



Mwanyingo v Stanford Investments Limited & 3 others (Environment & Land Case E008 of 2023) [2024] KEELC 7400 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7400 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E008 OF 2023**

**AE DENA, J
OCTOBER 31, 2024**

BETWEEN

MARIAMU NASORO MWANYINGO PLAINTIFF

AND

STANFORD INVESTMENTS LIMITED 1ST DEFENDANT

THOMAS J OPENDA 2ND DEFENDANT

GIBSON MWANGI JONAH THUO 3RD DEFENDANT

KWALE LAND REGISTRAR 4TH DEFENDANT

JUDGMENT

1. This suit was instituted on 6th February 2023 vide a Complaint dated 31st January 2023. It is brought by the beneficiaries of the estate of Ali Nassoro (herein the deceased). It is averred that the 1st Defendant is the current registered owner of parcel Kwale/Pungu Fuel Area/56 (herein suit property). That the suit property was however allocated by the Government to the deceased on 13/12/1977 who died on 13/05/1989 before he could collect the title deed thereto. That following the said demise, the adjudication record dated 13/12/1977 was fraudulently altered by forgery, misrepresentation replacing the deceased with the 2nd and 3rd defendants herein. That thereafter the records pertaining to the deceased were destroyed by the Defendants.
2. It is further averred that the deceased never transferred the land. That the 2nd and 3rd Defendants have never been allocated the suit property by the adjudication office, that the 2nd Defendant never acquired a good title that was capable of being transferred to the 1st defendant or to any subsequent person. At paragraph 14 is listed the discrepancies and alterations made to the adjudication records and the land register for the 1st Defendant made in furtherance of the fraud, forgery, misrepresentation including the particulars of fraud by the Defendants.



3. The Plaintiffs pray for Judgement jointly against the Defendants for;-
 - a. Orders directing the Land Registrar Kwale County to revoke the title deed for Kwale/Pungu Fuel Area/56 in the names of Stanford Investments Limited.
 - b. Orders directing the Land Registrar Kwale County to open a land register in the names of Mariamu Nasoro Mwanyingo as the Legal Administrator of the estate of the late Ali Nasoro.
 - c. Orders directing the Land Registrar Kwale County to issue to Mariamu Nasoro Mwanyingo as the Legal Administrator of the estate of the late Ali Nasoro with a title deed for Kwale/Pungu Fuel Area/56
 - d. Orders directing the Land Registrar Kwale County to cancel any land register in the names of Stanford Investments Limited.
 - e. Permanent orders of injunction to issue against Stanford Investments Limited restraining by themselves, servants, agents and or employees from trespassing or in any way dealing with all that parcel of land registered as Kwale/Pungu Fuel Area/56
 - f. Any other order or relief that the Honourable court may deem fit and necessary in the circumstances.
 - g. Costs and interest of the suit.
4. The suit is defended. The 1st Defendant filed on 10th March 2023 a Statement of Defence dated 8th March 2023 which raised a counterclaim. It is averred that the Plaintiff has not locus standi in instituting this suit as an administratrix of the deceased estate. The allegations contained in paragraphs 8,9,10,11,13,15, 16 are specifically denied. The 1st Defendant states that it followed due process in acquiring the suit property from the 2nd Defendant who was the duly registered owner with a good title. The counterclaim seeks that
 - a. A declaration that the suit property Kwale/Pungu Fuel Area/56 belongs to the 1st Defendant
 - b. A permanent injunction restraining the Plaintiff her assigns, servants or agents from trespassing into, disposing of, selling and or in any manner dealing with the suit property herein
 - c. Costs of the suit
 - d. Any other relief that the honourable court may deem fit to grant.
5. The Plaintiffs responded to the 1st Defendants Statement of Defence on 3/5/23. It is further stated that the 1st Defendant was incorporated on 21/06/2010 and did not have legal capacity to enter into any legally binding contractual relationship with the 2nd Defendant to purchase the suit property. That this rendered the sale agreements null and void. That the Letter of consent to transfer the suit property to the 1st Defendant was unprocedural as it could not be issued in the existence of a charge over a suit property. That in any case there was no green card upon which a certificate of official search could be issued to the applicant for the consent. That there was misrepresentation and non disclosure of material facts to the Board.
6. It is further stated that the green card if any opened pursuant to the deed of indemnity dated 29/09/2010 was never advertised as required to enable any objections which was unprocedural rendering the entries in the green card null and void abinitio.



