshs. 12,500,000/=. After payment of the full purchase price, a transfer was done on 26th June 2010 and the property was effectively transferred from the 2nd defendant to the plaintiff as the nominee of Jaideep Sigh Vohra, a shareholder in the plaintiff Company. The plaintiff stated that it has had and enjoyed quiet possession of the suit property since then until 2019 when several attempts were made to locate the Green Card of the suit property. When investigations were done it was discovered that the 1st allottee of the property was one Jacob Kenga Iha (1st defendant) from the Government of Kenya. A 1st Discharge of Charge had been obtained from the Settlement Fund Trustee (SFT) on 13th November 2006, after which the 1st title was issued and a Green Card thereto on 16th November 2006. The 1st defendant sold the land to the 2nd defendant vide agreement dated 7th April 2008. Despite that, the 1st defendant proceeded and acquired yet another Discharge of Charge from the SFT on 19th September 2016, and another title was issued on 18th April 2019. The plaintiff testified that this was a forgery and that it was, in this case, an innocent purchaser for value and had acquired a good title hence the orders sought as proposed in the plaint.

5. Rufus Kalama who testified as PW2, Land Registrar based at Isiolo said that he is the one who entered entries on 16th November 2006 regarding the suit property, while he worked in the same capacity at the Kilifi Land Registry. The entry made was a transfer of land from the 1st defendant to the 2nd defendant. He said that since this was a scheme, a Discharge of Charge, and consent from the relevant Land Control Board must have been shown at the registration and transfer stage. A settler could not be registered before compliance. He was shown a Discharge of Charge dated 13th November 2006 and a transfer dated 16th November 2006. The 1st document was in favour of the 1st defendant while the 2nd was in favour of the 2nd defendant. In cross-examination, he said that the discharge and transfer happened simultaneously, but that he could not see - for the transfer whether stamp duty had been paid, valuation done, or consent from the relevant Land Control Board had been obtained. He said the file concerning that transaction was missing. He further said if there was a change of acreage a survey must have been done. He also admitted that he did not see a transfer from the 1st to the 2nd defendant. He further admitted that it was not possible to have two Discharges of Charge. One must have been fraudulently obtained.

6. Anthony Karani who testified as PW3 – a Land Registrar based at Ardhi House Nairobi said that in 2010 he worked at the Kilifi Land Registry as an Assistant Land Registrar. He said he was the one who registered the title that was issued to the plaintiff. The title was issued on 24th June 2010. A search issued on the same date reflected the registration. He said that the fact that the title was registered, there must have been a file. He said the discrepancies in the acreage could have been out of a subsequent survey, but he could not tell when. In cross-examination, he said variation is usually done with the consent of the proprietor, the District Surveyor, the Land Registrar, the area administration, and locals whose land could be affected in the aftermath of the variations. He said this could have been done but the file to show that is also missing. He said that discharge was done when the Land Adjudication and Settlement Officer was satisfied that all dues owing to the SFT had been settled. That was not his docket.

7. The 1st defendant who testified as DW1 said that the 2nd defendant has never legally owned the land in question. He had entered a sale of land agreement with him vide agreement dated 7th April 2008 at a consideration of Kshs. 8,000,000/-. The 2nd defendant paid a deposit of Kshs 3,500,000/- leaving a balance of Kshs. 4,500,000/- which he failed to pay to date. At best the agreement never materialized. All the documents produced by the plaintiff and the 2nd defendant concerning the suit property are forgeries. When he sold the land, a title had not been issued. There was yet to be issued a Discharge of Charge. The plaintiff has never set foot on the suit property at all. The 1st defendant further testified that the 2nd defendant could not purport to sell what he never had, he (the 1st defendant) never applied for the Discharge of Charge in the year 2006, but he did so in 2016. Transfer to the 2nd defendant could not have possibly happened then because he had not paid the remaining balance to the SFT and he was never put in possession of the suit property to date. After the discharge, a title was issued in 2019 and later he sold the the same to the interested party (Rugita Simone) at a consideration of Kshs. 13,500,000/- an initial payment of Kshs. 2,720,000/- was made to him with a balance of 10,780,000/- to be paid upon change of user because the interested party is an Italian.

