



St Thomas Academy Limited v Githumu Kangema Limited and Others (Environment & Land Case 281 of 2013) [2024] KEELC 7025 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7025 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 281 OF 2013**

**JA MOGENI, J
OCTOBER 24, 2024**

BETWEEN

ST THOMAS ACADEMY LIMITED PLAINTIFF

AND

GITHUMU KANGEMA LIMITED AND OTHERS DEFENDANT

JUDGMENT

1. By the amended plaint dated 25/09/2014, the plaintiff seeks the following prayers:
 - a. A declaration that the cancellation of the Plaintiff's title and/or registration of ownership by the 2nd and/or 3rd Defendants, was null and void;
 - b. A declaration that the Plaintiff is the bona fide and lawful owner of the property, comprised in grant or Title LR No. 209/3007/1 Nairobi, pursuant to the transfer duly registered in its favour by the 2nd and 3rd defendants;
 - c. A declaration that the title issued to the 1st Defendant as registered on 5th February 2013 and subsequent and/or pursuant to the aforesaid cancellation of the Plaintiff's title was null and void;
 - d. Cancellation of the grant or Title in respect of LR No. 209/3007/1, Nairobi issued in the name of the 1st Defendant;
 - e. Issuance of a fresh grant in the name of the Plaintiff in respect of the property comprised in grant or Title LR No. 209/3007/1 Nairobi, with effect from 1st January 2005 and for a term of 50 years and pending the issuance of this fresh title; -
 - i. The 1st, 2nd and 3rd defendants and each of them, their officers, servants or agents or otherwise howsoever be prohibited from releasing the original Title LR No 209/3007/1 Nairobi, to the 1st Defendant, its officers and agents



- ii. The 1st Defendant be restrained from charging, leasing, possessing or transferring or in any other way from dealing with or interfering with Plaintiff's quiet possession of the property
 - iii. Costs of the suit
 - iv. Any other or further relief as this Honorable Court may deem fit and just.
2. It is the plaintiff's case that it purchased the property known as LR 209/3007/1 by the 1st defendant and the grant provided for 56 years and 3 months from 1/09/1948 to 1/07/2005 and the plaintiff sought the undertaking of the Commissioner of Lands that the lease would be extended. Vide a letter dated 20/07/2002 the Commissioner gave his undertaking that the lease was extended for a period of 50 years with effect from 1/07/2002 upon fulfilment of the conditions laid down.
3. The plaintiff states that following the undertaking it then entered into an agreement with the 1st defendant for purchase of LR No. 209/3007/1 and a transfer instrument was executed for a consideration of Kshs 5,000,000 and presented for registration on 4/03/2004. The plaintiff was finally registered as proprietor in July 2005. At the same time the plaintiff was issued after applying with the letter of allotment dated 26/09/2005.
4. The plaintiff avers to have been in actual possession, use and enjoyment of the property and pays land rent while waiting to be issued with the new grant. That it was however shocked to learn on 21/02/2013 that the new grant was processed in the name of the 1st defendant on the ground that the registration of the plaintiff's title effected on 14/07/2005 was contrary to the law as the lease had already expired on 1/01/2005.
5. The plaintiff is aggrieved by this action of the 2nd and 3rd defendants and believes the cancellation was as a result of fraud, collusion and or breach of statutory duty on the party of the 2nd and 3rd defendants. The plaintiff has listed (i) to (viii) grounds of fraud, collusion and or breach of statutory duty by the 1st, 2nd and 3rd defendants.
6. The plaintiff avers that renewal of the lease in the name of the 1st defendant is contrary to section 158 of the Land Act 2012 and is thus null and void.
7. The 1st defendant filed an amended statement of defence dated 23/10/2014 and denied the contents of the amended plaint in toto. It denied that it ever sold the property known as LR 209/3007/1 to the plaintiff or to any other party for that matter and therefore the purported sale agreement entered into between the plaintiff and the 1st defendant is foreign and not genuine.
8. The 1st defendant avers that if the plaintiff was ever registered as a proprietor of the suit property in July 2005 then the process was fraudulent and illegal.
9. The particulars of fraud by the plaintiff are listed as:
 - a. Causing the suit premises to be registered in its name knowing very well that it had not purchased the same from the 1st defendant
 - b. Colluding with some shareholders/Directors of the 1st defendant to transfer the suit property into its name
 - c. Purporting to buy the suit property from the 1st defendant when there was no such sale
10. The 1st defendant avers to have been in physical and legal possession of the suit property and has been collecting rent from the tenants who are in occupation and not the plaintiff.



