



REPUBLIC OF KENYA



KENYA LAW
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**Kisa v Kamburi & 2 others (Environment & Land Case 145 of 2013)
[2023] KEELC 643 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 145 OF 2013
A OMBWAYO, J
FEBRUARY 10, 2023**

BETWEEN

JAMES TOROITICH KISA PLAINTIFF

AND

JOSEPH MWANGI KAMBURI 1ST DEFENDANT

JOSEPH NJUGUNA MUSA 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. James Toroitich Kisa has come to this court by way of plaint against the defendant claiming that at all material times the plaintiff was a shareholder in Nakuru Housing and development Company Limited which was the registered owner of a leasehold title in a property known as Title No Nakuru Municipality Block 23/46 measuring about 0.872 hectares and hereinafter referred to as the suit property.
2. On or about November 7, 1987, the plaintiff purchased the suit property from the Nakuru Housing & Development Company Limited in a shareholders ballot plot allotment scheme for a consideration.
3. The plaintiff avers that he was allocated the leasehold interests in the property for a period of 99 years effective from August 1, 1991. The plaintiff was issued with a share certificate and the lease title documents as evidence for the said transaction
4. On or about November 27, 2008, the plaintiff lodged an application for registration of the lease title in his name at the Nakuru Lands Registry and was duly issued with a receipt evidencing payment of the requisite title registration fees. The said application for registration was later rejected on grounds that the title to the said property was in the name of the 2nd defendant.



5. The plaintiff avers that he immediately after the said rejection conducted an inquiry and official search on the title to the suit property at Nakuru Land Registry whereat he discovered fraudulent acts from the records and particularly a copy of title documents of the suit property wherein the said lease was purportedly registered in his name in May 13, 1997 without any consideration. The plaintiff further states that the alleged lease title earlier issued in the name of the plaintiff was surrendered and destroyed on May 13, 1997 when the new title was purportedly issued to the 1st defendant.
6. The plaintiff avers that the Commissioner of Lands by himself, through servants, agents and/or officers colluded and/or conspired with the 1st and 2nd defendant with intention to defeat the plaintiff's interest in the suit property by acceptance and/or registration of forged, falsified documentations and/or transactions with respect to the title of suit property and unlawfully issuing title to the suit property to the 1st defendant, and subsequently to the 2nd defendant having known and/or ought to have known that the aforesaid series transactions or documentations relating the title of the suit property were all suspect and obtained through falsehood and fraudulent transactions.
7. The plaintiff further avers that the 2nd defendant by himself, through his employees, servants and or representatives have unlawfully taken possession of the said suit property and unlawfully carrying out developments on the property. The plaintiff avers that the 2nd defendant by himself and/or through his servants, agents and or representatives commit acts trespass by incident of their continued unlawful occupation and use of the suit property without plaintiff's consent.
8. The plaintiff further states that it is upon the said inquiry and official search of the title and or documents of the suit property in 2008 that he also discovered that on or about May 24, 2001, the 1st defendant had conspired and colluded with the 2nd defendant to fraudulently and unlawfully transfer and register the illegally acquired title of the suit property in the 2nd defendant's name.
9. The plaintiff's avers that the 2nd defendant conspired and or colluded with the 1st defendant to defeat the plaintiff's legal interest in the suit property by assisting the 1st Defendant to commit fraud and particularly by executing transfer documents and procuring registration of the transfer of the said title in his name knowing that the 1st defendant did not have bonafide title to the said suit property. The plaintiff avers that the 1st defendant could not transfer any legal title in the suit property to the 2nd defendant.
10. The plaintiffs aver that he neither presented any application for registration of the suit property at the Nakuru Lands Registry on May 13, 1991 nor transferred his interest in the suit property to the 1st defendant on May 13, 1997. The plaintiff further states that the aforesaid purported registration of title in his name and subsequent purported transfer of the same to the 1st defendant was illegally and unlawfully obtained through falsehood, fraud and misrepresentation with the intention to defeat his interest in the property
11. The plaintiff prays for a declaration that the land parcel known as Title No Nakuru Municipality Block 23/46 lawfully belongs to the plaintiff. Moreover, a declaration that the purported sale and transfer of the parcel Land known at Title No Nakuru Municipality Block 23/46 to the 2nd defendant was unlawful and therefore void. Last but not least, a declaration that the purported transfer and/or registration of the land parcel of known as Title No Nakuru Municipality Block 23/46 in the name of 1st defendant was unlawful and therefore void.
12. The 2nd defendant filed a defence denying all the allegation of fraud, collutions or conspiracy with the 1st defendant. The 2nd defendant states that he purchased the land from the 1st defendant who duly



transferred the property to the 2nd defendant. The 2nd defendant has fully developed the property where the family resides.

