



**Baishe v Bwana (Environment & Land Case 229 of 2021)
[2023] KEELC 19129 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19129 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 229 OF 2021
NA MATHEKA, J
JULY 27, 2023**

BETWEEN

MUKESH KALE BAISHE PLAINTIFF

AND

ALI BWANA DEFENDANT

JUDGMENT

1 The plaintiff avers that he is the lawful and/ or beneficial owner of all that parcel of land measuring 0.0465 hectares being plot number MN/ 1/2873 situated at Shanzu area purchased from Ronald Karisa Mwanguna on the December 13, 1989 and duly issued with lease Certificate Ref CR NO. 89222 and Certificate of Title reference CR. 71143. That upon the purchase of the said parcel of land, the plaintiff did construct a house containing six bedroom, sitting room with a front shop, toilet, shower room, a kitchen and a flower garden. That the plaintiff in consultation with his wife left the suit premise under the care of the plaintiff's sister now (deceased) who at the later stage got married to Ali Bwana who is the defendant herein, and he joined her where they started living together in the plaintiff's suit premises. That the defendant has taken advantage of the plaintiff's long time absence and the demise of the plaintiff's sister, by plotting a scheme with intention to defraud what rightfully belongs to the plaintiff. That the defendant has tried on several occasions to engage the defendant peacefully to vacate the suit premises willfully and hand over vacant possession to him without success. That the defendant actions of denying the plaintiff access to his own suit premises, means he is determined to take what is rightfully owned by the plaintiff, by ensuring that he continues to issue both known and unknown threats to scare the plaintiff to abandon his own property. Despite the plaintiff making a complaint at Bamburi police station vide OB no. 18/19/9/2017, the defendant appears unshaken. The plaintiff prays for;

1. A Permanent injunction restraining the defendant by himself, his agents, servants or any other person claiming interest through him from denying the plaintiff's access to his own dwelling



house/ premises being plot number MN/1/2873 measuring 0.0465 Ha situated Shanzu area in any manner whatsoever.

2. Vacant possession.
 3. The OCS of Bamburi Police Station be order to supervise and ensure compliance by providing adequate security.
 4. Costs of this suit.
 5. Interest on the above at court rates.
- 2 The defendant states that the plaintiff herein Mukesh Kale Baishe using fraud and collusion with strangers has procured registration and Transfer of LR NO. 2873 (Original 2598) Shanzu site and service scheme into his favour and a fraudulent title issued and transferred to him as an owner. That Mr. Ali Bwana's Rights, Interests and Title to LR NO. MN.2873 (Original 2598) have severely been curtailed due to a corrupt, fraudulent and criminal scheme perpetuated by the plaintiff to steal this property. The defendant has a home with a residential house and a shop business and has lived on the said Plot for 29 years now from 1989 uninterrupted. The plaintiff has procured Registration and Transfer of the suit property by fraud through impersonation and falsification of identity and other documents without the approval or the necessary authority from the County Government of Mombasa being granted at all. That LR. NO. MN/1/2873 (original 2598) was allocated to a Mr. Ronald K. Mwanguma. He sold the same to Athman Bongo in 1985. Athman Bongo then sold this property to Ali Bwana the defendant for Kshs. 130,000 on December 13, 1989 with vacant possession. At the time of purchase by the defendant all the allotment documents were in Mr. Ronald K. Mwanguma's name though he had handed the allotment letter to Mr. Athman Bongo who gave them to the Applicant. Mr. Athman Bongo and Mr. Ronald Mwanguma passed away. Ronald K. Mwanguma died in 1998 Mr. Athman Bongo in 2004 or thereabout.
- 3 When the defendant Mr. Ali Bwana purchased the plot from Athman Bongo it was developed with a Swahili type of house by Mr. Athman Bongo. Mr. Ronald Mwanguma sold to Athman Bongo a vacant plot. Mr. Ali Bwana the defendant herein was introduced to this property by Mr. Keith Ngala Kazungu a land and property agent in October, 1989. By then he was a Civic Leader being a Councillor of Bamburi location Shanzu area. He introduced the defendant to Athman Bongo who resided on the lands Mr. Keith Ngala Kazungu is still alive. Mr. Ali Bwana took possession and started construction of a permanent house in 1990. He constructed his house on the land room by room and occupied the house before completion and eventually he removed the Swahili type house built by Mr. Athman Bongo. The entire structure was constructed by Mr. Yahya who is still alive. It took the period between 1991 to 1995 to complete the construction of the building. Mr. Ali has lived on the land from the date of purchase as it was handed over to him with vacant possession and the seller Mr. Athman Bongo relocated to Mavueni . He now has been on it for 29 years. The Sale Agreement was prepared, signed and executed on December 13, 1989 in the offices of L.G Maghnan Advocate. It was in the presence of the Clerk, Advocate and the Agent. The Agent was paid his commission. All the allotment letters and documents were handed over to Mr. Ali Bwana by Athman Bongo upon execution of the Agreement. The documentation was done by the clerk to Mr. L.G Maghnan's Advocate in the Advocates office in the presence of the Vendor's Agent Keith Ngala Kazungu a Councillor. The Vendor Mr. Athman Bongo and Mr. Ronald K. Mwanguma.
- 4 The defendant Mr. Ali Bwana then personally on the same day December 13, 1989 proceeded to the Municipal Council offices and paid Kshs. 3067.95 as Municipal Council Rates arrears for the period 1975-1982 on behalf of Ronald K. Mwanguma. He also paid the Land Rent of Kshs. 4675 in the name of Ronald K. Mwanguma. Both the rates and rents were in arrears. The defendant also paid