11. The 1st defendant avers that it came to their attention while in the process of seeking to renew their lease that the plaintiff was laying claim over the suit property and when the 2nd defendant summoned the plaintiff to resolve the issue it never honored the summons.
12. Failure for the 2nd defendant to attend to the summons by the 2nd defendant led to the cancellation of the transfer of the suit property into the name of the plaintiff and thus the title was processed in the name of the 1st defendant.
13. The 2nd, 3rd and 4th defendants filed a joint statement of defence dated 24/03/2015 and denied the averments of the plaintiff in the amended plaint. They denied that there was an inference of a renewal of lease by the 3rd defendant or that the letter referred to, at paragraph 6 of the amended plaint was meant to be any form of guarantee to the plaintiff or at all.
14. The 2nd, 3rd and 4th defendants deny that the plaintiff paid stamp duty for the transfer of the suit property or at all and that if there was any registration done in favour of the plaintiff then it was done unprocedurally as the same was later challenged by the 1st defendant, the initial registered proprietor. They deny that the plaintiff has been paying land rent.
15. They deny acting fraudulently and they state that if there was any transfer or registration done by the 2nd defendant which they deny then it was done upon fraudulent misrepresentation by the plaintiff to the 2nd defendant. Further that if the plaintiff was to claim any remedy then it needs to pursue from the vendor who duped him in the transaction and not from the 2nd, 3rd and 4th defendants. They also deny that there was any intention to sue issued.

Plaintiff's Case

16. At the hearing the case on the plaintiff's case, it called one witness PW1- James Kahara Muchera who was sworn in English and he stated that he is the administrator of the plaintiff and he adopted his witness statement dated 17/11/2022 and the bundle of documents filed on 24/03/2015 and a supplementary bundle dated 28/06/2022 which he requested the court to adopt as the exhibits. He further stated that he was going to rely on his amended plaint dated 25/09/2014.
17. On cross-examination by Counsel for the 1st defendant Mr. Maina Makome, he stated that the plaintiff purchased the suit property from the 1st defendant. He told the court that he however had no sale agreement and that it was his understanding that land can be sold without a sale agreement.
18. He testified that he knew the three directors of Githumu namely Hezron Ndungu, Richmond Kamau and John Mwaura. He stated that he did not know much about the 1st defendant but that there was an amount of Kshs 5 million which was to be paid in cash in the year 2003. The plaintiff stated that he conducted a search which showed that the property was registered in the name of Githumu and that they noted that there were three (3) caveats placed on the suit property.
19. That despite the caveats which showed that those who placed them were claiming purchaser's interest and another entry showed a court order extending a caveat, they still proceeded with sale agreement for the suit property.
20. He testified that he was sure that he was dealing with the members of the 1st defendant company although he was not shown the company resolution. Further that in conducting the search he noted that the lease of the suit property was about to expire but that their lawyer got an undertaking from the Commissioner who assured them that the lease was due for an extension.



