



**Kapiti Investments Company Limited v District Land Registrar, Machakos & 5 others
(Environment and Land Case 5 of 2014) [2024] KEELC 5556 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5556 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE 5 OF 2014
CA OCHIENG, J
JULY 30, 2024**

BETWEEN

KAPITI INVESTMENTS COMPANY LIMITED PLAINTIFF

AND

THE DISTRICT LAND REGISTRAR, MACHAKOS 1ST DEFENDANT

THE CHIEF LAND REGISTRAR 2ND DEFENDANT

THE CHAIRPERSON, LAND COMMISSION 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

ELIZABETH JOSHUA KIOKO 5TH DEFENDANT

NAHASHON KYALO NDUNDA 6TH DEFENDANT

JUDGMENT

1. Through an Amended Plaint dated the 30th October, 2014, the Plaintiff sought for the following Orders against the Defendants:-
 - a. A declaration that the restriction placed on all that parcel of land known as Mavoko Township Block 3/12873 - 12895 is unlawful and illegal.
 - b. The Honourable Court to issue orders of Mandamus directing and compelling the 1st Defendant to remove the restriction placed on the suit property and to allow the Applicant to deal with the suit property.
 - c. A permanent injunction restraining the 1st, 2nd and 3rd Defendants by themselves, their Agents, servants or otherwise howsoever from trespassing, encroaching, alienating, transferring, selling, leasing and charging or in any other way dealing with all that parcel of land known as Mavoko Town Block 3/12873 - 12895 in away that is detrimental to the Plaintiff.



- d. That the 1st, 2nd and 3rd Defendants jointly and severally compensate the Plaintiff for the losses suffered as a result of the unlawful restriction placed on Mavoko Town Block 3/12873 - 12895.
 - e. In the alternative and without prejudice to the foregoing, the 1st, 2nd and 3rd Defendants jointly and severally compensate the Plaintiff the monetary value of the land at the prevailing market rates at the time the orders sought are granted.
 - f. Costs of the suit together with the interest thereon at cost rates.
 - g. Such further relief or remedy this Honourable Court may deem just and expedient.
2. The 1st, 2nd and 4th Defendants in their Defence denied the averments in the amended Plaint except the descriptive and the jurisdiction of the court. They denied that the Plaintiff is the legal registered proprietor of land parcel number Mavoko Town Block 3/12873-12895, hereinafter referred to as the 'suit land'. They further denied that on 3rd May, 2010, one Miya who is a Director of the Plaintiff, on behalf of the Plaintiff, entered into a Sale Agreement as the purchaser with one Job Ndunda Muthike as the vendor for the sale of the mother title of the suit land being Mavoko Town Block 3/2718. Further, that the suit land is unoccupied. They contended that the alleged transactions were not conducted by the 1st Defendant as claimed by the Plaintiff. They disputed that the 1st Defendant and the Land Control Board approved the Plaintiff's plan of subdividing Mavoko Town Block 3/2718, culminating in the surrender of the said title as well as subdivision into Mavoko Town Block 3/12873 - 12895 respectively. They explained that a complaint was lodged with the 1st Defendant over a claim that the suit land had been transferred and subdivided without the complainants' knowledge, yet they had an interest over the suit land. Further, as a result of the said complaint, a restriction was registered against the suit land and the matter referred to the DCIO for further investigations, which is still pending.
 3. The Interested Parties (5th and 6th Defendants) filed their Defence including Counter-claim, wherein they denied the averments in the Plaint. They argued that it was not possible for their late father to sell LR No. Mavoko Town 3/2718 to the Plaintiff or its Director Gilbert Miya in May 2010, since he died on 1st August, 1997. They insisted that the sale was a fraud. In their counterclaim they sought for the Plaintiff's suit to be dismissed with costs and judgement entered as per the Counter-claim against the Plaintiff as follow:-
 - a. An order directing the 1st Defendant to forthwith revoke and cancel any title acquired by Gilbert Miya or the Plaintiff in respect to LR No. Mavoko Town Block 3/2718 and the removal of entries to that effect from the register, revocation and cancellation of any subdivisions thereof, and for the title to revert to Job Ndunda Muthike.
 - b. Costs and Interests.
 4. The matter proceeded for hearing where the Plaintiff called one witness while the 1st, 2nd and 4th Defendants had one witness and the 5th and 6th Defendants had two witnesses.