7. The 2nd Defendant responded vide statement of Defence dated 3/7/23 filed on 10/07/23. It is averred that the end defendant was allocated the suit property by the District Commissioner, and had possession until the year 2010 when he sold to the 1st defendant. He denies the allegations of fraud, forgery and or misrepresentation in obtaining the title. That the beneficiaries of the deceased were trespassers on the suit property. It is prayed that the suit is dismissed.
8. The Plaintiff replied on 17th July 2023 to the 2nd Defendants Defence. It is averred that the 2nd defendant was never the 1st allottee of the suit property. The District Commissioner did not have capacity to allocate land to individuals who were not natives or occupants. That the deceased being a 1st allottee could not trespass on his own land. It is stated that the 2nd Defendant did not adhere to due process in acquiring title to the suit property. The incidences of irregularity as observed with the 1st defendants title are reiterated mutatis mutandis.
9. The 3rd Defendant did not enter appearance despite service by way of advertisement.
10. The 4th Defendant responded to the suit through the office of the Attorney General vide a Statement of Defence dated 13th March 2023. The allegations of fraud, forgery, misrepresentation are denied. It is further averred that if the alleged transactions of illegality and fraud took place, then the same were perpetrated by the 1st to 3rd Defendants to the 4th Defendants that they were the legal proprietors of the suit property. That the Plaintiff does not disclose a reasonable cause of action against the 4th Defendant. That the 4th Defendant will comply with any orders of the court in the determination of this suit.

Hearing

11. The suit was heard virtually on 30/11/23 and 7/12/23.
12. PW1 was Mariamu Nasoro Mwaningo the Plaintiff. She adopted the witness statement dated 31/01/23 as her evidence in chief. The witness produced as exhibits the documents listed in the Plaintiffs list of documents dated 31/01/23 and 15/5/23. PW1 stated the deceased was her paternal grandfather. Referring to the adjudication records PW1 reiterated the averments in the Plaintiff and that she did not know the 2nd and 3rd Defendants appearing in the records. That she had sued the Defendants because they never got the titles in the correct manner. That she disagreed with the 1st Defendant contention of innocent purchaser without notice. PW1 told the court that the District Commissioner cannot take land from one person and allocate it to another. The witness stated though there were three structures on the suit property they did not belong to the defendants but for buyers who bought the same from one Nyayo whom they managed to chase out of the suit property.
13. On cross examination by Ms. Shamsa for the 1st Defendant the witness stated she was 11 years old in 1977. That her grandfather did not build on the suit property since it was for farming only. That the forgery committed by the 1st defendant was because he sold the land without PW1 consent.
14. Cross examined by Ms. Imenta for the 2nd Defendant the witness stated she does not live in the suit property. That she did not have evidence she has lived on the suit property. That she did not know the reason why the deceased did not process title. She stated her father was the only heir of the deceased though she could not remember when he died. PW1 reiterated that the 2nd defendant was assisted by the Land Registrar to remove the title document.
15. Cross examined by Ms. Langat for the 4th Defendant. She clarified that his grandfather died in 1989 when she was 23 years old. They used to cultivate on the suit property but stopped for 9 years because one Nyayo used to chase them away. That she was the one who initiated the process of obtaining title starting with the chief after which she engaged a lawyer. On being referred to PEx 4 the witness



- confirmed that the deceased name was still reflecting as owner of the suit property. None of the Defendants lives on the suit property.
16. PW4 clarified in re-examination that her names were corresponding with the deceased which was proof she was the granddaughter. That the grant reflected the date of death of the deceased as 6/5/1989. That the fraud was shown through PEx5.
 17. With the above the Plaintiffs case was marked as closed.
 18. DW1 was David Lumumba Onyonka a director and shareholder of the 1st Defendant. He adopted his witness statement dated 6/3/23 and produced the documents in the list of documents dated 8/3/23. DW1 stated he was a bonafide purchaser. He asked the vendor for a copy of title and search which indicated a charge and discharge. That the name Nasoro Ali never featured during the process of the sale. That the process of replacement was of the green card was handled by the 2nd Defendant. That the green card got lost several times including the year 2021 and no one came up to claim the suit property. The witness stated all he did was to pay for the stamp duty and reconstruction as required by the Land Registrar and had no intimation there was fraud. That he had been to the suit property in 2022 and there were no structures. That the court should declare him a bonafide purchaser.
 19. On cross examination by Mr. Mungai DW1 conceded he entered into the sale before registration of the company but which was ongoing. He relied on information given by the 2nd defendant and he had no reason to doubt him as they had done other business together. That he did not visit the Land Adjudication office to confirm the history of the parcel neither did he inquire with the neighbours. That he would only trust the title and not adjudication register. He could not remember when the green card was reported to him as missing and how long it took to replace as he left everything to the 2nd defendant. He was not aware if the 2nd defendant attended the LCB. The witness confirmed he did not attend the LCB. The witness confirmed he was aware of the requirement to attach a recent search to the LCB application though he recalled there was no green card to produce the search. The witness could not remember who paid for the consent fees though he believed due process was followed by his lawyers.
 20. DW1 conceded he was aware title could not issue to him in the absence of a discharge of charge. The witness declined to confirm his title was irregular because the discharge was after the transfer. Though he was aware of the 60 days gazette notice he could not confirm if the 2nd Defendant complied. He trusted the 2nd defendant and there was no need for him to do further due diligence. He conceded he had not presented proof of payment of the purchase price. That he visited the suit property and built a wall which was demolished though he did not have evidence of the same. Though he reported the demolishing he had no OB.
 21. On further cross examination by Ms. Omenta DW1 reiterated the search indicated the 1st Defendant as the registered owner of the suit property. Cross examined by Ms. Langat the witness told the court that the company bought the property for its use for Kshs. 12 million though the transfer indicated Kshs. 8 million. He had no proof of the payment. he conceded the transfer was registered before the discharge of charge. That he did not have any green card from the land registry. He confirmed the consent was issued when there was a charge.
 22. In re- examination DW1 clarified that the notification of discharge was received on 1/11/2010. Every time he went to the Land registry the green card was missing. At this juncture the 1st Defendants case was closed.
 23. DW2 was Thomas Joseph Openda the 2nd Defendant a retired businessman. He adopted his witness statement dated 3/7/23 as his evidence in chief and exhibits as listed in the 2nd defendants list of