21. The witness told the court that he was aware that the lease expired on 30/06/2005 and that on this date St Paul Thomas Academy were the owners of the suit property. That though the lease was extended through an application on 10/07/2002 but they had not purchased the property and so the plaintiff sought to extend the lease on behalf of Githumu. That by the time of the transfer the lease had expired on 30/06/2005.
22. He testified that the purchase for the suit property was done in cash and that they paid in instalments. That when they applied for the extension of the lease the deed file was missing though they never reported the issue of the missing file to the police. The plaintiff testified that they went to the suit property and took possession and that there were no tenants on the suit property. That they took possession in 2003.
23. The plaintiff denied that the 1st defendant is in possession he stated that it is the plaintiff who has been in possession since 2004 and it is a caretaker who is on the suit property. He stated that the cancellation of their registration is illegal since the Registrar of Lands never summoned the plaintiff to attend any proceedings of cancellation of registration.
24. It was the plaintiff's case that it filed this case after eight (8) years because the deed file was missing and that between 2005 to 2013 they were looking for documents to enable them file the suit.
25. On cross-examination by Mr. Allan Kamau, Counsel for the 2nd, 3rd and 4th defendants, it was his testimony that he did not have any evidence that he could present to attest to collusion between the defendants as he had claimed. That neither had he produced any information before the court to show that there was a missing deed file as testified. He told the court that at page 6 of the bundle of the plaintiff there are signature of directors and secretary but there are no names of the persons who signed the transfer document.
26. It was also his testimony that at page 5 of the bundle it shows that the booking at Land's office was done on 4/03/2004 but the same was not registered on the even date but that the transfer was registered on 14/07/2005. Again there is no evidence of payment of money except through the acknowledgment through signature of transfer at page 6 of the documents. He stated that though the plaintiff took possession in 2004 they have not constructed yet.
27. He contended that they never received any letter inviting them to a meeting as stated in the letter produced at page 26 of the 1st defendant's bundle. Again he restated that cancellation of the transfer was done behind their backs they were never informed nor were they invited to any meeting with the land registrar, thus they did not receive any summons and that is why they never challenged the cancellation of transfer.
28. It was his testimony that they were not conned since they were dealing with bona fide directors of the 1st defendant but he also stated that he never received any title showing that the plaintiff was the bona fide owner of the suit property. That whereas they were advised to seek for refund from the director of stamp duty, they chose to sue the 1st defendant instead and not seek refund despite having been advised to get their refund paid for stamp duty from the director.
29. On re-examination, the plaintiff testified that the advocate who witnessed the transfer document is Mr. Kyalo Mboolu Advocates and that during the transaction the plaintiff was represented by Mr Njagi Advocate who wrote to the Chief Land Registrar for the extension of the lease as is stated in the documents contained at page 4 of the plaintiff's bundle of documents. At the same time the plaintiff testified that in anticipation of the expiry of lease, he sought an undertaking from the vendors, the 1st defendants who gave the plaintiff a letter to show that the period for the lease shall be extended.



30. He confirmed that he was shown the caveats that are produced at pages 5 and 6 of the bundle of documents entry numbers 22, 23 and 24. That the plaintiff was a party to the case number HCC 562 of 2004 and that the court ordered that the plaintiff pays Kshs 775,000 to Kibathi and that they proceeded to register the said court order on 4/06/2004 as is seen at page 13. The court order is entry number 22 on the transfer document. It was his testimony that the court order precipitates the withdrawal of caveats and that he filed the court order with the 1st transfer to the plaintiff on 4/03/2004. That he booked the documents again on 12/04/2004 and he lodged the withdrawal of the caveat and the entries were made on the title.
31. It was his testimony that he paid all the requisite fees for the transfer and therefore he could not explain why the entries on the title were cancelled. According to him cancellations on a title can only be made if there is a court order. Further that they did due diligence through their counsel to the Registrar of Companies and they established the owners of the company and that the directors that they dealt with had original lease certificate and they signed the transfer document.
32. That whereas the title of the plaintiff was cancelled it is his contention that there was no due diligence since the directors of the 1st defendant showed the plaintiff the property as bona fide directors. Further that, they were issued with a letter of allotment dated 26/09/2005 and the transfer was made on 14/07/2005 and they complied with all conditions and they awaited issuance of title which was never done and the plaintiff filed this suit to make a claim to their title. This is because, the sale agreement was signed, the transfer was filed and also signed and there was a valuation done which precipitated the plaintiff paying stamp duty. With this the plaintiff shared original documents and closed their case.

Defense Case

33. DW1 – Jacob Nduati Gicheru took his oath in Swahili and testified that he was the treasurer of the 1st defendant and adopted his witness statement as his evidence in chief and his bundle of documents dated 2/04/2013 and another one dated 24/03/2015 and a further one dated 24/10/2019. It was his testimony that they did not sell the suit property to the plaintiff. Further he stated that the 3 directors were not representative of the rest of the members since the 3 sold their interest back to the 18 members. He mentioned the three as Kanyi Mbatia, Lucy Wairimu and Thathi Kiombi.
34. He told the court that the three above-mentioned directors even changed the registration from a business name to a company as shown by the document at page 21 of the defendant's bundle. That at page 23 there is a change of business name from Githumu Kangema United Traders Company on 16/05/1997 and it bears the signature of Kabiru Muigai who however had died in 1994 yet the change was done in 1997 and he purportedly signed.
35. That noting this anomaly the DW1 testified that they lodged a complaint with the Registrar but the plaintiff when summoned did not honor the summons and therefore the 1st defendant was given an allotment letter for which they paid Kshs 15,250 but they could not be allowed to pick the title. He further stated that the plaintiff was not in possession but that the 1st defendant was and he produced rent payment receipts as proof which are contained between pages 18-59.
36. Upon being cross-examined by Mr. Ibrahim counsel for the plaintiff he testified that they were told that the property was sold in 2004 by members who however were not directors of the 1st defendant. That the change from Githumu Kangema Ltd to Githumu Kangema Traders Company to which the three mentioned were members bears signatures of even dead members such as Kabiru Muigai although the plaintiff stated that he had not produced a death certificate. Neither did he produce an OB or abstract to show that the change of registration was a forgery.