Evidence of the Plaintiff

5. The Plaintiff claimed it is the registered proprietor of the suit land. Its witness PW1 Gilbert Miya, a director of the Plaintiff explained that he entered into a Sale Agreement dated the 3rd May, 2010, on behalf of the Plaintiff for purchase of mother title Mavoko Town Block 3/ 2718, from Job Ndunda Muthike ID No. 11480380. Further, that it acquired its Certificate of Title in 2010. It contended that it undertook due diligence before the purchase and presented all the relevant documents to the Land Registrar. Further, that it obtained consent of the Land Control Board before acquiring the title. It explained that on 18th January, 2012, it received a notice from the Machakos District Land Registrar



informing it of a dispute over the suit land. Further, they attended a meeting on 20th January, 2012 but there was a restriction over the suit land. PW1 confirmed during cross examination that their respective advocates handled the transaction on their behalf. Further, that they never met the vendor but paid the purchase price through the lawyer. They contended that they hired a surveyor to undertake the subdivision of Mavoko Town Block 3/2718 into the suit lands.

6. The Plaintiff produced the following documents as exhibits: Letters dated 6th January, 2012, 23rd April, 2012, 16th May, 2012, 7th June, 2012, 19th February, 2013 and 28th June, 2013; Certificates of Official Search dated 30th January, 2012 and 19th May, 2010; Emails dated 13th April, 2012, 19th April, 2012 and 18th June, 2012; Registry Index map of parcel 2718 on Sheet 9; Mutation Form dated 12th April, 2011; Bundle of Nation Newspaper dated 21st January, 2010, 23rd February, 2010, 10th August, 2011 and 15th December, 2011; Sale Agreement between Job Ndunda Muthike & Gilbert Hezekiah Miya dated 3rd May, 2010; Transfer over Mavoko Town Block 3/2718 dated 13th October, 2010; Certificate of Incorporation of Kapiti Investment Company Limited dated 5th June, 2010; Application for Official Search dated 18th May, 2010 by B. M Mungata & Co. Advocates; Application for consent of the Land Control Board dated 18th May, 2010; Letter of Consent dated 2nd September, 2010; Report and Valuation of Title No. Mavoko Block 3/12873 (Original No. 2718); and Bundle of documents in respect to payments.

Evidence of the Defendants

7. The 1st, 2nd and 4th Defendants presented one witness being the Land Registrar. The Land Registrar in his testimony confirmed that he is the one who undertook the registration of the Plaintiff's title after confirming that the documents presented were proper. However, during cross-examination, he explained that he later realized the title presented for the transfer was fake as the family of Job Ndunda Muthike presented another title for the suit land. Further, they confirmed that their father died in 1997 before the suit land was sold. The Land Registrar stated that he proceeded to enter a restriction on the suit land and referred the matter to the DCIO. The 1st, 2nd and 4th Defendants produced the following documents as exhibits: Letters from the District Land Registrar, Machakos dated the 16th May, 2012 and 10th May, 2012 and Letter from Chief Land Registrar dated the 4th June, 2012.
8. The 5th and 6th Defendants called two witnesses. DW1 in his testimony confirmed that their father died on 1st August, 1997. Further, that their late father was the owner of the mother title culminating in the suit land. It was his testimony that they still had the original title deed in their possession. He explained that, they are administrators of their late father's estate. He denied that their father sold the suit land. During cross-examination, he confirmed that the title deed to the suit land was issued after their father's demise in 2008. Further, that they had not been cultivating the suit land. He was emphatic that their father never sold the suit land. DW2 Bernard Wanjau from the National Registration Bureau who was a Fingerprints' expert in his testimony confirmed that he was presented with a copy of the National ID for Job Ndunda Muthika (vendor) and after comparing with their records at the National Registration Bureau, he discovered the vendor's ID was forged. In cross-examination, he explained the procedure used in confirming the authenticity of the ID for the vendor and insisted that it was fake as the features, fingerprints and font were all different. They produced the following documents as exhibits: Grant issued in Machakos HCSUC 112 of 2014; Copy of Title for LR Mavoko Town Block 3/2718; Copy of Death Certificate for Job Muthike Ndunda; and Copy of National Identity Card for Josiah Kioko Nahson and report from the Fingerprint expert from National Registration Bureau.