- documents dated of the same date. DW2 reiterated he sold the suit property to the 1st Defendant and denied that he obtained the same fraudulently.
24. Upon cross examination by Mr. Mungai DW2 told the court though he was issued with an allotment letter around late 1977 or early 1978 he did not produce it in court. He confirmed he obtained the suit property through the office of the District Commissioner. That the DC didn't have power to issue title and could not issue land which is already allocated to somebody else. He disowned the transfer from Gibson to himself stating he neither knew Gibson nor how the subject transfer/cancellations to him were effected. That he visited the property with the DC who did not inform him of the process of adjudication neither did the Registrar. He confirmed all duplicates should have matching information and where this is not the case then there must be a problem. He confirmed that the original adjudication register bearing his name did not match its duplicate as his name was missing. DW3 conceded the presence of charge during application for LCB consent though he could not recall whether a search was issued for purpose of the application. On replacement of green card the witness confirmed he was aware of the requirement for 60 days' notice in the Kenya gazette but stated it was the duty of the Land registrar to ensure procedure was followed including encumbrances. Though the purchaser relied on the 2nd Defendants documents he was at liberty to undertake his own due diligence. He stated he sold the property for Kshs. 8 million which was paid in tranches through bank transfers.
25. Cross examined by Ms. Shamsa DW2 stated that at the time of transfer to the 1st defendant he believed everything was on record and that is why the Land registrar effected the same. The witness stated he had no reason to keep off information from the 1st Defendant who bought it knowing that the 2nd Defendant was a bonafide owner. On being cross examined by Ms. Langat indicated he made an application to be allocated the suit property and paid Kshs.50 though he did not have the receipt. He could not remember if he received Kshs. 8M or 12M. That his lawyer represented him at LCB. That the indemnity DW2 executed was for just incase he was not the right owner and would refund the money.
26. The witness stresses in re-examination that he never colluded with the land registry. He stated there was no other owner before him and that he did due diligence before selling the property and passed on the documents to the 1st defendant.
27. With the above the 2nd Defendants case was marked as closed.
28. DW3 was Mr. Steve Mokaya Land Registrar in charge of Kwale county. He gave evidence on behalf of the 4th Defendant. The witness adopted his witness statement dated 30/11/23 and produced the documents as contained in the list of documents dated 9/6/23. Going through the parcel file for Kwale/Pungu Fuel Area/56 DW3 stated that he could not authoritatively state who the registered owner is because the register opened vide the gazette notice 5411 of 9/6/2017 was never executed by the Land Registrar. Explaining the history of the suit property DW3 told the court the same was allocated to Ali Nassoro by the Government of Kenya, thereafter the name was crossed out and the names of Gibson Mwangi, Juma Thuo and Thomas Openda entered. The crossing out of Ali Nasoro's name was not supported by any information or by a new register reflecting the changes as per the practice. That DW3 Exh 5 still reflected Nasoros name. That in the absence of a register at the lands office as to who is the registered owner the adjudication record is used.
29. Upon cross examination by Mr. Mungai DW3 stated he could not confirm the entry on page 2 (see DW3 Ex 5) as having been entered by Nasoro as it was not possible for an allottee to lodge an objection against himself. Further it was not practicable for Nasoro to file an objection before allotment since the adjudication record was prepared on 13/12/77 and the objection on 9/12/77 when the former had not yet been prepared. To him the entry was an afterthought and made by someone else other than Nasoro. That there was no evidence of proceedings under section 26 of the [Land Adjudication Act](#).



That Section 29 is on complaint to Executive Officer who is Gibson Mwangi. That Gibson Mwangi is the same person seen as the crossed out allottee who was the one who ought to have resolved the complaint. That this was an irregularity on the face of it.