8. Rugita Simone the interested party who testified as DW2 said that he purchased part of the suit land from the 1st defendant at a consideration of Kshs. 13,500,000/- he initially paid a deposit of Kshs 2,729,00/- and since he is an Italian, the land had to be changed from a freehold to a leasehold before he could pay the full purchase price. He was not aware that the land had been sold to another 3rd party.

9. John Wachira Karanja who testified as DW3 said that he is the Land Adjudication Officer Kilifi. He narrated the history of the suit land which was a scheme under the SFT. The initial offer was issued to one Jacob Kenga Iha (the 1st defendant) on 27th March 1997. The settler paid the Fund money required of him in installments and the last payment was on 19th September 2016. A Discharge of Charge was issued after the settler and a witness appended their signatures and collected the same. On his part, there was only one Discharge of Charge in respect to the suit property. He confirmed that the purported discharge of 2006 was never endorsed by the Land Registrar therefore no registration was ever effected.

10. Stella Gatweri who testified as DW4 said she is a Land Registrar with the Ministry of Lands. She received a Discharge of Charge from the Land Adjudication and Settlement Officer dated 18th April 2016, with a forwarding letter. After confirmation that there was no any other entry on the file she proceeded to prepare a title which she registered in favour of the 1st defendant. She later was to receive a complaint from the DCI that there were investigations over the issuance of title over that land. The 1st defendant was later to subdivide the land into two parcels Nos.797 and 798. He (the settler), sold the latter to one Simone an Italian National, and a transfer was effected but awaiting a change of user as the purchaser is a foreigner. She confirmed that there were no other documents on that file. She said the 2006 discharge had neither a signature, endorsement of the land Registrar nor affixed stamp from the Land Registry, and therefore that registration was incomplete.

11. Daniel Thoya Katana, the 2nd defendant who testified as DW5, said that he sold the land to the plaintiff, a resurvey was done and it was found to have been bigger on the ground. The consideration was Kshs 12,500,000/ which he was paid in full. He did effect transfer of the same to the plaintiff. He said he had bought this land from the 1st defendant in the year 2006, he had a photocopy of a Discharge of Charge. When selling it, he was with a Settlement Officer. The title was later to be issued after they went to the Land Control Board and consent was granted. He initially paid Kshs 3,500,000/-. He stated that after all these had happened, the 1st defendant changed his heart and started to demand Kshs. 8,000,000/-. He agreed he was to pay him the balance of Kshs 4,500,000/- and is even ready to do it now. According to him the agreement still stands because he (1st defendant) has also not refunded him. During cross-examination, he admitted that possession was to have taken place after the completion of the purchase price. He admitted that the DCI arrested him for obtaining money from the plaintiff through fraud but the plaintiff withdrew the case. He said the initial title was issued in 2006. He said he never notified the plaintiff that he had an outstanding debt over the suit land. He further stated he sold the land to the plaintiff for Kshs 12,000,000/-, a resurvey was done but that he does not have those documents. He said that all documents relating to the transfer were left at the Land Registry and he does not have copies.

12. Parties were directed to file written submissions. I did not see submissions from the plaintiff.

13. The 1st defendant submitted that the title held by the plaintiff was irregularly, illegally, and fraudulently obtained and cannot be said to be indefeasible. The case of Ardhi Highway Developers Limited v West End Butchery [2015] eKLR, was cited in support of that assertion, and pursuant to Section 80 of the *Land Registration Act*, an order of rectification should be issued. The 1st defendant avers that from the chronology of events, the 1st defendant remains the lawful owner of the suit property the case of Peter Kagunyu v Anne H.G Muchuke [2021] eKLR, is quoted, stating that when two titles are in contestation, the Court should undertake an inquiry to discover the root of the title (see also Samuel Kamere v Land Registrar Kajiado [2015] eKLR.

14. The 1st defendant further avers that title is usually challenged under Section 26 of the *Land Registration Act* when it is found to have been acquired illegally or through corrupt schemes as held in Zaharia Wambugu Gathimu & Another v John Ndugu Maina [2019] eKLR. The 1st defendant is of the view that no two 'genuine' titles held by parties can exist. One has to be fake (see Josephat Muthui Mwangi v Chief Land Registrar & 2 Others [2015] eKLR and Chemutai Too v Nickson Kipkurui & 2 Others [2015] eKLR.

