



Springs Preparatory School v Deenway International School & another (Environment & Land Case E001 of 2021) [2025] KEELC 821 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEELC 821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E001 OF 2021
SM KIBUNJA, J
FEBRUARY 26, 2025**

BETWEEN

SPRINGS PREPARATORY SCHOOL PLAINTIFF

AND

DEENWAY INTERNATIONAL SCHOOL 1ST DEFENDANT

ABDULKARIM SALEH MUHSIN 2ND DEFENDANT

JUDGMENT

1. Through the amended plaint dated 5th May 2021 the plaintiff sued the defendants seeking for the following prayers:
 - a. “A declaration that the 1st defendant is in occupation of plot no. 1862/I/MN CR. 52360 illegally.
 - a.1) A declaration that the second defendant has no title and or proper title to Plot no. 1862/ I/MN CR. 52360.
 - b) An order for vacant possession and eviction from Plot No. 18621/I/MN CR. 52360 to issue against the Defendants.
 - c) An order for cancellation and/or revocation of any title for this plot belonging to the 2nd Defendant if there be any.
 - d) Exemplary damages for trespass.
 - d.1) Mesna profits at Kshs. 137,600/- from 9/8/2019 to date of vacant possession.
 - e) Any other relief this court deems fit to grant in the circumstances.
 - f) Court to grant costs and interest of the suit.”



The plaintiff inter alia avers that it is the registered owner of Plot No. 1862/I/MN CR. 52360 (hereafter named suit property) and that sometime on 30th October 2020, its director was in a routine visit to the suit property and found that the defendant had illegally entered onto the suit property and erected structures without permission, and is also carrying out a business there without any benefit to the plaintiff. That after the plaintiff came to know through the 1st defendant's pleadings that it was a tenant of the 2nd defendant, it amended the plaint to join the 2nd defendant. That the 2nd defendant's title was declared fraudulent and cancelled and he has not challenged that decision before any court. The plaintiff alleged that the 2nd defendant with the help of the 1st defendant obtained possession of the suit property from 9th August 2019, and have been in illegal possession since then.

2. In their amended statement of defence dated 13th July 2021, the defendants inter alia averred that the suit property is registered in the 2nd defendant's favour, and was born out of a consolidation of 1853/I/MN and 1862/I/MN. It is their further allegation that the title by the 2nd defendant is CR. 38055 which is earlier than CR. 52360 which the plaintiff holds. The defendants further deny any court proceedings where the 2nd defendant's title was cancelled or declared fraudulent, and sought the plaintiff's claim to be dismissed with costs.
3. During the hearing, the plaintiff called Stephen Oddiaga, advocate and director of the plaintiff, and Daniel Wambua Nzau, who testified as PW1 and PW2 respectively. PW1 adopted the contents of his statement dated 22nd September 2020, as his evidence in chief. He inter alia testified that the plaintiff bought the suit property from one Daniel Wambui Nzau and produced an agreement dated 16th October 2015, and later discovered that the 1st defendant had encroached onto the suit property by erecting Makuti structures. That immediately the plaintiff found out the 1st defendant, who runs a school in an adjacent plot, was constructing on the suit property, they issued a demand notice. The plaintiff conducted a search and went through the parcel file, and found that the suit property was in the name of the vendor who sold it to the plaintiff. He produced the demand letter, certificate of registration and Transfer dated 2nd September 2016. He also produced both further list of documents dated 5th May 2021 and 17th February 2022. In cross-examination PW1 admitted that the title for CR 52360 originated from David Adekar before being transferred to Daniel Wambua Nzau. He admitted that on the Transfer executed on 12th July 2011, the Identity card number for the said David Adekar was 114xxxx and the PIN No. was A004420xxxx. He admitted that Muya J. had ordered a search at the Registrar of Persons whose report revealed that the said identity card number 114xxxx belonged to one Amiani Walter Omuruli. He denied that the identity card of David Adekar is questionable, but admitted that he did not conduct a search for the PIN number to find out whether it exists or not. He admitted that in the KRA pay-in slip serial no. 0272670 the PIN number recorded was A004218xxxx and when verified by PIN checker gives the owner as Christopher Gitahi. He also admitted in the pay-in slip serial number 0286xxx the PIN recorded was A001151xxxx, which from the PIN certificate dated 18th January 2021, belongs to Daniel Wambua Nzau, and David Adekar. He further testified that the Daniel Wambua Nzau sold the suit property to the plaintiff. He agreed that CR. 38055 was issued before CR. 52360, and that the sale agreement between one Yuster Kitawa Mwamburi and the 2nd defendant was done ten years before the sale agreement between David Nzau and the plaintiff dated 16th October 2015. He stated that he was also not aware of any suit cancelling the 2nd defendant's title CR No. 38055. He testified that David Nzau sold the suit property to Green Point, who later sold it back to him. That when the plaintiff possession of the suit property, they found it had a perimeter wall which is there to date. That the plaintiff has been in possession until the 1st defendant encroached.
4. PW2 adopted the contents of his statements dated 22nd December 2020 and 5th May 2021 respectively, as his evidence in chief. It was his testimony that he sold the suit property, CR 52360,