Plaintiff's Submissions

9. The Plaintiff in its submissions relied on the evidence as presented including the exhibits produced. It contended that the Land Registrar did not adhere to the proper laid down legal procedures to register a restriction on the suit land. It argued that in this particular case, the Registrar had no basis whatsoever to have placed the restriction over the suit land. It was their submission that it acquired the suit land lawfully and procedurally and is thus a bona fide purchaser for value without notice. Further, that it holds a valid and genuine Certificate of Title as confirmed by the Land Registrar and was not a party to any fraud.
10. It was their further submission that the 5th and 6th Defendants could not acquire, retain and sustain a legal title to the suit land. Further, that since the title to the suit land was issued eleven (11) years, after the deceased owner's demise, it was not legally possible for the said title to be issued in his name. It challenged the 5th and 6th Defendants' witnesses' testimonies and contended that they failed to produce evidence that the deceased owned shares in Lukenya Ranching. It further submitted that the Land Registrar failed to provide documents from Lukenya Ranching directing him to process the deceased title. It averred that the 5th and 6th Defendants had a duty to demonstrate the root of the deceased title which they failed to do. In conclusion, it reiterated that its title is the first in time and supersedes any other title. Further, that it is hence entitled to the orders as sought in the Plaintiff.
11. To support its averments, it relied on the following decisions: *David Macharia Kinyuru v District Land Registrar, Naivasha & Anor* (2017) eKLR; *Matoya v Standard Chartered Bank (K) Ltd & Others* (2003) I EA 140; *Katende v Haridar Co. Ltd* (2008) 2EA 173 cited in approval in the case of *Dina Management Limited v County Government of Mombasa & 5 Others* (2023) KESC 30 (KLR); *Weston Gitonga & 10 Others v Peter Rugu Gikanga* (2017) eKLR; *Mohamed v Duba & Another* (2022) KECA 442 (KLR); *Caroline Awinja Ochieng v Jane Anne Mbithe Gitau & 2 others* (2015) eKLR; *Munyu Maina v Hiram Gathiba Maina* Civil Appeal No. 239 of 2009 (2013) eKLR; *Gitwany Investment Limited v Tajmal Limited & 3 Others* (2006) eKLR; *Wibeso Investments Limited & Anor v Tamarind Meadows Limited & 5 Others* (2020) eKLR and *John Kamau Kinyanjui v Thika District Land Registrar* (2017) eKLR.

1st, 2nd and 4th Defendants' Submissions

12. The 1st, 2nd and 4th Defendants in their submissions provided a backgrounded of the dispute herein, relied on the evidence presented including the exhibits produced. They argued that the Land Registrar adhered to the law in lodging the restriction in accordance with the provisions of the *Land Act*. Further, that when the Land Registrar suspected fraud, he sent correspondence to the Machakos DCI office to investigate and prevent a crime. They further submitted that the Plaintiff and the Defendants were accorded a hearing before the restriction was registered. On whether the Plaintiff is the absolute and rightful proprietor of land parcel number Mavoko Town Block 3/2718, they insisted that it is not, as the process in the acquisition of the title was mischievous. To buttress their averments, they relied on the following decisions: *Mukuria James Chacha & 2 Others v Land Registrar, Muranga* (2019) eKLR; *Matoya v Standard Chartered Bank (K) Ltd & Others* (2003) I EA 140; and *Republic v Registrar of Lands, Kiambu County* (2015) eKLR.