15. The 1st defendant questions the manner the 2nd defendant acquired the title in 2006 two years before the agreement with the 1st defendant which they entered in 2008. This depicts fraud. It is not reflected in the sale agreement. In this regard, the 1st defendant cites the case of Munyu Maina v Hiram Gathira Maina [2013] eKLR.

16. The 1st defendant further avers that the 2nd defendant, failing to pay the remaining balance within 90 days, ran away from his side of the bargain. Therefore, the agreement between the duo is a non-starter, and the Law Society Condition of Sale 2015 comes into play. The decisions in Kihuba Holdings Limited v Charo Karisa Ngulu [2021] and Jeremiah Mucheru Ndibui Gichure [2019] eKLR are cited.

17. The 1st defendant contends that Courts of law do not rewrite contracts between parties nor can the Court endorse a bad bargain as held in National Bank of Kenya Limited v Pipeplastic Samkolit(K) 2 EA 503 and Fina Bank Limited v Spares and Industries Limited [2000] 1 EA 52.

18. 1st defendant avers that there is no privity of contract between him and the plaintiff. The only recourse the plaintiff has is to sue the 2nd defendant to recover the purchase price because the 2nd defendant had no title to pass. On privity of contract, the Court was referred to the holdings in Dunlop Pneumanic

Tyre Co. Limited v Selfridge & Co. Limited [1915] AC 447 and Savings & Loan (K) Limited v Kanyenje Karagita Gakombe & Another [2015] eKLR.

19. The 1st defendant is of the view that since the 2nd defendant had no title to pass under the doctrine of nemo dat quod non habet, the plaintiff's only remedy is to sue for indemnity from the 2nd defendant. According to the 1st defendant, the plaintiff was not diligent enough.

20. 2nd defendant supports the plaintiff's case and submits that in 2006 the 1st defendant sold him the land which he later sold to the plaintiff and that no fraud was involved. 2nd defendant said that the latter acquisition of another Discharge of Charge and title was fraudulent without orders from the Court.

21. The interested party submitted and adopted the thinking by the 1st defendant. The only addition I can see is that he claims to be a bona fide purchaser for value without notice. He said he did due diligence when purchasing the land in question from the 1st defendant. The Court is argued to adopt the findings in Taraban Company Limited v Sehmi & 7 Others [2021] eKLR on innocent purchaser for value where the Court found that an appellant had acquired a good title and was never involved in fraud or was party to it.

22. To me looking at the pleadings, testimonies by parties, and their respective submissions, the issues that fall for the determination of this Court is who has good title to the suit property given the history of acquisition and sale of the same. We have two titles in the market. One must be genuine and the other fake. Whether the doctrine of an innocent purchaser for value should apply to the plaintiff and the interested party in this case, based on the sale of the same land to the plaintiff by the 2nd defendant and the sale of the same by the 1st defendant to the interested party. What are the appropriate reliefs in this matter if any? And who should bear the costs of the suit?

23. Ideally, this Court – the ELC would not be dealing with fraudulent transactions, double allocations, or obtaining titles through dishonest means if the Torrens System was correctly operating in this Country and everything was presumed to be in the rightful status, holding all factors "Omnia praesumuntur rite esse acta" – (all acts are presumed to have been done rightly and regularly at the Land Registries). The ELC will close its doors, and we will not grow weary, but rather we will sprout wings, ready to soar to heaven as inspired by Isaiah 40.31:

> " But those who hope in the Lord will renew their strength. They will soar on wings like eagles; they will run and not grow weary, they will walk and not be faint"