to the Plaintiff and executed the said sale agreement dated 16th October 2015. That he had initially sold the suit property to Greenland in 2011 and even transferred it to the company in 2012 before payment in full, but when the company failed to pay the balance of the purchase, he retook it from the company in 2015 and resold it to the plaintiff. He testified that he had used part of the money paid to him by the plaintiff to refund the company, and they in turn transferred the land back to him at which point he transferred it to the plaintiff. That he had acquired the property, between 2010 and 2011, and that when the 2nd defendant claimed ownership of the suit property, the DCI and Land Registry headquarters intervened and upheld his title and cancelled that issued to the 2nd defendant as shown in the letter dated 2nd May 2012 from Mr. Ngatia. That he had the suit property from one David Adekar. In cross-examination he admitted that Identity card No.114xxxx belonged to someone else, and that PIN No. A004420xxxx does not exist. He explained that the owner of PIN number A004218xxxx recorded in the pay-in slip serial number 0286xxx was Christopher Gitahi who had been sent to make the payment by Omondi Waweru advocates, who were his advocates in the transaction. That he was not the owner of the land subject matter of the second pay-in slip serial number 0286xxx, and was apprehensive his said advocates could have made a mistake. He insisted that the said David Adekar existed, and that had used other ID cards and PIN to enable the transaction go through but did not have copies of the same. He also did not know the whereabouts of Mr David Adekar. That by the time he bought the suit property, the neighbours had built a perimeter wall to the left and right, but there was no wall to the front. He also testified that he conducted due diligence when purchasing the suit property and that he handed over all documents to the plaintiff, showing the same belonged to Mr. David Adekar. That Mr. Adeka had handed over the original documents, copies of ID and PIN certificate to him.

5. In their defence, the defendants called Nusrat Ahmed Umlai, Registrar of Persons, Abdulkarim Swaleh Muhsin, 2nd defendant, and Hamstrong Okiya Mokaya, a businessman in security, who testified as DW1 to DW3 respectively. His office investigated ID No. 0114xxxx under the order by this court dated 7th July 2022, and discovered that the true registered owner is Amiani Walter Omuruli. He produced the report dated 13th July 2022 as exhibit.
6. DW2 testified that he bought the suit property in 2004 from Yuster Gitau, under the sale agreement dated 28th October 2004 and that the land was both transferred and registered in his name on 13th November 2006. He paid stamp duty on 7th November 2006, and thereafter applied to build a stone wall and gate and got approval. He has had a security guard on the property since 2007. He further testified that he bought an adjacent plot 1853 and applied to consolidate the two plots which was approved on 23rd May 2013. He narrated that he built the permanent perimeter wall in 2010 to secure the land as he prepared to undertake development. In 2019 he rented the suit property to the 1st defendant. He stated that he only became aware of Mr Nzau's claim in 2021 after filing of this suit. He denied that Mr. Adeka exists and stated that the documents used in transferring the land to the plaintiff were fake. In cross-examination, he stated that his deed plan was issued on 10th January 1995, while the plaintiff's deed plan was dated 2nd September 1971. He is aware that there exists a letter from a Principal Registrar stating that his title is a fake, but he denied that he authored the response dated 7th January 2012. He told the court that he did not take any legal action after becoming aware of the above letter because of this pending suit. He reiterated that he built a perimeter wall around the two consolidated properties. He informed the court that he had not seen the deed plan of the plaintiff, and disputed the deed plan in the survey report dated 3rd April 2023 produced by PW1. He was categorical that the date of issue had been changed from 22nd September 1971 to 22nd September 1981. He mentioned other discrepancies such as the title being "Colony and protectorate" which was not the case in 1971. He also discredited the said letter from the Principal Registrar as not being certified as true copy.