The 5th and 6th Defendants Submissions

13. The 5th and 6th Defendants in their submissions also provided the background of the dispute herein, and relied on the evidence presented as well as the exhibits produced. They submitted that the proper and correct owner of Mavoko Town Block 3/2178 was the family of the late Job Ndunda Muthike who



died on 1st August, 1997. Further, that they obtained a Grant of Letters of Administration Intestate vide Machakos High Court Succession Cause No. 112 of 2014 to represent the estate. They contended that they hold the original title to the suit land and no application had been made for its replacement. They insisted that the Land Registrar testified that a title had been surrendered and cancelled but he later came to learn that, it was not the original but a fake replica of the same. They further submitted that the Plaintiff acquired its title fraudulently and cannot be deemed as legal owner of the suit land. To support their averments, they relied on the following decisions: *Re Estate of Julius Mimano (Deceased)* (2019) eKLR; *Evanson Wambugu Gachugi v Simon Wainaina Gatwiki & 2 Others* (2014) eKLR; *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* (2015) eKLR.

Analysis and Determination

14. Upon consideration of the Amended Plaintiff, respective Defences including Counter-claim, testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination:-
 - a. Who is the legal owner of the suit land.
 - b. Whether the Plaintiff is entitled to the orders as sought in the Plaintiff.
 - c. Whether the 5th and 6th Defendants are entitled to the orders as sought in the counterclaim.
 - d. Who should bear the costs of the suit.

As to who is the legal owner of the suit land.

15. Both the Plaintiff and the 5th and 6th Defendants claim ownership of the suit land. The Plaintiff claims it purchased the suit land from Job Ndinda Muthike and acquired its title. PW1 in his testimony explained that he entered into a Sale Agreement dated the 3rd May, 2010, on behalf of the Plaintiff for purchase of mother title Mavoko Town Block 3/2718, from Job Ndunda Muthike ID No. 11480380. He confirmed that the Plaintiff acquired its Certificate of Title in 2010. PW1 insisted that it undertook due diligence before the purchase and presented all the relevant documents to the Land Registrar including the consent of the Land Control Board. During cross-examination PW1 explained that the transaction in respect to the suit land was undertaken by their respective advocates and they never got to meet the vendor. Further, that the Plaintiff paid the purchase price through the lawyer.
16. DW3, the Land Registrar confirmed that he registered the Plaintiff as owner of the suit land based on the documents produced. However, in cross-examination he explained that when the 5th and 6th Defendants family members came to his office and presented a title in the name of Job Ndunda Muthike, he realized that the title presented by the Plaintiff was fake and this culminated in his entering a restriction on it and referring the matter to the DCI. DW2 Bernard Wanjau who was an expert witness from the National Registration Bureau in his testimony confirmed that the ID number 11480380 Serial No. 2133164171 belonged to Job Ndunda Muthike as per their records. Further, that the ID Number 11480380 Serial No. 2133164171 used by the vendor Job Ndunda Muthike to sell land to the Plaintiff was made using a forged Identity Card, since the print impressions of the said ID was non-identifiable to those in their records. Further, the thumbprints were different and the font used also different. DW1 Nahashon Kyalo Ndunda confirmed that the suit land belonged to the estate of Job Ndunda Muthike who was a member of Lukenya Ranching. Further, that although the owner died on 1st August, 1997, Lukenya Ranching processed a title in 2008 after his demise.
17. From the evidence presented, I note both the title of the Plaintiff as well as the one in the name of Job Ndunda Muthike (deceased) were issued a few days apart. The Plaintiff in its submissions has insisted that it is a bona fide purchaser for value without notice as it conducted due diligence before



purchasing the suit land and even acquired consent of the Land Control Board. Further, that the 5th and 6th Defendants title hence cannot stand as they failed to call officials of Lukenya Ranching to confirm the deceased was their member and to authenticate the root of their title. Which brings me to the question whether the Plaintiff can be deemed to be a bona fide purchaser for value.

