



Ethics & Anti Corruption Commission v Irungu & 3 others (Environment & Land Case 43 of 2015) [2024] KEELC 13688 (KLR) (11 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13688 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 43 OF 2015
NA MATHEKA, J
DECEMBER 11, 2024**

BETWEEN

ETHICS & ANTI CORRUPTION COMMISSION PLAINTIFF

AND

EDWARD MWANGI IRUNGU 1ST DEFENDANT

MINALOVE HOTEL & RESTAURANT LIMITED 2ND DEFENDANT

EQUITY BANK LIMITED 3RD DEFENDANT

WILSON GACHANJA 4TH DEFENDANT

JUDGMENT

1. On 18th March 1997, S.M Kagwe on behalf of the Commissioner of Lands issued Edward Mwangi Irungu with a letter of allotment over an unsurveyed plot within Mombasa Island measuring 0.0492ha for a term of 99 years starting from 1st March 1997. The letter of allotment was followed with the issuance of a lease on LR Mombasa Island/Block XXVI/1010 by Wilson Gacanja on 9th April 1998 and a certificate of lease issued on 27th April 1998 in favour of Edward Mwangi Irungu.
2. It is the plaintiff's case that the 4th defendant illegally allocated the suit property to the 1st defendant which was preserved for public use. Where a title has been acquired by fraud or through a corrupt scheme it can be challenged and once proved can be cancelled by the court as provided by Section 26 (1) of the *Land Registration Act*, which state that a certificate of title can be challenged on the grounds of fraud or misrepresentation or where the title was acquired illegally through a corrupt scheme. It provides that;

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible



owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

3. On the face of the allotment letter was a general condition, which stated that the letter was subject to the provisions of the Government Lands Act (now repealed) and that the Title would be issued under the Registration of Titles Act (now repealed) or Registered *Land Act* (now repealed). The repealed Government *Land Act* empowered the Commissioner of Lands to alienate government land on behalf of the President. Section 3 of the repealed Government Lands Act provided that;

The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may— subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;

The Act qualifies this power as follows:

The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)—(a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President.

4. Section 7 donates the powers of the President to the Commissioner of Lands in alienation of unalienated government land. It provides;

The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute or and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act.

5. Under the special conditions of the letter of allotment, Condition 5 the suit property was allocated to be used as a dwelling house. Nevertheless, the plaintiff has demonstrated that vide a letter dated 28th October 1955 the suit property was allocated for government staff housing and on 8th March 1991 it was occupied as government staff house-quarter. In my view, there is clear evidence that the suit property was allocated for public use as government staff quarters long before it was allotted to the 1st defendant. The suit property cannot be said to be unalienated government land available for allocation, and the fact that it is allocated next to state house is clear indication that it was not available for allocation to private individuals.

6. The 1st and 4th defendants have defended the title to the suit property by claiming that the suit property was never part of public land and that the said title was acquired with adherence to the legal requirements set out. The 2nd defendant on the other hand argued that it was a bonafide purchaser of value without notice and as such its title to the suit property should be upheld by the court. On one hand, the 1st defendant argued that the suit property was not public land, yet the evidence adduced demonstrate that the suit property was government land before it was allocated. In particular, the 1st defendant has produced a letter dated 24th May 1996, to the Commissioner of lands which he purports was used to secure a letter of allotment to the suit property. However, the said letter in my view cannot



be said to be genuine, it does not bear the stamp of the commissioner of lands to prove the said office received it. Further, the minutes dated 17th July 1996 of the Plots allocation committee meeting referred to plots within Likoni and Miritini, as opposed to Mombasa Island where the suit property is allocated. The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR held;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