other charges that were indicated in the Letter of Offer to enable for processing of title. Mr. Ali Bwana commenced process of registration of title for the property in 2016. On 19th 20th and September 21, 2017 the Applicant was visited by two Officers from Bamburi Police Station an Estate Agent from Idime Enterprises and Mr. Mukesh Baishe the plaintiff and his wife named Ursula. They attempted to evict him from his home of 29 years violently and through intimidation. He proceeded to Bamburi Police Station and registered a complaint officially against this police harassment. The OCS intervened and admonished his rogue officers and the issue never recurred.

5 Reasons wherefore the defendant prays for the plaintiff's suit be dismissed and judgement as per the Counter Claim as follows;

1. An Order for Rectification of the Register to the Chief Land Registrar or Officers under him to Rectify the Register for I-R NO. MN/ 1/2873 Org 2598) by Cancelling the title and Removing all the unlawful and offensive entries and Transfer documents and records on the register and thereafter rectify the Register to Reflect Mr. Ali Adi Bwanaas the Registered Proprietor of I-R NO. 2873 (Original 2598).
2. An order do issue to prohibit any dealings on this suit property against the Chief Land Registrar or his authorized officers or any other person whomsoever and whatsoever from making any adverse Illegal unlawful and unauthorized entries Orders, decisions, Records, Documents, Proceedings, Alterations and Amendments to the register or Records concerning the suit property LR NO. MN/1/2873 (Original 2598) purporting to divest and defeat the defendants Title, Rights and Interests therein.
3. A Permanent injunction and an Order for Title in Adverse possession of the Counter Claim herein be issued.
4. Costs.

6 This Court has considering the pleadings filed by the plaintiff and the defendant; oral and documentary evidence by PW1, PW2, PW3, DW1, DW2 and DW3 and the written submissions by the learned counsel for the plaintiff and the defendants. Section 26(1) of the *Land Registration Act*, 2012, which provides that;

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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.



7 Where the title in favor of the vendor is proven to have been obtained and/or acquired unprocedurally, illegally or by corrupt practice, the second and subsequent purchaser of the suit property do not acquire any valid title, irrespective of whether same knew of the illegality or otherwise.

8 The provisions of section 26 1(b) of the Land Registration Act, 2012, does not require defendant to prove that the title holder was privy or party to the illegality, and/or corrupt practice. For clarity, all that a claimant that must prove is that the process of the acquisition of the title was replete with impropriety, illegality or corrupt practice. In the case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 others (2015) eKLR, the court held that;

“... it needs to be appreciated that for section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme.