30. DW3 on being referred to the original adjudication record and the duplicate thereof stated that where the two are not similar it means there is a fraudulent entry made in the duplicate. On being referred to entries for the 1st and 2nd Defendant and the encumbrances the witness testified that ordinarily the date of the title would be the same as transfer date. Further that transfer cannot be registered unless the encumbrance is discharged. That a consent cannot issue where there is an existing encumbrance as this would be irregular. That a search was mandatory when applying for LCB consent to transfer. A search could not issue in the absence of a green card since the information in the green card is what is transferred into the search.
31. Analysing the date of indemnity for replacement of the green card vis a vis the 60 days notice requirement and the title issued to the 1st Defendant DW3 pointed that any issuance of a green card before 7/12/2010 would be irregular including the 1st Defendants title issued on 1/11/2010. That the parcel file did not have a gazette notice in respect of the 2010 indemnity document dated 29/9/10 meaning it was not done. That the title issued to the title to 2nd defendant and subsequent transfer to 1st defendant were unprocedural. There was no record supporting transfer to the 2nd Defendant.
32. Upon cross examination by Ms. Shamsa DW3 reiterated that while the green card for 2nd defendant was prepared and endorsed 'issued' it was never signed by the Land Registrar who signs green cards. That by his records he could not confirm who was the current registered owner of the suit property. Cross examined by Ms. Omenta the witness testified that it was not normal for the Registrar to be unable to confirm the registered owner. That a discharge of charge and transfer cannot be registered simultaneously. That once one is allotted property by the government there is no time limit within which to process title. He reiterated that everything was unprocedural and it could have involved officials from lands, lawyer or even the clients.
33. On re-examination the witness clarified that the endorsement 'issued' on the unsigned green card did not connote issue of the same but the title deed. That as long as the green card was not signed it was of no value to the land's office. That a discharge and transfer cannot be submitted at the same time since you must first obtain an LCB consent and a search for the current status which search ought to reflect the discharge . When a document is presented the recognised date is the one when the registrar has appended his signature. That as per the search dated 14/3/23, the adjudication record the property was still under the name of Nasoro. The 4th Defendants case was closed at this point.

Submissions

34. Parties filed and exchanged submissions as directed by the court. The plaintiffs' submissions are dated 20/12/23, the 1st Defendants 31/01/24 , the second Defendants 5/03/24 and the 4th Defendant 5/2/24.

The Plaintiffs Submissions

35. The Plaintiff upon analysing the plaintiff's case and the evidence presented in court identified 3 main issues for determination. On whether the cancellation of Adjudication record was as provided in law, it was submitted that the same did not comply with the provisions of Section 12(1) as there was no record of any objection proceedings which could only be filed by either the 2nd Defendant or the 3rd Defendant and not the deceased allottee. There was clear abuse of office by the 3rd Defendant in altering the name of the land owner and substituting it with himself as the Executive Officer who was member



of the Adjudication board as envisaged under section 6(2) of the [Land Adjudication Act](#). The process having been flawed any registration of title on the basis of a flawed process is a nullity. Reliance is placed on the case of Kipkoros Arap Soi Vs. Abuya Muragia Mwembe & 2 Others (2014) eKLR and the court of Appeal case of Henry Muthee Kathurima Vs. Commissioner of Lands & Ano. (2015) eKLR which emphasises that article 40 of the [Constitution](#) does not extend to illegally acquired property.

36. Citing the Court of Appeal case of Mangrove investments Limited Vs. Attorney General & Ano. (2020)eKLR it was submitted that un registered company could not acquire a valid interest in land. That the 1st Defendant had no legal capacity to enter into any contractual relationship with the 2nd defendant and therefore the sale agreement dated 21st June 2010 and which predated the incorporation of the 1st Defendant was null and void.
37. The Plaintiff further urged that the 1st, 2nd and 3rd Defendants failed to demonstrate that they acquired their titles legally and procedurally since their titles were being challenged. It was pointed that DW3 could not confirm that the 1st defendant was the current registered owner as the relevant green card was not signed by the Land Registrar. The provisions of the section 26(1) of the [Land Registration Act](#) on the grounds upon which title can be challenged and the cases of Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others (2015) eKLR and Munyu Maina Vs. Hiram Gathitha Maina (supra) were cited. Listing the various procedural irregularities noted in the acquisition of the titles herein as confirmed by DW1, DW2 and DW3 it was submitted that history and root of the same was unprocedural.

The 1st Defendants Submissions

38. Reiterating the facts and evidence of the 1st defendants it was submitted that the 1st Defendant was a bonafide purchaser without notice of another's claim to the suit property. The court was referred to the case of Samuel Kamere Vs. Land Registrar, Kajiado Civil appeal No. 28 of 2005 (2015)(eKLR on the elements to be proved on the defence of bonafide purchaser as well as the holding in Khadija Mohamed Vs. Amina Abdi [Duba & Ano. Malindi Civil Appeal No. 83 of 2019](#). Further that the adjudication record produced by the Plaintiffs were never corroborated with the evidence of the Land Adjudication officer and should not be relied upon.

The 2nd Defendants Submissions

39. Relying on the dictum of Onguto J in Caroline Awinja Ochieng & Ano. Vs. Jane Anne Mbithe Gitau & 2 others (2015) eKLR, it was submitted on behalf of the 2nd Defendant that it was successfully proved that the 2nd Defendant is the beneficial owner of the suit property as evidenced by the documents produced by DW2. That the Plaintiff only adduced the assistant chief letter dated 5/5/2022 and letter dated 15/9/22 from Land Adjudication and Settlement Officer. That there was no demonstration how and what Ali Nasoro the deceased did to acquire title to the time of his death. That the particulars of fraud itemised under paragraph 14 against the 2nd Defendant were not proved. Citing section 116 of the [evidence Act](#) it was further submitted that the Plaintiff did not prove that the 2nd Defendant was not the owner of the suit property.

