



Landlords Limited & another v Waymax Company Limited & 2 others (Environment & Land Case 578 of 2010) [2023] KEELC 15870 (KLR) (23 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 578 OF 2010
OA ANGOTE, J
FEBRUARY 23, 2023**

BETWEEN

LANDLORDS LIMITED 1ST PLAINTIFF

ROGER HANNS KINYONGA DDUNGU 2ND PLAINTIFF

AND

WAYMAX COMPANY LIMITED 1ST DEFENDANT

MFI SOLUTIONS LIMITED 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. In the Amended Complaint dated 2nd November 2018, the Plaintiffs have prayed for the following reliefs:
 - a. A declaration that the Plaintiffs are the legal owners of all that land parcel known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
 - b. That the defendants by themselves, their servants or agents or anyone else claiming through them otherwise howsoever be compelled to immediately surrender and deliver up the suit property L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3 in vacant possession to the plaintiffs to hold quietly enjoy, use, possession and occupation of the suit property.
 - c. That the Defendants/ Respondents their servants and/or agents or otherwise howsoever be restrained from being or remaining or entering upon all that piece of land situate in Nairobi and known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
 - d. A permanent injunction restraining the defendants from trespassing onto the Plaintiff's suit property known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.



- e. General damages for trespass.
 - f. Costs and interest.
 - g. Any other relief that this Honourable Court may deem fit and just to grant.
2. The Plaintiffs' case is that the 1st Plaintiff bought parcel of land known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3 (the suit property) on 25th February 2004 from the official receiver/ liquidator of Uganda Airlines Holdings Ltd for Uganda Shillings Two Hundred and One Million, Five Hundred and Sixty Thousand Only (Ushs. 201,560,000/-) that the 1st Plaintiff passed a resolution in 2003 to have the suit property transferred to the 2nd Plaintiff, who is a director of the 1st Plaintiff, and that the 2nd Plaintiff was rendered a beneficial owner pending formalities pertaining to registration of transfer instruments.
 3. The 2nd Plaintiff averred that on 6th November 2010, he learnt from his caretaker that the suit property had been sold to a third party; that he reported the matter to the Kilimani Police Station as O.B. No. 55/12/11/2010; that upon visiting the premises, there were visible signs of renovations being carried out which was a sign of trespass and that on 9th June 2009, he paid the outstanding rates for the suit land which stood at Kshs. 458,200 as at that date.
 4. It is the Plaintiffs' averment that they have never sold the suit property to the 1st and 2nd Defendants, who acquired the title fraudulently.
 5. According to the Plaintiffs, the Chief Land Registrar acted fraudulently and/or perpetuated misrepresentation by accepting transfer documents which he knew or ought to have known to be fraudulent; accepting transfer documents from individuals who had no right or interest in the suit property; issuing a title which he knew to be false and fraudulent and facilitating illegal transfer of the suit property knowing that such transfer was null and void. The Plaintiffs have prayed that the 2nd Defendant's title should be revoked and cancelled.
 6. The 1st Defendant opposed the Plaintiff's suit through a Statement of Defence dated 18th February 2011, in which it denied the facts as averred by the Plaintiffs, and stated that the alleged invitation to tender and/or sale was a nullity from the onset as the alleged vendors had no title to offer the property or to dispose of the same.
 7. In their Amended Statement of Defence, the 2nd Defendant denied the Plaintiff's claims. It averred that the suit property was registered in the 2nd Defendant's name on 20th April 2010 after payment of stamp duty, registration fees and all other charges; that the 2nd Defendant obtained confirmation from the Commissioner of Lands that the Indenture was registered in the name of the 1st Defendant and that all official searches were done before the suit property was transferred to the 2nd Defendant.
 8. It was averred in the 2nd Defendant's Defence that there are no records at lands office or any other office showing the Plaintiffs' alleged interest in the suit land, and that on or about 5th March 2010, it entered a sale agreement with the 1st Defendant for the purchase of the suit property for a consideration of Kshs. 27,000,000.
 9. The 3rd Defendant, vide their Statement of Defence dated 14th January 2020, denied the Plaintiffs' averments. The Attorney General averred that if the Plaintiffs made a complaint to the police as alleged, it was a statutory complaint; that there is no nexus of sale of the suit property between the Plaintiffs and the 1st Defendant and that the 2nd Defendant does not have any record to show how the property evolved to it to enable it transfer to the 2nd Defendant.



