



JUDGMENT HANDED DOWN BY THE SUPREME COURT ON THE DOCTRINE OF A BONA FIDE PURCHASER

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THE LANDMARK DECISION BY THE KENYAN SUPREME COURT ON THE EXTENT OF DUE DILIGENCE OBLIGATIONS OF A BONA FIDE PURCHASER

Cancellation of Title under the Land Registration Act 2012

According to Section 26 of the Land Registration Act 2012, protection to title can be removed and title impeached if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally or through a corrupt scheme.

The purpose of this clause is to remove any protections for innocent purchasers or innocent title holders, and since an innocent buyer's title is voidable, it safeguards the real title holders from having their titles invalidated by subsequent transactions. In decisions like *Alberta Mae Gacii v. Attorney General & 4 Others* [2006] eKLR (Mombasa High Court) and *Alice Chemutai Too v. Nickson Kipkurui Korir & 2 Others* [2015] eKLR (Kericho ELC), Kenyan courts have exhaustively decided this issue.

The Court's Ruling in SC Petition No. 8 (E010) of 2021

In 2017, the County Government of Mombasa contested the legitimacy of the title to the property known as MN/1/6053 owned by Dina Management Limited and located in Nyali Beach (the Property), arguing that the property was public land set aside for a public road and that its original owner had obtained the title in 1989 through illegal means. In order to establish a public right-of-way to the beach, the County forcefully entered the Property and destroyed the perimeter wall facing the coastline.

The third owner of the property, Dina Management Limited, contested the county government's acts, arguing that because it paid Kshs. 18 million to buy the property, it was a genuine buyer for value. In order to defend itself, Dina Management Limited claimed that it was not involved in the irregular procedure of obtaining the title and that it had done its due diligence before doing so.

In its decision on 21 April 2023, the Supreme Court, upholding earlier decisions of the Environment and Land Court and the Court of Appeal in this case, determined that a Title document is insufficient to establish ownership of land where the provenance of Title has been disputed. Beyond the instrument itself, the holder of the Title must demonstrate that the purchase process from the beginning was legitimate.

The Part Development Plan (PDP) and a letter of allocation based on the authorized PDP were among the documents that the Supreme Court deemed were necessary to demonstrate that the suit property was properly allocated to the initial owner. In light of the Supreme Court's finding that the initial owner's claim to the suit property was unlawfully granted, neither the original owner nor any subsequent buyers could be said to have obtained good title.

According to the Supreme Court, only when the initial allocation was lawful does a registered proprietor gain a legitimate Title. Therefore, it was the Appellant's responsibility to perform the appropriate due diligence before buying the subject property because doing so would have revealed any defects to the Title, in this particular instance, the absence of the aforementioned documents.

The Property, "by its very nature being a beach property, was always bound to be attractive and lucrative," according to the Supreme Court, and as a result, in light of Article 40(6) and Article 62(2) of the



Constitution, the land consequently automatically vests in Mombasa County. The Supreme Court thus concluded that Dina Management Limited could not benefit from the defence that it was a bona fide purchaser because it should have "been more cautious in undertaking its due diligence." In other words, it is the duty of bona fide purchasers to confirm the validity and legality of the property title. When the root of the title is contested, merely being in possession of a title document does not automatically qualify a party to be a bona fide purchaser.

Conclusion

A strong root of title reveals the legal process used to issue the title or lease was followed, includes a clear description of the property and leaves no room for question as to the title's validity.

As additional prudence will be needed before engaging in property transactions, we anticipate that this decision by the Supreme Court will extend the type of due diligence performed in property/real estate transactions.

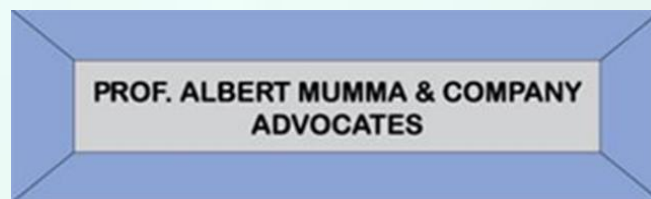
The official searches made at land registries do not probe into the root of title, so a thorough investigation of titles will be a taxing process. This serious deficit is anticipated to be addressed by modernizing the land registration system.

The Supreme Court's ruling can be accessed here: <http://kenyalaw.org/caselaw/cases/view/256748/>



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