The 4th Defendants Submissions

40. The 4th Defendant submitted on two issues namely whether the 2nd Defendant had good title to pass to the 1st Defendant and whether the 1st Defendant is an innocent purchaser for value. That there having been no evidence of proceedings heard by the Adjudication Officer as per section 12(1) of the [Land Adjudication Act](#) Cap 284 of the laws of Kenya that led to the cancelation of the name of Ali



Nasoro to Gibson Mwangi Jonah Thuo and then to Thomas Openda. That the cancellation of the deceased name was done illegally and therefore rendering the 2nd defendant title void ab initio. That the 2nd Defendant could not pass good title to the 1st Defendant. The court was referred to Kenya Anti-corruption Commission Vs. Online Entrepreneur Limited & Others (2019) eKLR to the effect that the acquisition of a title cannot be construed only in the end result.

41. On whether the 1st Defendant is an innocent purchaser for value without notice it is submitted that the 1st Defendant failed to conduct due diligence before he purchased the property. The sale agreement was entered into before incorporation of the 1st Defendant. Thus the 1st Defendant did not have capacity to enter into the agreement. That consent to transfer ought not to have been issued when there was an encumbrance. That there was admission by both the 2nd and 4th Defendant that the provisions of section 33 of the Land Registration Act 2012 as to replacement of green card were not complied with to enable objections by any person in including the Plaintiff against replacement. Reliance was placed on Republic Vs. Registrar of Titles Nairobi Ex Parte Ruth Mayoyo & 2 Others, New Karen Ventures Ltd (Interested Party) 2002) eKLR on mandatory compliance of section 33. That the 1st defendant cannot therefore claim to be an innocent purchaser. Referring to holding in Elijah Makeri Nyang'wara Vs. Stephen Mungai Njuguna (2013) eKLR it was submitted that title in the hands of an innocent 3rd party can be impeached if proved it was obtained illegally, unprocedurally or through a corrupt scheme. Further that the threshold set out in the case of Katende Vs. Haridar & Co. Ltd (2008) 2 EA 173 have not been met by the 1st Defendant as the 2nd Defendant did not hold valid title. It was urged that the Plaintiffs suit be allowed.

Analysis and Determination

42. Having considered the all the foregoing the issues that commend determinations are
1. Whether Ali Nasoro was entitled to be registered as the proprietor of the suit property?
 2. Whether the 2nd Defendant had good title to pass to the 1st Defendant
 3. Whether the 2nd Defendant is a bonafide purchaser for value without notice of another claim
 4. Whether the Plaintiff is entitled to the reliefs sought
 5. Whether the 1st Defendant is entitled to the prayers sought in the counterclaim
 6. Who should bear the costs of the main suit and counterclaim.
43. The Plaintiffs case is that the suit property was at adjudication allocated to their deceased grandfather one Ali Nassoro who died on 6/5/1989 before he could collect the title. That later the name of the deceased was fraudulently and unprocedurally removed from the adjudication records to reflect the 3rd and 2nd Defendants.
44. The law requires under Section 107 (1) of the Evidence Act that; -
- Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
45. In other words, the burden of proof was upon the plaintiff to adduce and produce documentary evidence that will prove its case. The Plaintiff produced in evidence a letter dated 5/5/22 from the Assistant Chief Pungu indicating when deceased died and the beneficiaries who are the grandchildren one of whom is the Plaintiff. A letter dated 1/8/22 from the County Civil Registrar introducing the Plaintiff as the granddaughter of the deceased was also produced for purposes of a death certificate. It



was not in dispute that the Plaintiff was not one of the beneficiaries of the deceased. At least there was no evidence adduced to displace this fact by the Defendants. A Limited Grant ad litem dated 17/11/22 was issued and produced in court. It is therefore clear from this evidence that the Plaintiff was before court as a beneficiary of the deceased.