10. According to the Attorney General, the suit property was the property of Uganda Airlines Corporation and that the Plaintiffs' claim for purchase was not presented at the land registry.

Hearing and Evidence

11. The 2nd Plaintiff, PW1, relied on his witness statement dated 13th February 2018 as his evidence in chief. PW 1 testified that following an advertisement by the Official Receiver/ Liquidator of Uganda Airlines Holdings Limited on 9th July 2001, for the sale of the suit land, he submitted a tender bid in the name of his company, the 1st Plaintiff, and emerged the winner of the tender when the bids were opened in public on 10th August 2001.
12. PW1 stated that the 1st Plaintiff complied with all conditions of the sale and a Sale Agreement was executed on 13th June 2002; that the 1st Plaintiff passed a resolution to transfer the property to him (2nd Plaintiff); that he agreed with the Official Receiver that the transfer forms would indicate him as the transferee and would be prepared in Kenya and that this position was confirmed by the Official Receiver of Uganda in the letter dated 23rd September 2003 addressed to Kavumba Kabenge & Co. Advocates and copied to the 1st Plaintiff, which conveyed a copy of the title of the suit property to enable the preparation of the documents for execution.
13. The 2nd Plaintiff testified that an Indenture was prepared on 25th February 2004 which was executed by himself and the Official Receiver and that the Official Receiver/Liquidator of Uganda Airways Holding Limited through the letter dated 15th November 2010 confirmed that the suit property had been sold to him.
14. According to PW1, vide a letter dated 25th February 2011, the Principal Registrar of Government Titles wrote to the Divisional CID Officer, Kilimani, advising that the conveyance dated 24th January 2001 between Uganda Airways corporation and the 1st Defendant was a fraud; that no good title was conveyed to the 2nd Defendant, and that the 2nd Defendant filed a Judicial Review Application No. 39 of 2011 wherein they sought an order of certiorari to quash the decision of the Principal Registrar of Government to cancel the title.
15. PW1 produced in evidence several documents including the sale agreement dated 13th June 2011 ; a copy of the Indenture dated 11th June 1979; a copy of the Uganda Gazette dated 11th May 2001 on the appointment of a liquidator for Uganda Airlines Holdings Ltd; draft copies of an Indenture dated 24th and 25th February 2004; a notice of sale of the suit property in The New Vision dated 9th July 2001, The East African dated 3-9th December 2001 and The Monitor dated 3rd December 2001 and the valuation report dated 26th July 2007.
16. PW1 also produced in evidence payment request from Nairobi City Council dated 9th June 2009 for KShs. 458,200; a copy of the cheque drawn in favour of the Nairobi City Council for Kshs. 458,200 and a letter dated 15th June 2009 from the Official Receiver/ Liquidator to L. Kwamboka & Co. Advocates
17. In cross-examination, PW1 stated that he was never shown the original title of the suit property; that he came to know about the missing title after the bid process; that the process of transfer was never completed as there was no title; that the registered owner of the property is Uganda Airlines Holding Limited and that he was given a certified copy of the title in the name of Uganda Airlines Corporation.
18. PW2, Ntale Mustapher, the Official Receiver/ Liquidator based at the Uganda Registration Services Bureau relied on his statement dated 16th November 2018. In his statement, he averred that the suit property belongs to Uganda Airlines Corporation which was later taken over by Uganda Airlines