37. He further testified that Githumu Kangema Ltd was incorporated in 1997 but that he had no certificate of incorporation and that from the business name the three were part and parcel of Githumu Kangema but that there is a letter produced at page 35 to the Chief Land Registrar which refers to the three as former directors although he has not attached a resignation letter nor Form 203A to attest to the fact that the three forfeited their shares.
38. It was his testimony that the Chairman Gikaru Mwangi kept the title and there is no evidence that it was taken from him by force. That whereas the 1st defendant went to court to stop the transfer in 2003, the same was done in July 2005. Further that the plaintiff was summoned to the Lands Office thrice although there is no evidence to show that they were ever served. He testified that DW1 initiated the process of extension of lease and they paid Kshs.15,250 and the allotment letter was given to the 1st defendant although they do not have the PDP from the City Council. He told the court that he did not have the original title
39. When cross-examined by Mr Kamau – he testified that he did not have any document to show that he is a director of the 1st defendant and that the three mentioned hereinabove are members of the 1st defendant company and that when they are summoned for meetings they never honor them. Further that from the money they collect as rent they usually keep aside the share of the three directors. He also stated that they had not expunged them from the membership records.
40. According to DW1- the business name was changed to a company by the three to make it easy to sell the land. He testified that whereas entry number 19 shows Joseph Kibathi Kariuki that he does not know him and that he did not know who was selling the suit property to him including entry number 20 shows a sale of the suit property that the plaintiff may have been part of the many purchasers who were being sold to the property fraudulently.
41. DW1 stated that upon learning of the action of the three, the 1st defendant went to court but later withdrew the suit Number HCC 1787 OF 2005 when they got the allotment letter in the name of the 1st defendant. That the three are still members of the 1st defendant although there is no evidence to show that they were invited to a meeting of the 1st defendant.
42. On why the 1st defendant kept the company name despite alleging that the three directors changed it from the business name, it was his testimony that they decided to keep the company name instead of going back to the business name so that they could move on. Further that they were summoned to the Land's office by the Registrar and that the plaintiff never attended the meeting after they learnt about the attempt of the three to sell the suit property.
43. DW2- Boniface Mangaria Muchai testified on 5/07/2023. He took his oath in Swahili and adopted his witness statement and list of documents. Upon being cross-examined he stated that there was no intention to sell the suit property and that the 1st defendant withdrew suit No. 1787 of 2005 after the Chief Land Registrar cancelled the title that had been issued to the plaintiff since the transfer was done on an expired lease which did expire on 1/01/2005 and there was no extension issued.
44. When the 1st defendant learnt about the illegal transfer they went to see the Registrar of Lands on two occasions and the plaintiff never turned up and this led the Registrar to issue the 1st defendant with a letter. The summons for the meeting has been produced at pages 55 of the 1st defendant's bundle and that the three were the directors of the company then and they had in their custody the original title but they had no authority to sign any transfer document.
45. He testified that they wrote to the Registrar referring to the three as former directors but they never produced any CR 12 to support this averment. Further that he did not have any court order stopping



the transfer. It was his testimony that they became aware about the caveats when they went to place their caveat. They learnt that the caveats were allegedly placed by those who had paid money to the three directors.