7. DW3, owner of a security business testified that he has guarded the suit property under instruction from the 2nd defendant, from 2007 to 2019, when part of the property was leased out. That the 2nd defendant built a perimeter wall in 2010.
8. At the closure of the parties' cases, the learned counsel for the plaintiff and the 2nd defendant filed their submissions dated 5th November 2024 and 18th November 2024 respectively, which the court has considered.
9. The issues for determination by the court are as follows:
 - a. Who between the plaintiff and 2nd defendant is the lawful registered proprietor of the suit property.
 - b. Whether the plaintiff is entitled to any of the prayers sought and if so, against who.
 - c. Who bears the costs?
10. The court has carefully considered the pleadings, the oral and documentary evidence tendered by all the witness, submissions by counsel, superior courts decisions cited thereon and come to the following determinations:
 - a. There are two titles presented by the plaintiff and 2nd defendant, being CR. 52360, held by the plaintiff, and CR 38055, held by the 2nd defendant, and both titles are for plot 1862/I/MN. The 2nd defendant claimed in his evidence that his title was to be consolidated with plot 1853/I/MN to form a new plot 20457/I/MN. However, no search certificate or even a copy of the white card was presented in court to confirm that the consolidation took place. The court will therefore treat CR. 52360 and CR 38055 to pertain to only 1862/I/MN. In the case of Dr. Joseph Arap Ngok versus Justice Moiwo ole Keiwua & 5 others, Civil Appeal No.Nai.60 of 1997 the Court held that:

“Section 23(1) of the 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 misrepresentation 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.”

Section 23 of the Act, that is, Registration Titles Act, and was similar to section 25 of the [Land Registration Act](#) chapter 300 of Laws of Kenya. It provides that title of a registered owner is sacrosanct and it does not matter whether it is first registration or subsequent registration. However, there is an exception under section 26 of the same Act which is that title can be defeated if it was acquired by fraud, mistake, unprocedural, illegally or through a corrupt scheme. Invariably this section always refer to subsequent registration but what happens when the court has to go to the root of the first registration like is the case here. The existence of Mr Adeka has been challenged by the 2nd defendant based on various evidence that has been produced such as the report dated 17th May 2021 by DW1 who stated that the ID No. 0114xxxx which was used in the Transfer document dated 12th July 2011 belonged to one Amiani Walter Omuruli, and that the PIN No. used did not exist. Further in the pay-in slips afore mentioned used for the payment of land rent belonged to one Christopher Gitahi, and Daniel Nzau respectively. PW1 attempted to explain the irregularities of the Pin numbers, but



was unsuccessful, and the court is not satisfied. It cannot have been an innocent mistake as documents attributed to Mr. Adeka did not contain the correct not PIN details which casts a lot of doubt on his existence.

- b. The court will come back to that issue later, but I would like to address the problem of having two titles to the same suit property. There is no nexus between the two titles from the first registration for reason that in CR 52360, the first registered owner is the said David Adekarr Adeka, while in CR 38055 it is Yuster Kitana Mwamburi. The rule of thumb has always been where there are two titles for the same land, the first in line to be registered is to be taken as the first true owner. See the decision in the case of *Wreck Motors Enterprises v The Commissioner of Lands and Others*; Civil Appeal No. 71 of 1997. This rule is borrowed from a maxim of equity, which states that “between equal equities, the first in order of time shall prevail.” In the case of *Gitwany Investment Limited v Tajmal Limited & 3 others* [2006] eKLR the court held:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs Commissioner of Lands, C.A. No. 71/1997* (unreported):- is the “grant [that] takes priority. The land is alienated already.” Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity. The Gitwany title fits this description and in fact upto the end of this case, the 3rd party has not sought to cancel it!”