- Holdings Limited and that following the Government of Uganda's privatisation program, the Official Receiver was appointed as liquidator of Uganda Airlines Holdings Limited.
19. It was the evidence of PW2 that the suit property was sold to the 1st Plaintiff in the liquidation process vide a sale agreement dated 13th June 2002; that after purchasing the suit property, the 1st Plaintiff took possession; that the 1st Plaintiff then requested to have the property transferred to the 2nd Plaintiff, which request was granted and that Uganda Airlines Holdings Limited has never and could not sell the suit property to any other party as it had divested its interest.
 20. PW2 produced in evidence the gazette of the resolution by Uganda Airlines Holding Ltd dated 20th April 2001; the advertisement of the sale of the suit property in the monitor newspaper and the letter addressed to L. Kwamboka & Co. Advocates confirming the sale of the suit property. PW2 testified that Uganda Airline Corporation ceased to exist on 14th April 2000.
 21. In cross-examination, PW2 stated that the suit property is currently registered in the name of Uganda Airlines Corporation; that the title to the suit property was never handed to Uganda Airlines Holdings Ltd; that he was not aware of any complaint regarding the lost title, which loss was discovered in 2001, when they wrote to the lands office in Nairobi and that Uganda Airlines Corporation could not transact in the suit property after incorporation of Uganda Airlines Holdings Limited.
 22. It was the evidence of PW2 that it was true that the registered owner of the suit property as at 2001 was the 1st Defendant and that the Indenture held by the 1st Plaintiff has not been registered.
 23. DW1, Fredrick Kimemia Kimani, the Director of the 1st Defendant, testified that in January 2008, he saw a signage on the suit property advertising the sale of the land; that he expressed interest in purchasing the suit property to the former directors of the 1st Defendant and that when he conducted searches at the lands office and the Companies Registry, they confirmed the owner of the suit property to be the 1st Defendant, whose directors were Jonah Kimaiyo Nyolei, Peter Maina Ngatia and Edgar Kyprotich Misoii.
 24. It was the evidence of DW1 that in March 2008, he entered into a formal negotiation with the then Directors of the 1st Defendant; that he purchased the 1st Defendant company together with one of its assets being the suit property; that he and his co-director effected the necessary changes and became directors of the 1st Defendant and that to raise the purchase price, they applied for a financing facility from K-Rep Bank in March 2008.
 25. It was the evidence of DW1 that a mortgage was registered in favour of the bank against the suit property; that they entered into a sale agreement with the 2nd Defendant dated 5th March 2010; that the suit property was subsequently transferred to the 2nd Defendant by an Indenture of Conveyance dated 20th April 2010 and registered on 3rd May 2010, and that he was only informed on 2nd December 2010 that the Plaintiffs were claiming ownership of the suit property.
 26. In cross-examination, DW1 stated that he paid Kshs. 6 million in cash when he bought the land from the former directors, and had no proof of payment; that he later paid Kshs 14 million in US dollars whereafter the shares were transferred to him and his co-director and that they did not append their signatures to the transfer document.
 27. DW1 testified that the Indenture in favour of the 1st Defendant was made on 24th January 2001 and registered on 17th July 2007; that he did not inquire about the payable stamp duty; that he was not bothered about who made payment for the rates; that he sold the suit property for Kshs. 27 million to the 2nd Defendant, and that the declared value of the suit property for payment of stamp duty was Kshs. 30 million.