46. DW2- testified that they became aware that the family of Joseph Kibathi with whom Githumu Company entered into an agreement with sued the 1st defendant as evidenced by the Court Order at Page 13 of the 1st defendant's bundle but that Githumu Kangema the 1st defendant refunded the family of Joseph Kibathi the purchase price as per the court documents produced. DW2 stated that they were not aware of this since they got the allotment letter issued in the name of Githumu Kangema. Although the documents produced in the supplementary bundle at pages 1-6 entry number 25 show the title being in the name of another party.
47. On further cross-examination he stated that he has been a director of the 1st defendant since 5/10/2004 and is authorized to represent the 1st defendant as per the letter that he produced. He testified that those who were selling the property were members and also they were directors as well. That the transfer document produced by the plaintiff at page 26 of the plaintiff's bundle is dated 2/12/2003 and Githumu was the vendor and the director has signed.
48. It was his testimony that he was not aware of any other case challenging the transfer except for this instant case. He stated that there were 4 among others from whom deposits had been received but that he was not aware of any refund to St Thomas Academy and that he did not have any statements of accounts.
49. He testified that the lease for the 1st defendant was expiring on 1/01/2003 and so by the time the directors entered into an agreement the lease was in existence. That a fresh title was registered on 5/01/2013 but the 1st defendant never received their title although they wrote to the Chief Land Registrar. He testified that he had 15 shares although the document at page 33 dated 21/05/2006 bearing his name show that he has nil shares. That the other three directors had 1 share each though they have disappeared.
50. On re-examination he testified that the 1st defendant never agreed to sell to the late David Muthee any land and that in respect to the HCC 1787 of 2005 the case was withdrawn since the lease was cancelled and therefore there was no need to pursue the suit. Also, the 1st defendant had no resolution to enter into a negotiation with the family of Joseph Kibathi and that those who entered into the consent had no authority of the company.
51. DW2- told the court that there were 15 directors and that there is no resolution to support the action of the 3 directors mentioned hereinabove. Further that at all the times the meetings were called at the Registrar's the 3 directors never turned up and that they are the ones in control and that they are the ones collecting rent. That as at 1/01/2005 a new lease had been issued and that they could not start selling before the issuance of a new lease. That the new lease issued is in the name of Githumu Kangema but that the 1st defendant decided not to collect the Certificate of Lease until this matter is heard and determined. With that the 1st defendant closed their case.

Case for the 2nd to 4th Defendants

52. Jointly the 2nd to 4th defendants had one witness DW3 – Gordon Ochieng who was sworn in English and he stated that he is the Director Land Administration and that he has worked with the Ministry of Lands Physical Planning Housing and Urban Development since 1989. He adopted his witness statement and list of documents containing 18 documents.



53. Upon being cross-examined by Mr. Adan the advocate for the plaintiff he stated that in a letter dated 10/07/2002 by Mr Kaburu he indicated that there was to be an extension of the lease. That at page 87 of the plaintiff's bundle there is a copy of a deed plan though the processes for the title had been submitted and actioned but the surrender of the original title had not been done. The transfer submitted and produced which is at page 26 of the plaintiff's bundle had been submitted to the Land's office on 04/03/2004 and booked on 01/08/2004 and then rebooked on 12/08/2004. It is his testimony that the lease was still alive by the time the transfer was being booked.
54. He further testified that whereas the letter at page 26 of the 1st defendant's bundle states that the transfer cannot be registered but that the document at page 24 of the plaintiff's bundle shows that a transfer had been effected on 14.07.2005. The letter dated 15/03/2006 addresses the issue of want of compliance and the fact that the registration should not have been made since the lease had expired.
55. It was his testimony before the court that for transfer and registration to be done then the original title has to be produced. He testified that the lease had been renewed but that he did not know why it was cancelled. He also stated that it is procedural to have a letter of allotment where the lease has expired. That Kaburu's letter presupposed that all these processes would be undertaken that once the lease expires a letter of allotment has to be issued. In practice a search should have been carried out before a letter of allotment was issued.
56. He testified that by 14/07/2005 the property has been transferred. St Thomas were issued with letter of allotment on 26/09/2005 to Githumu and they made payment on 12/01/2007 but Githumu made their payment in November 2009 therefore St Paul Thomas came first.
57. It was his testimony that he dealt with the processes of renewal of lease and extension of lease and that the application of renewal was made by Githumu Kangema Company and the lease was to come out in the name of Githumu Kangema. On the issue of enhancement of rent, he testified that this was determined and communicated vide the letter dated 13/09/2002. He stated further that the lease could not be registered because the term of the lease had expired and the transfer could not be effected. That the transfer document shows stamps and cancellation and so this shows that the transfer could not proceed and so the transfer is essentially cancelled. Thus a cancellation was effected against the title of St. Thomas Academy Limited.
58. At this point Counsel for the 2nd-4th defendants sought an adjournment to allow the Chief Land Registrar to retrieve documents relating to this case. The parties appeared in court on five different occasions without any progress since the Registrar stated that they had a challenge retrieving the file. At the last appearance on 29/05/2024 the Mr. Kamau Allan for the Chief Land Registrar closed his case without producing what he had stated to be crucial information from the office of Chief Land Registrar to aid the court in resolving the suit before the court.