- c. Going by the above holding it would seem that the title registered in the name of David Adekarr Adebe is the legitimate and real title as it was issued from 1st March 1980. The title of Yuster Kitana was issued on 1st March 1990, and therefore fails on the application of the holding in the abovementioned Gitwany Case [supra]. Further, the letter from Mr. Ngatia dated 1st August 2011 solidifies the above position that the title first registered in the name of Yuster Koitana Mwamburi is a forgery. Counsel for the 2nd defendant did not argue on the letter but instead focussed on non-existence of David Adekar.
- d. At this point the court has dispensed its duty in the determination of this suit, but having used equity it is also bound by the maxim that equity follows the law. The court now revisits the issue of whether or not Adekar exists. The 2nd defendant has raised doubt under section 109 of the *Evidence Act* chapter 80 of Law of Kenya, that Mr. Adekar exists. Perhaps, during the issuance of the grants by the Commissioner of Land then, there was no requirement for attachment of identity cards and PIN certificates, and insertion of their numbers, as is the case now under section 44 of the *Land Registration Act*. If there were such attachments, the existence of MR. Adekar would have been easily settled once and for all. None of the parties called the Land Registrar or the Chief Land Registrar to explain to this court how David Adekar obtained the title that is in his name. The unassailable evidence produced in the form of a letter from Mr. Ngatia, has shown the reason for deducing that the 2nd defendant’s title is fake is because allegedly a letter forwarding another letter of reference 1/31560/IX/77 dated 30th July 2004 from the Commissioner of Lands bears his forged signature. He also deduced that a similar letter forwarding a similar letter of reference 101465/28 from the Commissioner of



Lands bears the true signature. That position has not been challenged by any of the parties in this suit.

- e. There is yet another maxim of equity which states that equity will not allow a wrongdoer to profit by wrong. See the decision in the case of Jeho versus Vivian [1876] Law Rep 6 Ch App.742 (restitution). The court is not completely satisfied that Mr. Adeka exists despite the sentiments of Mr. Ngatia that the plaintiff's title is genuine. In the case of Gitwany case (supra), the court found that one of the directors of the plaintiff was the wife of the Mr. Gacanja, Commissioner of Lands, who issued the first title. That was the only evidence the defendant had to successfully prove that there was fraud in obtaining the first title, which the court appreciated. The court held that there might have been fraud but since no concrete evidence was provided, there was nothing it could do. In this case evidence has been provided by DW1 that the identity card used in the Transfer document in favour of the plaintiff does not belong to Mr. Adekar. The further evidence provided on the PIN certificate number in the pay-in slips for land rent also raises doubt on existence of Mr. Adeka. With this evidence, the burden shifted to the plaintiff to show that the said Mr. Adeka exists. Proof to that effect, like from the Directorate of Criminal Investigations or Registrar of Persons would have sufficed.
 - f. From the foregoing, neither the plaintiff's nor the 2nd defendant's title to the suit property is defensible under the law. As it is there is no winner in this suit and the court is aware that there is a charge encumbered on the plaintiff's title. In this case the court is of the considered view that none of the two contestants deserve to retain title to the suit property, as none of them has proved to have obtained their title in accordance with the law. It is only fair and just therefore, that land parcel 1862/I/MN, suit property, reverts back to National Land Commission under section 13 (5) (f) of the *Environment and Land Court Act*.
 - g. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where for good reasons the court direct differently. In this case and in view of the final determination on the suit property, each party will bear their own costs.
11. From the foregoing determinations, the court finds and order as follows:
- a. The plaintiff has failed to prove its case against the defendants to the standard required of balance of probabilities, and the suit is dismissed in its entirety.
 - b. That due to the unique finding that neither the plaintiff nor the 2nd defendant acquired the title they hold to the suit property regularly and lawfully, their respective titles are hereby cancelled, and the suit property, Plot 1862/I/MN, is hereby reverted to the National Land Commission free from encumbrance effective immediately. The Deputy Registrar is to forward a copy of the Judgement to the Chairman National Land Commission.
 - c. That the Deputy Registrar to present a copy of this judgement to the Mombasa County Land Registrar for their attention and to capture the necessary entries on the suit property's register to effect this order.
 - d. Each party to bear their own costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 26TH DAY OF FEBRUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.



Plaintiff :M/s Mwanzia

Defendants: Mr. Wafula

Shitemi –Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