28. DW1 produced a bundle of documents as evidence, including a receipt dated 13th October 2009 from Kenya Power and Lighting Company being payment for power connection; water bills for the suit property from Nairobi Water Company issued in the name of the 1st Defendant's director; the mortgage dated 31st March 2008 by Jupiter Logistics Ltd over the suit land in favour of K-Rep Bank guaranteed by Waymax Co Ltd and an Indenture of Re-conveyance of mortgage dated 3rd November 2009 by K-Rep to the 1st Defendant.
29. DW1 also produced in evidence the Indenture of Conveyance dated 20th April 2010 between the 1st and 2nd Defendants; valuation reports dated 19th April 2010 and 26th July 2007; sale agreement dated 5th March 2010 between the 1st and 2nd Defendants; certificates of postal search dated 3rd May 2010 and 9th December 2009 and an Indenture of Conveyance dated 24th January 2001 between Uganda Airlines Corporation and Waymax Ltd.
30. DW2, Naushad Abdi, the General Manager of the 2nd Defendant, testified that the 2nd Defendant entered into a sale agreement with the 1st Defendant on 5th March 2010 for the sale of the suit property at a consideration of Kshs. 27 million; that before they purchased the land, they were shown a certificate of search dated 9th February 2010 confirming the property was in the 1st Defendant's name and that a subsequent search on 26th February 2010 confirmed the same.
31. It was the evidence of DW2 that they paid a deposit of Kshs. 11 million following which the title documents were released to their advocates on 10th March 2010, including the original Indenture of Conveyance in the 1st Defendant's favor, a mortgage in favour of K-Rep Bank dated 31st March 2008 and an Indenture of Re-conveyance of mortgage dated 10th March 2009.
32. According to DW2, they paid the stamp duty of Kshs. 1,280,050 on 20th April 2010 based on the government valuer's confirmation of the value of the suit land at Kshs. 32 million; that the Indenture of Conveyance dated 20th April 2010 was registered on 3rd May 2010 and entered into the Government Lands Registry as entry No. 72/N86/82/10/15132, and that they have been in quiet possession of the suit property since May 2010 without any interruption.
33. The Deputy Chief Land Registrar, DW3, testified that the suit land L.R. 209/359/16 was registered in the name of Uganda Airline Corporation and that there are no records in relation to the alleged purchase and transfer of the suit property from Uganda Airlines Corporation to Mr. Jonah Kimayio Nyolie, Peter Maina Ngatia and Edgar Kyprotich Misoi.
34. DW3 stated that there was an investigation conducted in November 2011 by the Chief Land Registrar who recommended that the entry in the register in favour of Waymax Ltd was fraudulent and consequently, there could be no better transfer of the suit property to MFI Office Solutions, the 2nd Defendant. According to DW3, the Chief Land Registrar expunged the entry and reverted the suit land to Uganda Airlines Corporation.
35. DW3 produced in evidence a bundle of documents which included a copy of the extract of the register of the suit land, a letter from Kilimani CID to the Land Registrar dated 26th August 2010, a letter from Kilonzo & Co. Advocates dated 30th August 2010, a letter from the Land Registrar and the transfer documents.

Submissions

36. Counsel for the Plaintiffs submitted that the sale of the suit property to the 1st Plaintiff was lawful and that the Plaintiffs obtained a legal interest in the suit property upon payment of the purchase price. It



- was submitted that although the Plaintiffs' interest was not registered by lodging of the Indenture, its valid and cannot be defeated by fraudulent acts of the Defendants.
37. Counsel relied on the case of *Henry Mwitari vs Commissioner for Lands & Another* [2017] eKLR where the court found that the interest of the Plaintiff, who had been issued with a letter of allotment was protected by law and could not be defeated by a subsequent fraudulent acquisition of grant by another party.
 38. Plaintiffs' counsel submitted that the 1st Defendant did not acquire the suit property as alleged, as they failed to provide evidence to show that the suit property was indeed acquired in 2001 for Kshs. 30 million. It was his submission that the 1st Defendant had failed to prove the root of the title as well as the legality of the title which they passed to the 2nd Defendant. They relied on the cases of *Rajendra Sanghani and Jayant Rach vs Fairmile Investments Ltd & Another* [2021] eKLR and *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR.
 39. Counsel submitted that it was suspect that Mr. Fredrick Kimemia Kimani and his co-director did not obtain the documents relating to acquisition of the property yet the company was incorporated solely for purposes of buying the suit property and was not active in any other business and that Mr. Kimemia Kimani and his co-director were part of the fraudulent scheme to steal the property from Uganda Airlines Corporation. Counsel questioned the decision of the 1st Defendant's directors not to call the former directors of Waymax Company Ltd as witnesses to give evidence of the purchase and sale of the suit property.
 40. The Plaintiffs' counsel advanced the position that the 2nd Defendant did not acquire a valid title in the suit property and that the 2nd Defendant's duty of due diligence went beyond carrying out a search at the lands office and included verifying documentation relating to the 1st Defendant's acquisition of the suit land, the rates records at the county offices and payment of stamp duty.
 41. Further, it was submitted, the 2nd Defendant was also bound to investigate how the 1st Defendant's shares were acquired by its current directors. Counsel relied on the case of *Esther Ndegi Njiru & Another vs Leonard Gatei* [2014] eKLR, where the court emphasized the need to ascertain the history or the root of a title, as well as the Ugandan case of *Katende vs Haridas and Company Ltd* [2008] 2 EA 173.
 42. Counsel submitted that the 2nd Defendant was not an innocent purchaser as there were several red flags that indicated that this was a corrupt scheme; that there was no paper trail to back the payments and that the 1st Defendant's current directors sold the property at a loss, that is Kshs. 27 million yet the previous directors had purportedly bought the property at Kshs. 30 million.
 43. It was submitted by the Plaintiffs' counsel that the other red flags in respect of the transaction by the Defendants included: the conveyance to the 1st Defendant was not registered until 7 years later; there are no records of signed resolutions and share transfer documents; the request for valuation usually lodged with the instrument is dated 19th October 2010, a day earlier than the date of the Indenture that was purportedly lodged for valuation, and that while the sale agreement indicates the purchase price as Kshs. 27 million, the Indenture indicates the purchase price as Kshs. 30 million.
 44. The 1st Defendant's counsel submitted that the Plaintiffs' claim cannot supersede the 1st Defendant's claim as they do not have title to the property as their claim is based on alleged beneficial interest in the property. Further, that the 1st Defendant is a bonafide purchaser of the suit property for value without notice of any fraud and that the 1st Defendant acquired a good title.