Analysis and Determination

59. I have taken my time and read through all the documents filed in this matter. I have also considered the submissions filed by the parties. The plaintiff's submissions are dated 3/09/2024 and the Defendant's submissions are dated 23/09/2024. Each party has put their best foot forward in relation to this case. As I read the pleadings I could not but help wondering why these parties chose to come to court instead of resolving this matter through mediation or other forms of alternative dispute resolution. Land matters can be complex but at times parties to suit complicate land matters that simply call for a sitting down and defining of parameters, identification of issues and suggestions on how to resolve them without involving the courts.



60. This case struck me like the perennial traffic matters where a motor vehicle hits a pedestrian on a zebra crossing or a driver hits another one from the rear side and each put up a spirited defence. In such situations I imagine the traffic officer just carries the Traffic Act and points out the relevant sections to the parties and from there I imagine again that the drivers who hit the pedestrian on the zebra crossing and from the rear say “officer wacha tuongee” – meaning “officer allow us to talk” after reading the relevant sections.
61. Having considered the pleadings, evidence on record and the submissions filed, the following issues arise for determination:
- Whether the process of the transfer of land between the plaintiff and the 1st defendant is valid.
 - Whether the Plaintiff is entitled to the orders sought.
 - Who should bear the costs of this suit?
62. With regard to the first issue, the main challenge is that of the principle of *nemo dat quod non habet* which comes into play. The said principle is embodied in Section 23 of the Sale of Goods Act which stipulates as follows:
- “ 23 (1) Subject to the provisions of this Act where goods were sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.”
63. The *nemo dat* principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.
64. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract. This principle was applied in the case of *Haul Mart Kenya limited v Tata Africa Kenya limited* (2017) eKLR and *Katana Kalume V Municipal Council of Mombasa* (2019) eKLR.
65. In the instant case, the parties herein allegedly signed a transfer dated 2.12.2003 and a consent to transfer dated 5/08/2003 although there were caveats lodged for claims of purchaser’s interest but the plaintiff did not seem to pay attention to the caveats.
66. The plaintiff claims that it was purchasing the suit property from the 1st defendant. From the evidence on record, the transfer produced is only signed by the 1st defendant and not the plaintiff. This being the case it means that the transfer as is could not confer title to the plaintiff.
67. The Commissioner of Lands vide the letter dated 10/07/2002 had intimated to the Plaintiff that the lease was to expire on 1/07/2002 for Certificate of Title for LR No. 209/3007/1. That on the strength of the letter from the 3rd defendant dated 10/07/2002, the plaintiff allegedly entered into an agreement with the 1st defendant, a transfer instrument dated 2/12/2003 for a consideration of Kshs 5,000,000



was executed by the 1st defendant and then it was presented for registration leading to issuance of letter of allotment to the plaintiff dated 26/09/2005 giving a new lease to the suit property.

68. All the averments are denied by the 1st defendant. From all the documents presented, the plaintiff did not present the sale agreement but he chose to rely on the transfer document and the fact that he had paid for the suit property. There is also no title presented before the court showing that the title was registered in the name of the Plaintiff. For failure to produce a title document, the plaintiff has attributed this to the late booking of the transfer documents. There is also no evidence placed before the court to support the allegation by the Plaintiff that he was purchasing the suit property from 1st defendant. Further no sale agreement between the Plaintiff and 1st Defendant was adduced in support of this averment. On its part, the 1st Defendant denied receiving Kshs. 5,000,000 million or so from the Plaintiff. Yes there are cheques and bank statements that show money was for purposes of taxes and rates and it was paid by St Paul Thomas but there is no indication that the suit property was purchased by the plaintiff.
69. It was 1st Defendant's testimony that it never received any payment in relation to LR No. 209/3007/1 from the plaintiff. DW1 also testified that he never transferred or signed any documents from lands office in the name of the suit property having been sold. It was therefore the contention by the 1st defendant that the transfer document and the title issued to the Plaintiff was not genuine. This is also reflected on page 56 of the 1st Defendant's bundle. He denies the plaintiff's allegations of the 1st Defendant executing documents of transfer. 1st Defendant testified that he did not transact any sale agreement between itself and the Plaintiff.
70. In the case of *Diamond Trust Bank Kenya Ltd V Said Hamad Shamisi & 2 Others* [2015] eKLR, in explaining the doctrine of *Nemo dat Quod non habet*, the Court stated as follows:

“Firstly, Section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner's authority or consent, sell and confer a better title in the goods than he has. (*Nemo dat quod non habet*).