24. The Torrens title system works based on title registration, which confers the high indefeasibility of registered ownership. The approach eliminates the requirement to demonstrate a chain of titles, which involves tracking titles through a sequence of documents backward in time. For example, to buy land, one would simply be required to visit the Land Registry, search for the most current registered owner, make the purchase (as the plaintiff and the interested party did in this case), have the land transferred and registered in one's favour, and then embark on using it as necessary. But the reality is that our registration system does not reflect what is obtained on the ground, which is why this system isn't functioning well for us. There are instances when the registration of interests' sequencing is off-mark (as in this case). Double registrations, fraudulent acquisitions, corrupt, and underhand deals, et cetera have led to so many lawsuits - around what is now commonly referred to as 'due diligence and tracing the root of the title' - that is the daily bread for the ELC. Decisions like *Wainaina v Kiguru & Another*

(Environment & Land Case E023 of 2021) [2022] KEELC 3261 (KLR) (28 July 2022) (Judgment) have been coined:

> "It is trite that when a person's title is called into question, the said proprietor has to show the root of his ownership. In the case of Hebert L Martin & 2 Others v Margaret J Kamar & 5 Others [2016] the Court held:
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> > "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."
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> 22. Further In the case of Munyu Maina v Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Court of Appeal held that:-
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> > "We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to 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."

25. This was also the holding in the case of Mary Ngonyo Kiume v Charles Muisyo David & 2 others; Exams Housing Co-operative Society Limited (Interested Party) [2022] eKLR where the court held:

> "The Kenya's land system operates under the Torrens System, where the certificate of title is prima facie conclusive and indefeasible proof of ownership of land. This principle is set out in Section 26 of the *Land Registration Act*. Subsection 1 (a) and (b) of Section 26 however provide exemptions to this rule, which is that a title can be challenged on grounds of fraud or misrepresentation, to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or under a corrupt scheme".

26. Proceeding from the above sentiments, Section 26 (1) of the *Land Registration Act* provides that:

> "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.

27. The Court here is called upon to inquire which of the two titles is genuine. It has to have, like in determining fake currency, an ultraviolet fine view lens to determine which of the two titles is genuine and which is fake. I need then to have a walk on the journey of the two titles and how they were acquired, what the authorities refer to as – 'the root of the title.'

28. The history of the title we are dealing with - Kilifi/Madeteni/390 is as captured by John Wachira Karanja who testified as DW3, the Land Adjudication Officer Kilifi, and as supported by Stella Gatweri who testified as DW4, the Land Registrar with the Ministry of Land. He narrated that the suit land was a scheme under the SFT. The initial offer was issued to one Jacob Kenga Iha (1st defendant) on 27th March 1997. The settler paid the Fund money required of him in installments and the last payment was on 19th September 2016. A Discharge of Charge was issued after the settler and a witness appended their signatures and collected the same from the offices of the Scheme. On his part, Mr. John Wachira Karanja said there was only one Discharge of Charge concerning the suit property. He confirmed that the purported discharge of 2006 was never endorsed by the Land Registrar then, he affirmed that the record he held showed no other discharge had been issued earlier than the one issued in 2016. On her part, Stella Gatweri the Land Registrar with the Ministry of Land said she received a Discharge of Charge from the Land Adjudication and Settlement Officer dated 18th April 2016, with a forwarding letter. After confirmation that there was no other entry on the file she proceeded to prepare a title which she registered in favour of the 1st defendant. She later was to receive a complaint from the DCI that there were investigations over the issuance of title involving the same land. The 1st defendant was later to subdivide the land into two parcels which are 797 and 798. He (the settler), sold the latter to one Simone (the interested party), and a transfer was effected but awaiting a change of user as the purchaser is a foreigner. She confirmed that there were no other documents on that file. She said the 2006 discharge had neither a signature, endorsement of the land Registrar nor stamp from the Land Registry and therefore that registration was incomplete.