45. Counsel submitted that the 1st Defendant has given a detailed chronology of how it acquired the suit property before selling and transferring the same to the 2nd Defendant. Counsel relied on the decision of the Court of Appeal of Uganda in *Katende vs Haridar and Company Limited* as cited in *Lawrence P. Mukiri vs Attorney General & 4 Others* (2013) eKLR.
46. Counsel submitted that the 1st Defendant's current directors did all that was required of them and had no reason to suspect that there was another party claiming ownership of the suit property. Counsel relied on the Court of Appeal case of *Wreck Motor Enterprises vs Commissioner of Lands & 3 Others* [1997] eKLR.
47. Further, it was submitted by the 1st Defendant's counsel, that the allegation of fraud against the 1st Defendant had not been proved to the required standards. Counsel sought to rely on the cases of *Mutsonga vs Nyati* [1984] K.L.R. 425, *Koinange & 13 others vs Koinange* [1986] K.L.R., *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR and *Moses Paranai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* [2020] eKLR.
48. Counsel for the 2nd Defendant submitted that the 2nd Defendant was a bona fide purchaser for value without any notice as to any defect in the title. Counsel sought to rely on the definition of a bona fide purchaser by the Court of Appeal in *Weston Gitonga & 10 Others vs Peter Rugu Gikanga & Another* [2017] eKLR, *Nairobi Permanent Markets Society & 11 Others vs Salima Enterprises & 2 Others* eKLR, and *Kuria Greens Limited vs Registrar of Titles & Another* [2011] eKLR where the court pronounced itself on the doctrine of an innocent purchaser.
49. The 2nd Defendant's counsel submitted that the 2nd Defendant has been in possession of the suit property; that certificates of search of the property show that it is the owner; that good title passed to it from the 1st Defendant and that the Plaintiffs failed to prove otherwise. Counsel sought to rely on the decision of this court in *Republic vs Principal Registrar Government Lands (ex parte MFI Office Solutions Ltd)*, where it upheld the 2nd Defendant's title to the suit property.
50. He submitted that the evidence of the 2nd Plaintiff differs from the averments in the Amended Plaintiff, specifically that while in the Amended Plaintiff the 2nd Plaintiff swore that he entered into a sale agreement with the Official Receiver on 13th June 2002, in the Amended Plaintiff, he asserted that he bought the property on 25th February 2004.
51. Counsel also submitted that the declaratory relief sought by the Plaintiffs that this court declares both Plaintiffs as the legal owners of the suit property is irreconcilable with the facts asserted that the 1st Plaintiff transferred ownership of the suit property to the 2nd Plaintiff and that this court should draw an adverse inference from the Plaintiff's failure to produce the alleged Special Resolution.
52. Counsel argued that the Sale Agreement dated 13th June 2002 produced by PW2 was not duly stamped contrary to Section 19(2) of the *Stamp Duty Act* and was only signed by one director of the 1st Plaintiff, and that due to failure to stamp the agreement and the Indenture dated 25th February 2002, this court should render them inadmissible.
53. The Attorney General, on its part, submitted that the 1st Plaintiff is the owner of the suit land, having proved that it was declared the highest bidder during the sale at a public auction and that if Jonah Kimayio Nyolei, Peter Maina Ngatia and Edgar Kyprotich Misoi were not called to produce evidence on how they purchased the suit land, then they could not pass a better title to Waymax Company Limited and neither could the 2nd Defendant have a better title to the suit land.