13. The 3rd defendant denied receiving a lease from the plaintiff for registration. The 3rd defendant denies all allegation of fraud especially agents to commissioner of lands. The agreement that the plaintiff has suffered economic loss is also denied. The 3rd defendant prays that the suit be dismissed.
14. When the matter came up for hearing the plaintiff, a consulting Engineer based in Nairobi testified that he did not know the 1st and 2nd defendants. In 1982 he became a member Nakuru Housing Development Company Ltd and was issued a share certificate No 238 dated November 7, 1987. In the register of the company he is No 46. He paid 420/= development fee as per request in October 1982. They balloted for other plots at an annual general meeting and was allotted plot No 46 which he duly paid for.
15. On November 27, 2008 he lodged an application for registration of the lease in his favour and paid the requisite registration fees. He was surprised that when his application was rejected on the basis that his title had been registered in another person's name. He conducted a search which revealed that he had been registered in his favour in 1991 and subsequently transferred to the 1st defendant. The lease was registered in his favour in May 1991 and that purportedly transferred the property to the 1st defendant in 1997.
16. He had not presented any documents for registration. The abstract of title further showed the 1st defendant transferred the land to the 2nd defendant on May 24, 2001. The 1st defendant was unknown to him and that he never transferred the land to him. The 2nd defendant purportedly entered into an agreement with the 1st defendant in May 2001. The agreement is dated May 17, 2001 and the transfer was effected on May 24, 2001. He never executed any transfer in favour of 1st defendant. He was unknown to him and to date he does not know him. After allotment was done they were shown our respective plots. He filed a list of documents on June 20, 2012 that were admitted in evidence as PEx1 – 14.
17. DW1 Joseph Njuguna Muse gave evidence and also relied on his statement dated February 9, 2012. He stated that this plot in Nakuru Municipality /Block 23/46. He bought the land from Joseph Mwangi Kaburi. He did a search and found that the land belonged to the 1st defendant. He produced the certificate of official search. He produced the sale agreement and the certificate of lease. He also produced the green card. He paid for the rates and also produced the valuation report. The land was valued at Kshs19,500,000. He entered the land in 2005. He prayed that the suit be dismissed. On cross examination he states that he does not remember the agents. He bought the land for Kshs330,000. He did not know where the 1st defendant lived. He did not look for the 1st defendant. He insisted that the 1st defendant transferred the land to him. He states that he has never seen Kamburu.
18. The gravamen of the plaintiff's submissions is that the plaintiff has proved his case on a balance of probabilities that the 1st defendant was a conman and that the 2nd defendant did not know him and never bothered to know him. The 1st defendant never entered appearance and consequently did not file defence.
19. The gravamen of the defendant submission is that the 2nd defendant has a valid title as he is the registered proprietor of the suit land. He relies on the section 26(1) of the *Land Registration Act* 2012. The 2nd defendant further argues that he is a bonafide purchaser for value without notice.



20. This dispute revolves on fraud and whether the 2nd defendant was an innocent purchaser for value without notice In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” Emphasis ours.

21. Given the seriousness of the allegations, the onus was on the plaintiff to provide evidence to the Court of the alleged fraud which evidence must meet the standard of proof as was underscored by the Court of Appeal in *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* [1996] eKLR as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the Court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

22. I have considered the evidence on record and the rival submissions and do find that the plaintiff was a member number 46 of Nakuru Housing Company Limited. He was allocated plot number 46 that later became Nakuru Municipality Block 23/46 measuring approximately 0.0872 acres. The lessor was the government of Kenya and the lessee was James Toroitich Kisa who was also the first registered owner when the registrar was opened on May 13, 1991. It is not clear on record how Joseph Mwangi Kaburi became the proprietor on May 13, 1997. He was issued with a certificate of lease though. There is no transfer of lease produced in court, in fact by the time Joseph Mwangi Kaburu was issued with a certificate of lease the lease has not been registered by the Land Registrar .

23. As to whether the 2nd defendant is a bona fide purchaser for value without notice, the *Black's Law Dictionary* 9th Edition defines a bona fide purchaser as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

24. In *Katende v Haridar & Company Limited* [2008] 2 E.A.173 the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine ... (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;



- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.”

25. The plaintiff had not been issued with a certificate of lease and therefore there could not be transfer of lease. The 2nd defendant cannot claim to be an innocent purchaser for value because he did not produce the transfer of lease executed between himself and the 1st defendant. The 2nd defendant ought to have been keen to notice that the entries in the register were irregular as the lessee had not been issued with a certificate. The demeanor of the 2nd defendant demonstrated that he did not know the vendor and he did not meet him personally. He did not know the agents .

Section 26 (1) of the [Land Registration Act 2012](#) provides :-

26. Certificate of title to be held as conclusive evidence of proprietorship.

(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.

26. I do find that this is a case where the plaintiff was defrauded of his land by the 1st defendant who also defrauded the 2nd defendant of his money. The 2nd defendant acquired his title illegally and unprocedurally from the 1st defendant who did not have a valid title.

27. I do find that the 2nd defendant does not fit the description of an innocent purchaser for value without notice.

28. The upshot of the above is that the suit succeeds and I do grant a declaration that the purported transfer and/or registration of the land parcel known as Title No Nakuru Municipality Block 23/46 in the name of 1st Defendant was unlawful and therefore void.

29. Further I do issue a declaration that the purported sale and transfer of the parcel Land known as Title No Nakuru Municipality Block 23/46 to the 2nd defendant was unlawful and therefore void.

30. Moreover, a declaration that the land parcel known as Title No Nakuru Municipality Block 23/46 lawfully belongs to the plaintiff.

31. I do direct that, the 2nd and 3rd defendants to deliver up to the plaintiff the title documents and all necessary instruments to facilitate the transfer or a duly executed transfer in respect of Property known as Title No Nakuru Municipality Block 23/46 situated in Nakuru in favour of the plaintiff free of all encumbrances and in default thereof, the Deputy Registrar to execute a transfer of the said property to the plaintiff.



32. I do grant an order that the 2nd defendant vacates the property within 150 days failure whereof he be evicted therefrom. At the expiry of the 150 days, the 2nd defendant do pull down and remove all structures or building erected upon the plaintiff's property known as title No Nakuru Municipality Block 23/46 situate in Nakuru. General damages for fraud against the defendants not awarded as they were not proved. Mense profits as against the 2nd defendant not awarded as they were not proved. Cost of the suit to the plaintiff. Orders accordingly

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 10TH DAY OF FEBRUARY 2023.

A O OMBWAYO

JUDGE