These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in *Bishopsgate Motor Finance Corporation Ltd V Transport Brakes Ltd* (1949) 1 KB 322, AT PP. 336 when he stated:

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

..... the import and tenor of the Doctrine of *Nemo dat quod non habet*, was further amplified and/or otherwise deliberated upon in the decision in the case of *Katana Kalume & Another V Municipal Council of Mombasa & Another* [2019] eKLR.

“*Nemo Dat quod Non Habet*” (No one can give that which one does not have) equally applies to the purported allocation of the suit property herein to the 2nd defendant.

A person cannot give a better title than what he has, except in rare cases such as, a sale under an order of court, transfer of negotiable instrument to a holder in due course. None of these exceptions apply in this case, No person can ever pass a better title than the one he has.”



71. As it is, no person can ever pass a better title than the one he has. There is no sale agreement between the plaintiff and the 1st defendant although there are documents of transfer executed by allegedly people who are directors of the 1st defendant but who did not have authority in the form of the Company Resolution to engage in the transfer.
72. The plaintiff allegation that the 2nd defendant the Chief Land Registrar cancelled its title, this cannot be anywhere near truth since the Lease had expired and by the time the plaintiff alleges to have purchased the suit property. At the same time the plaintiff alleges that they agreed between the itself and the 1st defendant that he pays Kshs 775,000 to the estate of the late Joseph Kariuki and produced in its bundle a copy of the cheque. This be as it may the said parties are not before the court and the said agreement was not produced in court except a copy of a cheque made out to PSK Kamiti Advocates on 19/07/2024. Again no agreement was produced and the said Kamiti Advocates were not called as witnesses.
73. I am of the view that the alleged three directors who the plaintiff claim to have signed an agreement with it without a company resolution cannot enter into an agreement to sell the suit property which is not registered in their individual names since the suit property belongs to a company. The 1st defendant's directors had no property to transfer under the doctrine of *nemo dat quod non habet* in the absence of a sale agreement the transfer was done through concealment of facts and misrepresentation on the part of the directors of the 1st defendant.
74. Section 3(3) of the *Law of Contract Act* read together with Section 38 of the *Land Act*, 2012 provide that no suit shall be brought upon a contract for the disposition of an interest in land unless; the contract upon which the suit is founded is in writing, signed by all the parties, and the signature of each party signing has been attested by a witness who is present when the contract was signed. This was the decision of the Court in the case of *Machakos District Cooperative Union Vs Philip Nzuki Kiilu CA No 112 of 1997*.
75. Whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Section 3 (3) of the Law of contract.
76. Section 3(3) of the Law of Contract reads as follows; -
- “No suit shall be brought upon a contract for the disposition of an interest in land unless-
- (a) The contract upon which the suit is founded:
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”
77. It is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. The Plaintiff submitted that at the material time of the agreement and registration of the transfer, it had acquired an equitable interest in the suit property. The plaintiff however failed to prove that there was a valid sale agreement



with the 1st defendant (whether written or oral) for the purchase of the suit property herein. No evidence was adduced herein to support this allegation and submission. The court is not privy to the alleged sale between the plaintiff and the 1st defendant. Therefore, the Court is not convinced that the plaintiff had acquired an equitable interest in the suit property which interest was transferred to it by the 1st defendant as alleged. At the same time it is not clear when the plaintiff allegedly paid the purchase price for the suit property and if it took possession of the same thereby acquiring an equitable beneficial interest in the suit property.

78. In the circumstances, based on the oral and documentary evidence before me, it is my finding that there was no contract between the plaintiff and the 1st defendant capable of transferring an interest in land to the plaintiff as alleged. The consequence of the same is that the alleged transfer relied upon by the plaintiff which in any case came after the expiry of the lease period is not legally binding on the Parties in this suit and cannot be enforced by the Court as the 1st defendant had no property to transfer under the principle of *nemo dat quod non habet*.