54. The Attorney General further submitted that although a person holds title to property, there is need to explain the process upon which one became the owner, as held in *Alberta Mae Gacci vs Attorney General & 4 Others* [2006] eKLR and *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR. They also sought to rely on *Republic vs Minister for Transport & Communication & 5 Others Ex parte Waa Ship Garbage Collector & 15 Others* [2006] which was cited with approval in *Kenya National Highway Authority vs Shalien Masood Mughal & 5 Others* [2017] eKLR, where Maraga J (as he was then) held that courts should nullify titles held by land grabbers.
55. The Attorney General further cited the cases of *Sai Offices Supplies Limited vs Rosemary Alivista Luseno & Another* [2014] eKLR and *Darralle Limited vs ASL Limited and Attorney General* eKLR 2022 which I have considered.

Analysis and Determination

56. Having considered the Plaintiff, the Defences, the evidence and submissions of the parties, the following issues arise for determination:
 - a. Whether the Plaintiffs acquired legal ownership of the suit land
 - b. Whether the 1st Defendant lawfully acquired title to the suit property.
 - c. Whether the 2nd Defendant acquired good title to the suit property
 - d. Whether the Plaintiffs are entitled to the reliefs they have sought
57. The central contention of this suit is the ownership of the suit land, L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3. It is not disputed that as at 1979, Uganda Airlines Corporation was the registered owner of the suit property, having acquired the same from Mr. George Elijah Tibakuna. The 2nd Plaintiff and the 2nd Defendant both claim to have legal title to the suit land, with the 2nd Defendant's interest being listed on the register of the suit land, pursuant to Section 26 of the [Land Registration Act](#).
58. The Plaintiffs' case is that following an invitation to tender, the 1st Plaintiff was the highest bidder for the suit land and bought the same on 25th February 2004 from the Official Receiver/ Liquidator of Uganda Airlines Holdings Ltd for Ushs. 201,560,000.
59. It was averred that the 1st Plaintiff passed a resolution in 2003 to have the suit transferred to the 2nd Plaintiff, who is a director of the 1st Plaintiff; that they later learnt that the suit land had purportedly been sold to the 2nd Defendant and reported the alleged trespass to the police and that the 1st and 2nd Defendants fraudulently acquired title to the suit land.
60. The 3rd Defendant has supported the Plaintiffs' claim and asserted that there is no nexus of sale between Uganda Airlines Corporation and the 1st Defendant and that the 1st Defendant does not have any record to show how the suit property evolved to it to enable it to transfer the same to the 2nd Defendant. It is the 3rd Defendant's position that the transaction involving the Defendants was fraudulent.
61. The 1st and 2nd Defendants opposed the Plaintiffs' claim and averred that they are bonafide purchasers for value and with a good title. According to the 1st Defendant, after conducting due diligence at the Companies Registry and the Lands Registry, they bought the shares of the 1st Defendant whose previous directors were Jonah Kimaiyo Nyolei, Peter Maina Ngatia and Edgar Kyprotich Miso for the sum of Kshs. 20 million and that these previous directors acquired title to the suit land on 24th January 2001 through a certificate of Indenture.



62. Section 26 of the [Land Registration Act](#) sets out the principles of indefeasibility of title as follows:

- “(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.”

63. As ably stated by Mutungi J in *Esther Ndegi Njiru & Another vs Leonard Gatei* [2014] eKLR, despite the deference of the law for the doctrine of sanctity of title, in view of the rampant cases of fraudulent land transactions, legal practitioners need to carry out due diligence that goes beyond obtaining a certificate of search. He stated as follows:

“Article 40 (6) of [the Constitution](#) removes protection of title to property that is found to have been unlawfully acquired. This provision of [the constitution](#) coupled with the provision of section 26(1) (a) and (b) of the [Land Registration Act](#) in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavour to ascertain the history and/or root of the tile.”