46. PW1 produced communication dated 15/09/22 and 6/12/21 from Ministry of Lands and Physical Planning Department of Land Adjudication and Settlement (see Pexh 4). The letter was in respect of Plot No. 56 Pungu Fuel adjudication area. The letter confirms that at the time of demarcation the said plot was recorded in the name of Ali Nasoro as it exists in the demarcation books. PW1 also tendered in evidence two Duplicate Adjudication Record (Pexh 5), in respect of the same suit property. One of the records signed on 13/12/77 reflected the name of the land owner as Ali Nasoro and Gibson Mwangi Jonah Thuo. However, the name of the former is crossed out leaving Gibson Mwangi Jonah Thuo as the land owner. The other duplicate signed on 13/12/77 reflect Ali Nasoro, Gibson Mwangi Jonah Thuo and Thomas Openda as the land owners. My review of the same revealed that the names of Ali Nasoro and Gibson Mwangi Jonah Thuo are crossed out leaving Thomas J. Openda as the owner.
47. In addition to the above a copy of title dated 1/11/2010 for Kwale/Pungu Fuel Area/56 in the name of the 1st Defendant Stanford Investments Limited was produced. This title was also produced by DW3. This therefore indeed proves the Plaintiff allegation that the deceased name was crossed out and the subsequent registration of the 1st Defendant instead of Ali Nasoro.
48. The next step was for the Plaintiff to prove the contention that the deceased name was crossed or replaced unprocedurally and or fraudulently. The Plaintiff stated in her evidence that the deceased never transferred the suit property to any person or entity. Indeed none of the defendants specifically pleaded and or stated that they obtained the land through any arrangements with the deceased. The 3rd Defendant being Gibson Mwangi Jonah Thuo did not enter appearance. DW1 told the court the company purchased the suit property from the 2nd Defendant and the 2nd Defendant stated in his evidence in chief that he got the land through the District Commissioners office. On being cross examined by Ms. Langat the 2nd Defendant indicated he made an application to be allocated the suit property and paid Kshs.50. This corroborates the Plaintiff case that the deceased never transferred the land. But is there any other way the land could have passed to the 2nd and 3rd Defendants?
49. It was imperative therefore for the Court to review the legal framework governing land adjudication and its provisions as regards cancellation of a name from the register. This is the [Land Adjudication Act](#) cap 284 of the laws of Kenya (now repealed). Adjudication is the process of ascertainment of land rights and or authoritative process of final determination of existing rights and claims of people to land. The objectives of the [Land adjudication Act](#) as stated in the short title was to provide for the ascertainment and recording of rights and interests in Trust Land or customary land and for purposes connected therewith and purposes incidental thereto.
50. Under the Act alterations to register/record can only be undertaken in accordance to sections 27(1) or section 29(3). Section 27(1) gives power to the adjudication officer to alter the adjudication register to conform with any determination of objections under section 26 of the Act. It is important to note section 12 makes it mandatory for the adjudication officer to keep a record of any objection proceedings in the same way a court of law keeps a record. Indeed none was produced in this regard and I would safely conclude there were no objection proceedings in the present case that led to the alteration cancelling of the name of Ali Nasoro. DW3 in his testimony confirmed that the crossing out of Ali Nasoro's name was not supported by any information. In any case the 2nd Defendant testified that he was given the land by the District Commissioner and or he applied for the same and was allocated.



51. This court noted the submission by Counsel for the 2nd Defendant that the adjudication records were not corroborated by anyone from the Land adjudication office who could have explained the cancellation of Ali Nasoro name. Firstly this document was produced without any objection from counsel and there was opportunity to cross examine on it. Secondly DW3 produced a letter dated 14/3/23 (DW3 Ex 1) addressed to the Land Adjudication & Settlement Office Kwale seeking to be provided with a current search of the registered owner of Kwale/Pungu Fuel Area/56. The said office submitted Adjudication Record (DW3 Ex 5). This record shows that Ali Nasoro name as having been crossed out. At page 2 of the same exhibit there is an endorsement 'Name Changed' by an objection submitted by Ali Nasoro on 9/12/77 and it is signed by the Adjudication Officer. What other explanation was required by the maker when the document speaks for itself. I have already discussed what the law requires in terms of supporting any cancellation.
52. DW3 during cross examination testified that he could not confirm the entry on page 2 as having been entered by Nasoro as it was not possible for an allottee to lodge an objection against himself. Further it was not practicable for Nasoro to file an objection before allotment since the adjudication record was prepared on 13/12/77 and the objection on 9/12/77 when the former had not yet been prepared. To him the entry was an afterthought and made by someone else other than Nasoro. I have perused the said documents and respectfully agree with this observation.
53. The other instance for cancellation or alteration would be under section 29(3) above where a person aggrieved by a decision made under section 26 appeals to the Cabinet Secretary is upheld then the adjudication officer would alter the record to conform with the determination. But having made a conclusion that there were no proceedings under section 26 then there cannot have been an appeal in my view.
54. Clearly from the foregoing the alteration of the adjudication record by cancellation of Ali Nasoro's name was unprocedural and not in accordance to the law and must be disregarded by this court .

Whether the 2nd Defendant had good title to pass to the 1st Defendant

55. But having made the above finding where does this leave the 2nd Defendant and 1st Defendant? I have started with the 2nd Defendant because as per the pleadings he is the one who sold the suit property and which is not in dispute. The 2nd Defendants case is that he was the lawfully registered owner of the suit property. His evidence was that he was allocated the land after applying for the same and making the requisite payment of Kshs. 50. Infact from his witness statement which DW2 adopted as his evidence in chief it is stated that this was a beach property only issued by the President of Kenya then.
56. The 2nd Defendants title having been brought into challenge it was incumbent upon the 2nd Defendant to defend his title. In the case of Samuel Odhiambo Oludhe & 2 Others Vs Jubilee Jumbo Hardware Limited & Another (2018) eKLR the court stated that possession of title is not absolute proof of title. In Kogo Flats Limited Vs. Sammy Cherunga & Another (2019)eKLR Odeny J pronounced that the process of acquisition of title is as good as the end result which is the title document. If certain steps are missing there has to be explanation as to why there is an anomaly on the acquisition. Also see Munyu Maina Vs Hiram Gathiha Maina Civil Appeal No. 239 of 2009 (2013) eKLR.
57. But what does the applicable law state. This is section 26 of the [Land Registration Act](#) which provides as follows :-
 - 26.(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.