29. This then brings us to the 2006 discharge and subsequent title issued to the 2nd defendant. What should be noted from the onset is that the 2nd defendant opted not to file any defence, but he testified and stated that he bought this land from the 1st defendant in the year 2008 after agreeing, with him. He had a photocopy of a Discharge of Charge. When selling it, he was with a Settlement Officer. The title was later issued after they went to the Land Control Board and consent was granted. He initially paid Kshs 3,500,000/-. He stated that after all these had happened, the 1st defendant changed his heart and started to demand Kshs. 8,000,000/-. He agreed he was to pay him the balance of Kshs 4,500,000/- and is even ready to do it now. According to him the agreement still stands because he (1st defendant) has also not refunded him. During cross-examination, he admitted that possession was to have taken place after the completion of the purchase price. He admitted that the DCI arrested him for obtaining money from the plaintiff through fraud but the plaintiff withdrew the case. He said the initial title was issued in 2006. He said he never notified the plaintiff that he had an outstanding debt over the suit land. He further stated he sold the land to the plaintiff for Kshs 12,000,000/-, a resurvey was done but that he does not have those documents. He said that all documents relating to the transfer were left at the Land Registry and he does not have copies.

30. The 1st defendant on the other hand categorically stated that at no point in time did he ever sign any transfer documents to have the land pass to the 2nd defendant. They entered a sale agreement in 2008 well before a Discharge of Charge had been issued by the SFT and therefore no title would have been issued by any Land Registry, if that happened, it smacks of fraud.

31. The two Land Registrars who testified concerning the initial title that is Rufus Kalama PW2 and Anthony Kimani PW3 admit that the documents concerning the initial title cannot be traced at the land office. They said it was not possible to issue a title in this case for land that was under the SFT Scheme minus a Discharge of Charge, consent from the land Control Board, and transfer. They did not address the issue of the initial Discharge of Charge that had no endorsement from the Land Registrar and stamp, whose effect was that there was no registration, which could lead to the issuance of title.

32. It is apparent to me then from the materials placed before me that the 2nd defendant well knew he had no good title to pass. The entire register for the transactions he undertook leading to the passing of the title to the plaintiff is at best riddled with fraud. He knew he had not paid the full purchase price to the 1st defendant. He knew that there was no genuine Discharge of Charge issued by the SFT if issued, it had not been registered. He knew he had not gone to the Land Control Board with the 1st defendant for consent(the discharge and transfer happened simultaneously). He knew no procedurally known title could have been issued without full payment of the SFT monies. He knew that he never signed any transfer document with the 1st defendant. He knew that no stamp duty had been paid concerning the deal he had with the 1st defendant. He knew that no 2nd survey could have happened without the area administration and those neighbouring the suit land being notified. He knew that all those documents were to be properly entered in the Green Card, but that none of those documents existed. If they ever existed it was a fraudulent scheme by himself and the Land Registry for purposes of having a fake title for either speculation or swindling purposes. At best the 2nd defendant falls within the four corners of a fraud. I think that is why he could not file a defence in this matter. The doctrine of nemo dat quod non habet comes into play. That he had no good title to pass to the plaintiff. This is further fortified by the fact that the entire record concerning the transactions on the sale of the suit property to the plaintiff does not exist at the Land Registry. It is by design.

33. This then brings me to whether the plaintiff falls within the category of a bona fide purchaser for value without notice or whether he falls within the exceptions to the nemo dat rule as laid by Lord Denning in Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Ltd (1949) 1 KB 322, at pp. 336-337 when he stated:

> "In the development of our law, two principles have striven for masterly. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."

34. The plaintiff avers that it had done due diligence at the Land Registry and with a search certificate, and no caution placed on the title, it then falls within the realm of an innocent purchaser for value without notice.

35. From precedents, the ELC has made attempts to balance the two competing interests as laid in the Bishopsgate Case (supra), that of protecting the indefeasibility of title, the right to own property under Article 40 of *the Constitution* and its exceptions as laid in Article 40(6) of *the Constitution* and Section

26(1)(b) of the *Land Registration Act* and the commercial interests of an innocent purchaser for value without notice on the other hand. My focus now shifts to those precedents.

36. In Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others [2015] eKLR, Munyao J. considered the operation of Section 26(1)(b) of the *Land Registration Act* concerning an innocent purchaser as follows:

> " It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the titleholder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows: -
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> > "...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions." I stand by the above words and I am unable to put it better than I did in the said dictum."

37. The position that a title fraudulently obtained cannot be allowed to stand has been affirmed in several other cases. The point was made in Arthi Highway Developers Limited v West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 [2015] eKLR, where the Court of Appeal upheld the decision of the Environment and Land Court to cancel title to land which felons had fraudulently acquired title and later sold the same to other parties.