64. A party claiming land has a duty to ascertain and prove the root of their title. The process of acquiring a title is as important as the title itself and a title acquired through an irregular and fraudulent process is not a valid title in law.

65. In the case of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal held that when a registered proprietor’s title is challenged, it is not sufficient to dangle the instrument of Title as proof of ownership because it is this instrument of Title that is challenged. The registered proprietor must go beyond the instrument and prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.

66. In the case of *Wambui vs Mwangi & 3 Others* (2021) KECA 144 (KLR) the Court of Appeal held as follows:

“...Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity or otherwise a product of a corrupt scheme.”



67. The Judges of the Court of Appeal in the above matter addressed their mind on the Torrens System as follows:

“Under the Torrens Land Registration System, all that the land registration under this system provides for is that a party suffering prejudice arising from such a party acting on the entries made in the register kept by the Government and held out by the Government as correct for all intents and purposes to his detriment is entitled to compensation for any loss as a result of acting on such entries to his/her detriment.”

68. In this matter, the 1st Plaintiff has averred that it obtained legal title to the suit land as it was the highest bidder in an auction conducted by the Liquidator of Uganda Airlines Holdings Corporation. It produced in evidence invitations to tender by the Official Receiver/ Liquidator of Uganda Airlines Holdings Ltd for several properties, including the suit land, in three newspapers between July and December 2001.

69. The Plaintiffs also produced the duly executed Agreement of Sale between the 1st Plaintiff and the Liquidator of Uganda Airlines Holdings Ltd dated 13th June 2002, as well as a copy of the cheque evidencing payment of rates of Kshs. 458,200 in 2009. While Pw1 asserted that the 1st Plaintiff passed a special resolution for the property to be registered in the name of the 2nd Plaintiff, the resolution was not produced in court.

70. Neither the 1st Plaintiff's interest nor that of the 2nd Plaintiff was registered at the lands office. The Plaintiffs have attached drafts of the Indenture of Conveyance dated February 2004 which though signed by the Official Receiver/Liquidator and the 2nd Plaintiff, is incomplete because the 2nd Plaintiff's signature has not been witnessed.

71. While in its submissions the 2nd Defendant contested the mandate of the Liquidator as well as the nexus between Uganda Airlines Company and Uganda Airlines Holding Limited, the Plaintiffs produced in evidence a Gazette Notice dated 11th May 2001 indicating that the Official Receiver was appointed as a Liquidator of the Company by a Special Resolution dated 20th April 2001, following which written authorization of the Liquidator was required for any director or employee of the company to transact on behalf of the company.

72. Although the Plaintiffs did not produce proof of payment of the purchase price, the Liquidator of Uganda Airlines Holdings Ltd through a letter dated 15th November 2010 admitted that it sold the suit property to the 1st Plaintiff and that he agreed to transfer title to the 2nd Plaintiff.

73. The evidence on record showing that the 1st Plaintiff purchased the suit property from Uganda Airline Holding Limited by way of an agreement dated 13th June 2002 stands unimpeached. Indeed, after the said purchase, the Plaintiffs went ahead to pay rates to the then Nairobi City Council of KShs.458,200. That being the case, it is the finding of this court that the 1st Plaintiff purchased the suit property from the Liquidator of Uganda Airlines Holdings Ltd.

74. Although the suit property was never transferred to the Plaintiffs, due to the missing title, the Official Receiver of Uganda Airlines Holding Limited continued holding the said land in trust for the 1st Plaintiff. That is the position that the Court of Appeal took in the case of Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR, where it stated as follows:

“It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became



a trustee holding the suit property in favour of the Plaintiff. The Plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property.”