58. Arising from the above provisions it is apparent that the title is indeed protected, but the protection is not available 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.
59. In support of his case DW2 produced 8 documents namely Agreement for sale dated 14/5/2010 (DW2 ex1) Application for consent of Land Control Board dated 23/9/2010 (DW2 ex2), Letter of consent dated 6/10/2010 (DW2 ex3), Notification of charge dated 14/9/89 (DW2 ex4), Notification of Discharge dated 5/11/2010 (DW2 ex 5), Stamp Duty Declaration and Assessment and pay in slip dated 13/10/2010 (DW2ex6), Stamp Duty Declaration and Assessment and pay in slip dated 13/10/2010 for transfer (DW2 ex 7) and Transfer of Land registered on 1/11/2010 (DW2 ex 8).
60. A quick glance at these documents does not reveal proof of ownership per se except that the 2nd Defendant was selling the suit property as owner thereof. There are also no historical documents to support how the title was acquired. Upon cross examination by Mr. Mungai DW2 told the court though he was issued with an allotment letter around late 1977 or early 1978 he did not produce it in court. No evidence was tabled by the 2nd Defendant to show that the suit property was a beach property and if yes no document as to presidential consent were placed before the court. No explanation was given for these missing documents. Infact looking at the documents produced by DW3 the Land Registrar Kwale and who is the custodian of documents of title, all indications are that the land was subject to land adjudication and consolidation. The explanation by DW2 during cross examination that he was never informed by the District Commissioner that the suit property was under adjudication is of no assistance to his case.
61. But having noted the above the DW3 produced a copy of surrendered title dated 22/4/1978 of Thomas J. Openda (DW3 Ex3). Guided by the case law cited and in the absence of its history and documentation supporting its acquisition, the said title perse cannot suffice as proof of ownership. The court in *Kipkoros Arap Soi Vs. Abuya Muragia Mwembe & 2 Others* (2014) eKLR faced with similar circumstances where the adjudication record is changed unprocedurally to facilitate the registration of another person as owner impeached the title which was a first registration. Also see *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015]eKLR.
62. I must address the allegations of fraud raised against the Defendants. It is trite that fraud must be specifically pleaded and particularised See *Vijay Morjaria Vs Nansingh, Madhusingh & Another* (2000)eKLR. The particulars have been laid out under paragraph 14 of the Plaintiff's submissions. Blacks Law Dictionary 11th edition defines fraud as 'knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or detriment. In law fraud is intentional deception to secure unfair or unlawful gain or to deprive a victim of a legal right.' The victim is the deceased whose name was unprocedurally removed in the guise that he the allottee filed an objection against himself.
63. I will not spend a lot of time on the above because for me all the instances of procedural improprieties amounted to misrepresentations including the altering of the adjudication record, the absence of green



card to support information given to the Land Control Board among others which have been pointed out and which the court has noted upon the review of the documentation and evidence of DW1, DW2 and DW3, point toward the existence of fraud. Infact DW3 confirmed in his evidence that where you have duplicate adjudication records where the two do not match then there is a problem and this is not rocket science in my view.

Assuming this court is wrong on the above, the illegalities and failure to follow procedure would be a ground to impeach the titles herein.

64. Based on the foregoing the 2nd Defendant having failed to successfully defend his title to the suit property, the said title issued on 22nd April 1978 cannot stand by dint of the provisions of section 26(1) (a) and (b) having been unprocedurally acquired. I will now proceed to look at the 1st Defendants title having been purchased from the 2nd Defendant.

Whether the 1st Defendant is a bonafide purchaser for value without notice of another claim

65. The 1st defendants case is that he is a bonafide purchaser for value without notice of another claim over the suit property and has raised a counterclaim in this regard and seeks a declaration that the suit property belongs to the 1st Defendant. It is not in dispute that the 1st Defendant purchased the suit property from the 2nd Defendant. In proof of its case the 1st Defendant produced Agreement for sale, Deed of Indemnity and payment receipt, Application for consent and letter of consent, Notification of discharge and payment receipts, Transfer of Land forms and payment receipts, Copy of title deed and search and bundle of Indemnities, Gazette Notice and Search DW1 EX 1-7 in the order listed.