38. In Samuel Kamere v Land Registrar [2015] eKLR the Court of Appeal held as follows:

> " to be considered a bonafide purchaser for value, a person 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 legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.

39. Further in Esther Ndegi Njiru & Another v Leornard Gatei [2014] eKLR, the Court held that:

> " The rampant cases of fraudulent transactions involving title to land have 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 on purchasers of titled properties to ascertain the status of a property beyond carrying out an official search".

40. The Supreme Court has weighed in on the issue of bona fide purchaser for value without notice in the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment):

" The 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."

91. The Court of Appeal in Uganda in Katende v Haridar & Company Ltd [2008] 2 EA 173, defined a bona fide purchaser for value 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:
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> 1. he holds a certificate of title;
> 2. he purchased the property in good faith;
> 3. he had no knowledge of the fraud;
> 4. he purchased for valuable consideration;
> 5. the vendors had apparent valid title;
> 6. he purchased without notice of any fraud; and
> 7. he was not party to the fraud."

92. On the same issue, the Court of Appeal in Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR stated as follows:

> "...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."

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."

41. The Supreme Court in the Dina Management Case (supra), concluded that once a title is found to have been illegally or irregularly acquired, the subsequent holder cannot be said to have a good title too, it will be against Article 40 of *the Constitution*:

> "Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.
>
> 111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.
>
> 112. We therefore agree with the appellate court that the appellant's title is not protected under Article 40 of *the Constitution* and the land automatically vests to the 1st respondent pursuant to Article 62(2) of *the Constitution*. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence."

42. In a nutshell, in this case, Land parcel No. Kilifi/Madeteni/390 was a product of the SFT Scheme, there could never have been two Discharges of Charge. The 2006 one did not exist or was procured through fraud or corruption, it did not and was never endorsed or sanctioned for registration by the Land Registrar, any title that could have been issued using the said Discharge of Charge was null and void. The records for all the transactions leading to the sale to the plaintiff are not available at the Land Registry. It becomes clear that any transfers originating from a fraudulent title can only be considered as 'fruit from the poisonous tree.' Whether the plaintiff was a bona fide purchaser of the suit property, or regardless of its claims of not being party to the fraud yields to the result that any title that originated from unprocedural activities renders the title held by the plaintiff defeasible. It was a product of the corrupt scheme by the 2nd defendants and the officials from the Land Registry. The plaintiff ought to have been more diligent. The title it holds is and cannot be protected by the law. And therefore, in my view, the orders sought by the plaintiff against the defendants cannot stand.

43. On the Counterclaim by the 3rd party, to me, this is a moot issue. The suit property is Agricultural Land as described under Section 2 of the *Land Control Act* and as such is subject to the provisions of

Section 9 of the Act concerning the granting or refusal of consent to the transferring of any such land to a foreigner. To which Section 9 (1) (c) of the Act provides that:

(1) In deciding whether to grant or refuse consent in respect of a controlled the transaction, a land control board shall—

(c) refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange, or partition to a person who is not—

i. a citizen of Kenya; or

ii. private company or cooperative society all of whose members are citizens of Kenya; or

iii. group representatives incorporated under the Land (Group Representatives) Act, 1968 (Cap. 287); or

iv. a state corporation within the meaning of the State Corporation Act, 1986 (Cap. 446).

44. The 3rd party, being a foreigner and not a Kenyan citizen, cannot legally become the owner of the suit property in the state it is as a freehold. But as I have said the agreement between him and the 1st defendant has not crystallized and cannot be subject to litigation here. I will therefore not interfere with the arrangements he has with the 1st defendant as the same stands to date. I need not discuss whether he too is an innocent purchaser for value without notice. The counterclaim is therefore misconceived and fails.

45. Therefore, the plaintiff's suit against the defendants is hereby dismissed with costs. The counterclaim by the 3rd party is also dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI THIS 25TH DAY OF APRIL 2024. SINCE THE COURT WAS NOT SITTING, ALL THE PARTIES TO BE SUPPLIED THIS DECISION VIA EMAIL.

E. K. MAKORI

JUDGE**