The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme.

The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.

The assertion of the defendants that they were innocent purchasers who were not aware of the fraudulent transaction does not hold the water in this case as the purpose of section 26 is to protect real title holders from the unscrupulous persons.”

9 I have perused copies of the Title Deed and Documents of Transfer and Deed Plan on the file which show that the Registration of the Title was effected on March 21, 2018 under CR. File No. 71143/1 by a Registrar of Titles Mombasa. The proprietor indicated as Mr. Ronald Karisa Mwanguna P.O. Box was 83738 Mombasa. An Entry on the Title for 21-3-2018 for Transfer to the Mukesh Kale Baishe. In the copy of Transfer of Lease dated March 12, 2018; the transferor is Ronald Karisa Mwanguna witnessed by Vincent Omollo Advocate and drawn by Kamoti Omollo & Company Advocates. The Transferee Is Mukesh Kale Baishe who signed the said Transfer witnessed by Vincent Omollo Advocate. The Transferor is identified in the Transfer document as Ronald Karisa Mwanguna. The ID No. 5012948. PIN Number is A0016355696L. Its purportedly executed by signature of the said Ronald Mwanguna. PW2 stated that he is Mr. Reynold Mwanganya Mwatere and he did sign the transfer and the details relate to him including the photograph. The defendant confirmed this upon inquiry from the Registration offices in Mombasa though it is not in dispute.

10 I find that the plaintiff forged and falsified documents and through impersonation used the said Reynold Mwanganya Mwatere to fraudulently impersonate Ronald Karisa Mwanguna and help him procure registration and subsequently Transfer the property to himself. PW2 states that he did not know what he was signing. He maintains that his uncle bought the plot on his behalf in 1972 and he paid Kshs. 25,000/= . That the plaintiff paid him Kshs. 200,000/= for the transfer. He confirms that he is not Ronald Karisa Mwanguna as per the allotment letter of the suit plot. I have analyzed above the process the plaintiff used to register and transfer the suit land to himself and find that it fell short of the glory of the law and procedure of registration. I find the defendant has proved that the suit land was fraudulently transferred.

11 The defendant Mr. Ali Bwana testified that he purchased the plot from Athman Bongo it was developed with a Swahili type of house by Mr. Athman Bongo. Mr. Ronald Mwanguna sold to



Athman Bongo a vacant plot. Mr. Ali Bwana the defendant herein was introduced to this property by Mr. Keith Ngala Kazungu a land and property agent in October, 1989. He took possession and started construction of a permanent house in 1990. DW2 and DW3 corroborated his evidence. He has lived on the suit plot ever since. I am satisfied that the suit plot belongs to the defendant.

- 12 On the issue whether the defendant is entitled to an order of cancellation of the plaintiff's title, the court is empowered under section 80 (1) of the *Land Registration Act* to order the rectification and cancellation of any title that is proven to have been fraudulently acquired. Section 80(1) provides as follows:

Rectification by order of court

- (1) 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.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

- 13 In the case of *Kenya Anti-Corruption Commission v Online Enterprise Limited* Kisumu ELC number 708 of 2015 the court stated that;

“the court is also empowered under section 80 (1) of the *Land Registration Act*, to order the rectification of the register by directing that any registration be cancelled or amended if its satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the defendants irregularly, fraudulently and un-procedurally registered the suit land in their names and the same should not be allowed to stand.”

- 14 I find that the defendant has proved its case and I hereby order the cancellation of the plaintiff's Certificate of Lease issued on March 12, 2018 and the same be registered in the defendant's name. The plaintiff's case is dismissed and the defendant having proved its counterclaim against the plaintiff, I therefore give specific orders as follows:

1. The registration in favour of the plaintiff as proprietor of plot number MN/1/2873, measuring 0.0465 Ha situated Shanzu area be and is hereby cancelled.
2. An order is hereby granted for the rectification of the register and the defendant be registered as the Proprietor of plot number MN/1/2873, measuring 0.0465 Ha situated Shanzu area.
3. plaintiff to pay costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH JULY 2023.

N.A. MATHEKA

JUDGE

TABLE

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