66. But who is a bonafide purchaser. In *Katende v Haridar and Company Limited* the court of Appeal in Uganda stated "... a bona fide purchase for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. The Court of Appeal and the Supreme Court of Kenya have also had occasion to pronounce on the defence of bonafide purchaser. The court of Appeal in *Samuel Kamere Vs. Land Registrar, Kajiado Civil appeal No. 28 of 2005* (2015)eKLR stated thus

It is evident that there are two competing claims over the suit property, and we have said that the plaintiff's proprietary interest is already established. Since the appellant's title is under challenge, in order to be considered a bonafide purchaser for value, he 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 a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property. (Emphasis is mine)

67. Applying the above to the facts of this case I will interrogate whether the 1st Defendant met the above requirements. Did the 1st Defendant prove that he had acquired a valid title? My answer is an emphatic no. During cross examination DW1 admitted to all the gaps and or irregularities pointed in the documents produced as pertains the transfer to himself. DW1 conceded he did not attend the Land Control Board. The witness confirmed he was aware of the requirement to attach a recent search to the LCB application though he recalled there was no green card to produce the search. He was aware title could not issue to him in the absence of a discharge of charge. Cross examined my Ms. Langat DW1 conceded the transfer was registered before the discharge of charge. That he did not have any green card from the land registry. He confirmed the Land Control Board consent to transfer was issued when there was a charge. It is trite that this is irregular in a normal conveyance. Though he was aware of the 60 days gazette notice he could not confirm if the 2nd Defendant complied. He agreed a consent cannot issue where there is an existing encumbrance as this would be irregular and that a search was mandatory when applying for Land Control Board consent to transfer. That a search could not issue



in the absence of a green card since the information in the green card is what is transferred into the search. DW3 confirmed that a transfer cannot be registered unless the encumbrance is discharged.

68. Did the 1st Defendant demonstrate he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title? Again my answer is an emphatic no. DW1 indicated in cross examination that he trusted the 2nd Defendant and there was no need for him to do further due diligence. That he trusted the 2nd Defendants title more than the adjudication record. My review of the witness testimony is that DW1 in his entire oral testimony and during cross examination DW1 reiterated that he left everything to do with the finer details of the transaction to the 2nd Defendant whom he trusted. All he did was to fill in forms sign and pay. It was his evidence that he did not find it necessary to undertake due diligence by visiting the adjudication office to look into history of the title.
69. The court is also emboldened by the Supreme Court of Kenya decision in *Dina Management Limited Vs. County Government of Mombasa & Others (SC Petition No. 8 (E010 of 2021))* which considered the question of due diligence that should be undertaken for one to benefit from the defence of innocent purchaser and affirmed the decision in Samuel Kamere Supra.
70. On the consideration there is nothing in the evidence to show that the appellant paid valuable consideration, or indeed, any consideration at all, for the suit property. Indeed, DW1 conceded he had not presented proof of payment of the purchase price.
71. Clearly arising from the foregoing the 1st Defendant cannot be termed as an innocent purchaser for value and the court finds as such. Further the court having made a finding that the 2nd Defendants title could not be sustained for having been acquired unprocedurally it therefore follows that the 2nd Defendant could not pass good title to the 1st Defendant. In this regard I'm guided by the decided case in *Arthi Highway Developers Vs West End Butchery & 6 Others (2015) eKLR* where the court held that a transfer of title by vendor possessing fake title/fraudulent title cannot pass good title.
72. In view of the above the Counterclaim raised by the 1st Defendant is of no consequence and must fail.

Whether the Plaintiff is entitled to the reliefs sought

73. Having impeached the titles of the 1st Defendant and the 2nd Defendant and having found that the cancellation of the name of the Deceased Ali Nasoro from the adjudication record was unprocedural clearly it is only fair that the register be rectified to reflect the true owner as Ali Nasoro. Power of the court to rectify the register is conferred by Section 80 of the *Land Registration Act*. This is also buttressed by precedent See *Falcon Global Logistics Co. Limited v Management Committee of Eldama Ravine Boarding Primary School [2018] eKLR* and Court of Appeal in *Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR*
74. The upshot of the foregoing is that this court finds that the Plaintiff has proved her case on behalf of the estate of Ali Nasoro on a balance of probabilities and I accordingly enter judgement for the Plaintiffs against Defendants as follows:-
 1. The Land Registrar Kwale County to revoke the title deed for Kwale/Pungu Fuel Area/56 in the names of Stanford Investments Limited
 2. Land Registrar Kwale County to cancel any land register in the names of Stanford Investments Limited.
 3. The Land Registrar Kwale County to open a land register in the names of Ali Nasoro and to issue a title deed in the name of Ali Nasoro for Kwale/Pungu Fuel Area/56



4. Permanent orders of injunction hereby issue against Stanford Investments Limited restraining by themselves, servants, agents and or employees from trespassing or in any way dealing with all that parcel of land registered as Kwale/Pungu Fuel Area/56
5. The Plaintiff shall have the Costs of the main suit.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 31ST DAY OF OCTOBER 2024.

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A E DENA

JUDGE

Ms. Omenta for 2nd Defendant

Mr Mungai for the Plaintiff

No appearance for the 1st defendant

No appearance for the 4th Defendant

Asmaa Maftah – Court Assistant

HON. LADY JUSTICE A.E DENA

