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THE SUPREME COURT
PRONOUNCES ITSELF ON THE
DOCTRINE OF A *BONA
FIDE PURCHASER*

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The Supreme Court, in a landmark Judgment delivered on 21st April 2023 in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (2023) eKLR, held that the protection offered to a bona fide purchaser for value without notice does not apply where the Title to the property was obtained irregularly or illegally.

In this case, the dispute arose with respect to the ownership of Property Title Number MN/1/6053 situated in Nyali Beach, Mombasa County. The suit property was allocated and thereafter a freehold Title over the property issued to the first registered owner by the Commissioner of Lands in 1989.

The suit property was thereafter sold to a subsequent purchaser and eventually sold to the Appellant. In the ensuing period, the County Government of Mombasa entered the suit property, which was adjacent to the beach, demolished the perimeter wall facing the beachfront and flattened the property to the same level of the beach, on the premise that the land was designated as an open space, and thus was not available for alienation to a private party.

HOLDING

In arriving at the decision, the Supreme Court held that a Title document is not sufficient proof of ownership of property where the origin of that Title has been challenged. The holder of the Title document must go beyond the instrument itself and show that the process of acquisition from inception was legal.

In this regard, the Supreme Court found that no documents had been produced to show that the suit property was lawfully allocated to the first owner i.e., the Part Development Plan (PDP) and a letter of allotment based on the approved PDP. The Supreme Court therefore determined that the allocation of the suit property to the first owner was illegal and as a result, no good Title capable of transfer was acquired either by the first owner, or subsequent purchasers.

The Supreme Court held that a registered proprietor

acquires a valid Title only if the original allocation was legal. Therefore, the onus was on the Appellant to carry out the necessary due diligence before purchasing the suit property, as it would have discovered the defects in the Title, in this case the lack of the aforesaid documents. In the circumstances, the Supreme Court held that the protection offered to a bona fide purchaser did not apply to the Appellant, and it did not acquire a valid Title to begin with.

CONCLUSION

The Supreme Court's decision settles with finality the hitherto troubling position of the bona fide purchaser, with the Court emphasizing that one must go to the root of the Title in order to satisfy oneself as to the Title's validity.

The decision, though arguably controversial as it upsets the Torrens system which is predicated upon the sanctity of the Register, resolves earlier conflicting decisions by the Court of Appeal which had brought some confusion on the matter, as these earlier decisions essentially pulled in different directions with regard to the bona fide purchaser. This includes *Tarabana Company Limited v Sehmi & 7 others* (2021) eKLR, where the Court of Appeal determined the Appellant to be a bona fide purchaser deserving of protection, as the Title to the suit property, though acquired illegally, was acquired before the Appellant came into the picture i.e., the Appellant was not involved in the illegality. However, in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR, the Appellant was determined not to be a bona fide purchaser, as it knew about the challenge relating to the Title to the suit property. Fraudsters sold the suit property to the Appellant who in turn sub-divided it into various parcels for sale. The Court of Appeal held that no valid Title passed to the Appellant, which in turn meant that Titles acquired by the subsequent purchasers of the subdivisions were also null and void.

The Supreme Court's decision now mandates all purchasers to investigate the root of the Title to the property before proceeding with acquisition, for there will be no protection offered to a purchaser with respect to a

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Title whose root is defective or marred by illegality.

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This alert is for informational purposes only and should not be taken or be construed as a legal opinion. If you have any queries or need any clarifications as to how any aspect of the amendments might affect you, please do not hesitate to contact Pamella Ager - Managing Partner, (pamella@oraro.co.ke) and James Kituku, Partner (james@oraro.co.ke), or your usual contact at our firm.



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