Whether the Plaintiff is entitled to the orders sought

79. It has been established that the plaintiff entered into a land sale agreement which is not written and also the transfer process happened after the expiry of the lease and therefore the 1st defendant had no title in the suit property that could be passed on. Further without a resolution of the company the directors could not purport to enter into an agreement to sell the suit property when they were not the proprietor of the same. Thus the 1st defendant had no property to transfer under the doctrine of *nemo dat quod non habet*. The alleged transfer was by the 2nd defendant was done through concealment of facts and misrepresentation on the part of the 1st defendant.
80. Having held that the 1st defendant could not have lawfully transferred the suit property to the Plaintiff, I believe the Plaintiff's best fall-back is a claim for refund of monies paid towards the purchase of the suit property, which the Plaintiff is entitled to since it is alleged that the plaintiff paid Kshs 5,000,000 but there was no evidence presented to support this claim in court. At the same time the plaintiff claims to have paid out Kshs 775,000 to the estate of the late Joseph Kariuki following an agreement between itself and the 1st defendant. This can also be claimed in a different cause of action by the plaintiff from the 1st defendant.
81. The plaintiff at the same time claims ownership because according to him he paid rates, rent and water bills. Again I reiterate, payment of rates, rent and water bills is not a conferment of ownership of a suit property. It is like someone claiming that they are the father of a child for whom they pay school fees for. You cannot claim to be a father or a parent of a child for the reason that you pay school fees for a certain child. You could even receive the report card of performance of the child from the school – that does not make you the parent or father. I am sure this example helps the plaintiff understand that there are people who pay rates, rent and bills to houses that do not belong to them.
82. The plaintiff from the evidence presented was advised to get its refund of stamp duty paid and it is not clear why it did not collect the stamp duty.
83. Flowing from my finding on the first issue, the 1st defendant could not transfer the suit property to the Plaintiff. It is the court's finding that there is no valid sale agreement between the Plaintiff and the Defendant. This being the case, the plaintiff cannot claim protection under Section 26 since the title to the plaintiff was cancelled.



84. Section 26 provides that;

“Certificate of title to be held as conclusive evidence of ownership. (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.....and the title of that proprietor shall not be subject to challenge, except –

- a. On 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.”

85. From the record, the Certificate of Title is one registered in the name of 1st Defendant. The registration was done on 14/07/2005. The same title that had been registered in the name of the plaintiff but was cancelled on 05/02/2013. There is however no Certificate of title before this Court demonstrating that the Plaintiff was issued with a new Title to the suit property if at all the cancellation was lifted by the Land Registrar.

86. Furthermore, PW2 testified before this Court that she did not execute the transfer documents, she also indicated that the PIN certificate on the transfer was also not the correct one. It is not in contention that 1st defendant was the registered proprietor of the suit property. Once again, there is no evidence that the 1st defendant sold the suit property to the plaintiff. On the other hand, the directors of the 1st Defendant cannot purport to sell interest in the suit property which they did not own and was never registered as the owner. Therefore, this purported sale was void from the beginning.

87. It is a term of Condition 11 (5) of the LSK Conditions of Sale that “where the contract becomes void under any law, the provisions of sub conditions (3) and (4) shall apply.”

88. Sub conditions (3) and (4) provide for rescission of the contract. It provides that on rescission, the vendor shall repay to the purchaser his deposit and any payment of purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor. In the circumstances of this instant case though there was no agreement for sale and it is not even clear that the alleged Kshs 5,000,000 was paid and to whom.

89. As held herein above, the contract if any became void on grounds of the doctrine of nemo dat quod non habet. The same is embedded in Section 23 (1) of the *Sale of Goods Act*. A person cannot give a better title than what he has, except in rare cases such as, a sale under an order of court, transfer of negotiable instrument to a holder in due course. None of these exceptions apply in this case. At the same time this court can also not rely on provisions of Condition 11 (5) of the LSK Conditions as the said Agreement was void from the start.

90. Consequently, the Court finds that the Plaintiff has not proved its case on the required standard of balance of probability and that prayers (a), (b), (d) and (e) as sought in the Plaint dated 25/06/2021 are unmerited.

91. With regard to prayers (d), (e), (f) on interest, Condition 11 (3) of the LSK Conditions provides that on rescission, the purchaser is entitled to a refund of his deposit and any payments of the purchase price without interest. I cannot therefore grant the aforementioned prayers.



92. In the end, the plaintiff has failed to establish their case on the required standard of balance of probabilities and is therefore not entitled to the orders sought.

Who should bear the Costs of the Suit?

93. It is trite that costs usually follow the events. Section 27 of the *Civil Procedure Act* gives the Court discretion to grant costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the 1st defendant as the successful litigant is entitled to the costs of the suit.

Disposal Orders

94. Accordingly, the plaintiff's claim is hereby dismissed with costs to the 1st defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024.

MOGENI J

JUDGE

Judgment read in virtual court in the presence of:

Mr. Ibrahim Aden for Plaintiff

Mr. Maina for 1st Defendant

Mr. Kamau 2nd -4th Defendant

Ms. C. Sagina - Court Assistant.