75. The transaction to obtain the suit property was purportedly conducted by the former directors of the 1st Defendant, Jonah Kimaiyo Nyolei, Peter Maina Ngatia and Edgar Kyprotich Misoi. The current directors of the 1st Defendant, Fredrick Kimemia Kimani and Mercy Makena Mbogori, have averred that the 1st Defendant purchased the suit property for Kshs. 30 million and obtained an Indenture of Conveyance dated 24th January 2001 from Uganda Airlines Corporation.
76. However, the present Directors of the 1st Defendant did not present evidence of payment of the purchase price to Uganda Airlines Corporation or the sale agreement between the 1st Defendant and Uganda Airlines Corporation, duly signed sealed by the two companies.
77. Although Fredrick Kimemia Kimani and Mercy Makena Mbogori have averred that they acquired proprietorship of the suit land through purchase of shares of the 1st Defendant vide the agreement dated 27th May 2008, the evidence of the consideration for the transfer of the said shares was never produced in evidence.
78. Based on these facts, did the 1st Defendant lawfully obtain title to the suit property? Save for the Indenture of Conveyance, the 1st Defendant has failed to provide any evidence of the process through which it obtained ownership of the suit property. No sale agreement has been presented for this court’s scrutiny, nor any proof of payment of the purchase price to Uganda Airlines Corporation.
79. The 1st Defendant’s current directors also failed to call its previous directors as witnesses who could have easily presented evidence of the agreement they entered into with Uganda Airlines Corporation and evidence of payment of the purchase price. They equally did not call any director of Uganda Airlines Corporation to attest to the sale of the suit land.
80. For the above reasons, this court finds that the 1st Defendant has failed to establish the root of its title. The evidence before this court shows that its directors acted fraudulently. Any title they purported to obtain from this scheme was thus illegal, unlawful, null and void.
81. Although the 2nd Defendant has argued that it is an innocent purchaser for value without notice of any fraud, Article 40 (6) of *the Constitution* bars legal protection of unlawfully acquired property. In addition, Section 26(1)(b) of the *Land Registration Act* provides that title that has been illegally acquired may be impeached.
82. This position was upheld by the court in *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another* (2013) eKLR where it stated that the purpose of Section 26(1)(b) is to protect the real title holders from being deprived of titles by subsequent transactions. This is the same position that the Court of Appeal took in *Darelle Limited Plaintiff vs ASL Limited & 2 Others* [2015] eKLR, where it stated as follows:

“The court finds that a certificate of title that is obtained unprocedurally, illegally or through fraud cannot be held to be absolute and indefensible. Since it is evident that the certificate of title held by Darelle Ltd was acquired unprocedurally, it would be unequitable to retain the same.”
83. If indeed the 2nd Defendant relied on the register to purchase the suit property, then it should have sought for indemnity from the government. However, and to the extent that the 1st Defendant did not



have a valid title to pass to the 2nd Defendant, the suit property should revert to its legal and beneficial owners, that is Uganda Airlines Holding Limited and the 1st Plaintiff respectively.

84. The court having found that the 2nd Defendant has no valid title to the suit land, it must find that its actions of entering and taking possession of the suit property amounts to trespass. As was held by this court in *Duncan Nderitu Ndegwa vs Kenya Pipeline Company Ltd & Another* (2013) eKLR, once trespass has been established, it is actionable per se and no proof of damage is required.
85. However, taking into consideration the circumstances of this case, and considering that the 2nd Defendant was likely defrauded by the 1st Defendant, I shall exercise my discretion by declining to award damages for trespass as against the 2nd Defendant.
86. For the reasons I have given above, I allow the Plaintiffs' Complaint as follows:
- a. The Plaintiffs are the beneficial owners of all that land known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
 - b. Any entry purporting to grant title of L. R. No. 209/359/16 to the 1st and 2nd Defendants be cancelled.
 - c. The Defendants by themselves, their servants or agents or anyone else claiming through them howsoever be and are hereby compelled to immediately surrender and deliver up the suit property L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3 in vacant possession to the Plaintiffs.
 - d. The Defendants and or their servants and/or agents or otherwise howsoever be and are hereby restrained from being or remaining on or entering upon all that piece of land situate in Nairobi and known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
 - e. A permanent injunction be and is hereby issued restraining the Defendants from trespassing onto the suit property known as L.R. No. 209/359/16 originally known as L.R. No. 209/359/2/3.
 - f. The Plaintiffs are awarded costs of the suit which shall be paid by the 1st Defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23RD DAY OF FEBRUARY, 2023.

O. A. ANGOTE

JUDGE

_In the presence of;

Ms Kilonzo for 2nd Defendant

Mr. Ingutia for Plaintiff

Mr. Muriungi for 1st Defendant