7. The evidence that the 1st defendant has presented does not explain the circumstances that led to him being allocated government land contrary to the repealed Government *Land Act*. The 1st defendant has failed to demonstrate to the court that the 4th defendant while acting on behalf of the commissioner of lands had the requisite powers to grant the suit property to him. There was no right procedure to be followed in alienating the suit property to him as the suit property was not available for alienation to a private individual. The 1st defendant has failed to prove that he was legally entitled to the suit property as the plaintiff has demonstrated to the court that the same was not available for alienation by the Commissioner of Lands. The 4th defendant had no authority to alienate the suit property to the 1st defendant as he purported to do, as it was the preserve of the president. The 4th defendant had no authority to issue grant under the Government Lands Act, nor could he pass any registerable title under the Registered *Land Act*. It is the finding of this court that the government of Kenya was the original owner of the suit property hence no further title could be issued to a private individual as the 1st defendant. Therefore, the issuance of allotment dated 18th March 1997 and the subsequent certificate of lease dated 27th April 1998 was irregular and a nullity from the start.

8. As held above, the Commissioner of Lands had no authority to alienate government land to private individuals, and as such the actions of the 4th defendant were more than the powers donated to him by the president. The Court of Appeal in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* (2015) eKLR held that;

“As regards complicity by the Commissioner of Lands, the trial court found the officials at the land Registry, who are the custodians and issuers of Titles to have allowed the existence of two different Titles on the same property with all endorsements made thereon, which on its own was participation in the forgery. It observed that the Ministry of Lands kept the master record of all land and the registered owners, under a system which guarantees a land title certificate to be full, valid and indefeasible Title. The Commissioner of Lands failed to explain in this case how two land Title certificates on the same land could exist and which one was genuine. The responsibility to ensure accuracy of the register and authenticity of Titles lay with the Government, which is by law required to pay compensation for any fraud or other errors committed during registration. It was on that basis that the Commissioner of lands was found to have been privy to the forged entries during registration and issuance of the title.”

9. The court has examined the lease issued to the 1st defendant on 9th April 1998 and it is clear that Wilson Gacanja has signed on it as the Commissioner of Lands. During cross-examination, the 1st defendant admitted to having worked in the government as an administrator for 43 years starting as



a District Officer and interestingly he worked in Mombasa between 1995 and 1998 when he had the suit property allocated to him. He also admitted that when he was issued with the letter of allotment there was a government house, he confirmed that the suit property bordered the former Provincial Commissioner's residence. It is therefore clear to this court that the 1st defendant was aware that the suit property was government land and was unavailable for alienation to himself or any other private person. The allegation he made on cross examination that there was a policy of disposing of government property is unfounded, irregular in law and cannot stand to support his claim in the suit property. Fraud has everything to do with one's state of mind and intentions as well as the outcome of those intentions. Being in a position of influence and power, as he then was, in the administration of government, the 1st defendant took advantage and connived with the 4th defendant to fraudulently hive off the suit property and alienate it to himself.

10. The 1st defendant never held a good title, he had no leasehold interest in the suit property and hence had nothing to transfer to the 2nd defendant. The common law principle of *nemo dat quod non habet* (no one can give what they do not have), becomes applicable. The Court of Appeal in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* (*supra*) held,

“It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”

11. Having declared that the 1st defendant did not acquire a good title, then needless to say he had no good title to pass downstream. His title was not sanctioned by the fact that he transferred it to someone else, if anything he transferred a title tainted with illegality and fraud and remained null and void *ab initio*. The Court in *Miroro vs Nyarumi & 5 others* (Environment & Land Case 23 of 2019) (2023) KEELC 21533 (KLR) (15 November 2023) (Judgment) held;

“In our case, I have demonstrated that Tom Nyagami Gai never acquired a good title to the suit property. His registration was procured by way of fraud. Having not obtained a good title to the suit land, he had no good title to pass to the plaintiff, and therefore the plaintiff does not hold a good title to the suit land. Even the doctrine of an innocent purchaser for value without notice cannot help in such an instance. The doctrine of an innocent purchaser for value without notice, in our jurisprudence, cannot apply to one who has purchased a fraudulent title, or a title that is for one reason or another declared to be null and void. Thus, so long as a title is illegal, it is pointless to argue that one is an innocent purchaser for value, and indeed, the court need not consider the innocence, or otherwise, of the purchaser in so far as the question of nullification of title is concerned. A fraudulent title is subject to nullification irrespective of the fact that the purchaser is an innocent purchaser for value without notice. This principle was given a seal of acceptance by the Supreme Court in the case of *Dina Management vs County Government of Mombasa & 5 Others*, Supreme Court of Kenya, Petition No. 8 (E010) of 2021 [2023] KESC 30 (KLR). The Supreme Court affirmed the findings of the court of first instance and the first appellate court and stated as follows :-

“Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. [1993] Ltd, who in turn could pass to the appellant.



Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser”.

12. The 2nd defendant is therefore not an innocent purchaser for value without notice, as he purchased an illegal title. Without a good title, the charge registered thereto cannot suffice. The 3rd defendant, though failing to participate in this proceeding may not have been privy to the fraudulent transactions but failed to undertake proper due diligence. They ought to have gone beyond an official search from the land registry, maybe a search at the Department of survey of Kenya, that would have led them to discover that the suit property is oddly sandwiched by government land. That is a legal obligation they took lightly, they did not look beyond a mere search and for that it has cost the charge they sought to secure. The court in *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others (2015) eKLR* held;

“Having considered all arguments I frankly do not see how the title of the 1st respondent, the star fraudster, can be upheld, and having nothing to charge, I do not see how the charge in favour of the bank can be upheld. It was argued that a decision to cancel the charge would be injurious to the economy. But it is no less, and in fact, it may probably be more injurious, if I am to deny the applicant and the heirs of the estate of the deceased their rightful inheritance, which comprises of the suit property. The charge has to be cancelled and I am afraid that in this instance, the bank will have to pursue the 1st respondent personally to recover its money. I sincerely hope that they will be successful in this mission. As for the applicant, she has succeeded in this case and the title has to revert back to the name of the deceased.”

13. Consequently, this court finds that the plaintiff has successfully pleaded and proved to a standard above a balance of probabilities that the 1st defendant acquired title to the suit property illegally by way of a corruption scheme with the aid of the 4th defendant and other officials at the office of the then Commissioner of lands. The title held by the 2nd defendant cannot stand and is nullified as per Section 80 of the *Land Registration Act* which states:

Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

14. The plaintiff has asked for compensation for the loss of use of the suit properties from 27th April 1998 till the date of cancellation of the grants. The valuation report dated 4th September 2014 valued the suit property at Kshs 20,000,000/=. Though the report is over a decade old states that there is an incomplete three-storey building and a double-storey outbuilding. The court will grant general damages of Kshs 5,000,000/= as fair compensation to the plaintiff. Costs are the last issue left and as a winning party, the plaintiff is awarded the costs of the suit as against the defendants. I conclude by making the following orders:

- a. The Lease to Title No. Mombasa/Block XXVI/1010 dated 9th April 1998 issued to the 1st defendant was improperly procured and the same is hereby cancelled.



- b. Having no title, the 1st defendant did not pass a good title to the 2nd defendant and the transfer of land dated 2nd July 2013 is hereby cancelled subsequently the certificate of lease issued on 18th July 2013 is also cancelled.
- c. Having no title, the 2nd defendant could not have properly charged the Mombasa/Block XXVI/1010 and the charge registered under the title on 18th July 2013 is also cancelled.
- d. That the register of the land parcel Mombasa/Block XXVI/1010 be rectified, to remove the entries in favour of the 2nd defendant and the charge in favour of the 3rd defendant and the title to revert to the Government of Kenya.
- e. A permanent order of injunction to restrain the 2nd defendant whether by themselves or through their agents, servants or assigns from alienating, transferring, charging, leasing, subdividing, disposing of, wasting, entering or remaining upon, or undertaking any construction or development of any nature thereon, land reference number Mombasa/Block XXVI/1010 or from howsoever dealing with the said property, other than by way of surrender to the Government of Kenya.
- f. General damages of Kshs 5,000,000/= as against the 1st and 2nd defendants for wrongful interference with public land in an irregular, illegal and fraudulent manner.
- g. Costs of the suit are awarded to the plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF DECEMBER 2024.

N.A. MATHEKA

JUDGE