18. On proof of ownership of land, Sections 26(1) (b) of the *Land Registration Act* stipulates thus:-

“The Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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. Emphasis mine

19. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR, the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice wherein they cited the Uganda Court of Appeal Case of *Katende v Haridar & Company Ltd*, in which the said Court had described it as follows:-

“A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a Certificate of Title
- b. He purchased the Property in good faith;
- c. He has no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

20. In applying the principles established in the aforementioned case to the circumstances at hand, I note the Plaintiff acquired a title from the vendor Job Ndunda Muthike who had used a forged National Identity Card of one Job Ndunda Muthike (deceased) to sell the said suit land to it. PW1 had been emphatic that the Plaintiff undertook due diligence as well as obtained consent of the Land Control Board before it purchased the suit land but during cross-examination, he confirmed that he never met the vendor and the transaction was done by their advocates. I note the Plaintiff failed to bring the advocate who undertook the transaction on its behalf to confirm the identity of the vendor, receipt of purchase price as well as the process used in undertaking due diligence. The Land Registrar in his testimony confirmed that after registering the Plaintiff as owner of suit land, he realized the vendor's Certificate of Title was fake as the family of Job Ndunda Muthike presented another title to him. From this analysis, I find that the vendor 'job Ndunda Muthike', did not have a proper title to pass to the Plaintiff as he used forged identification. It is interesting to note that the Plaintiff, despite entering



into a Sale Agreement in 2010 and paying the full purchase price, never bothered to meet the vendor. In the submissions, the Plaintiff sought to shift the burden of proving the root of title to the 5th and 6th Defendants by insisting that they should have produced records from Lukenya Ranching. Further, that a title could not have been issued in the deceased's name. However, the Land Registrar explained that the registration in respect to the suit land was a surrender from Lukenya Ranching to the Allottee. Further, most of the surrenders were done in 2008. He confirmed that it was normal for a title to be issued in a deceased person's name. Further, that the register to the title was opened on 25th February, 2008 which was the opening date for the Company (Lukenya Ranching). Which brings me to the question that can a title be held invalid because it was issued in a deceased person's name. I wish to respond in the negative. It is my considered view that Lukenya Ranching having had records of the members and surrendered the same to the Land Registrar, a title could be issued at whatever time that was convenient. I opine that it was incumbent upon the Plaintiff to produce the vendor to confirm if he was indeed the same Job Ndunda Muthike who was the owner of the suit land. In the circumstance, I find that the Plaintiff is not a bona fide purchaser for value as claimed. In that regard, I find that it is actually the title in the name of Job Ndunda Muthike (deceased) which is valid and it was correct for the Land Registrar to enter a restriction when he suspected fraud as this was in accordance with the provisions of Section 76 of the Land Registration Act. From the evidence tendered by the Plaintiff, I find that it failed to demonstrate that the 5th and 6th Defendants who are administrators of the estate of Job Ndunda Muthike fraudulently acquired their title to the suit land. I opine that the burden of proof was upon it, to prove the same but it failed to discharge it. I hence find that the Plaintiff is not entitled to orders as sought in the Plaintiff but the 5th and 6th Defendants are entitled to orders sought in the Counter-claim.

On who should bear the costs of the suit.

21. Since the 5th and 6th Defendants are the inconvenienced parties, I find that they entitled to the same.
22. It is against the foregoing that I find the Plaintiff has not proved its case on a balance of probability and will proceed to dismiss it. I find that the 5th and 6th Defendants have proved their case on a balance of probability and will allow the Counter-claim and proceed to make the following final orders:-
 - a. The Plaintiff's suit as against the Defendants be and is hereby dismissed.
 - b. An order be and is hereby issued directing the 1st Defendant to forthwith revoke and cancel any title acquired by Gilbert Miya or the Plaintiff in respect to LR No. Mavoko Town Block 3/2718 and the removal of entries to that effect from the register, revocation and cancellation of any subdivisions thereof, and for the title to revert to the estate of Job Ndunda Muthike.
 - c. Costs of the suit including Counter-claim is awarded to only the 5th and 6th Defendants to be borne by the Plaintiff including the 1st, 2nd and 4th Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF JULY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Kirimi for 5th and 6th Defendants

Munyua Ezekiel for Plaintiff



No appearance for Attorney General for 1st, 3rd and 4th Defendants

Court Assistant – Simon/Ashley

