



**Technology Investments Limited & 3 others v Patel & 2 others (Environment & Land Case 55 & 179 of 2020 (Consolidated)) [2023] KEELC 16641 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16641 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 55 & 179 OF 2020 (CONSOLIDATED)**

**M SILA, J  
MARCH 29, 2023**

**BETWEEN**

**TECHNOLOGY INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**ASU KHANJI PATEL ..... 1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF LANDS, MOMBASA COUNTY ..... 2<sup>ND</sup> DEFENDANT**

**AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 179 OF 2020**

**BETWEEN**

**SOS CHILDREN'S VILLAGE KENYA ..... 1<sup>ST</sup> PLAINTIFF**

**REGISTERED TRUSTEES OF SHRI CUTCH SATSANG SWAMINARAYAN  
MANDIR (TEMPLE) ..... 2<sup>ND</sup> PLAINTIFF**

**V. NARAN MULJI PROPERTIES LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**TECHNOLOGY INVESTMENTS LIMITED ..... DEFENDANT**

**JUDGMENT**

**A. Introduction And Pleadings**

1. This judgment is in respect of two consolidated suits being Mombasa ELC No 55 of 2020 and Mombasa ELC No 179 of 2020. In the first suit, the plaintiff, Technology Investments Limited, sued Asu Khanji Patel as 1<sup>st</sup> defendant, and the Land Registrar, Mombasa, as 2<sup>nd</sup> defendant, claiming to be



the registered owner of the land parcel MN/I/9596 located in Nyali, Mombasa (the suit property), which land she averred to have purchased for the sum of Kshs 100,000,000/= (Kenya Shillings One Hundred Million) on 13 July 2017 from the previous registered proprietor. The suit property was said to measure 0.5 Ha and title issued through grant CR No 27815 and contained in Land Survey Plan No 198180. It was pleaded that upon taking possession, the plaintiff placed a caretaker on the premises, but on 16 May 2020, the 1<sup>st</sup> defendant invaded the property, pulled down the gate and placed some people on it. She feared that the 2<sup>nd</sup> defendant was creating a parallel title for the 1<sup>st</sup> defendant. In the plaint, Technology Investments Limited asked for the following orders (paraphrased for brevity) :-

- a. A permanent injunction to restrain the defendants from the suit property.
  - b. A declaration that she is the legitimate proprietor of the suit property containing 0.5 Ha or thereabouts delineated in the grant CR 27815 and land survey plan No 198180.
  - c. Damages for trespass
  - d. Costs of the suit.
  - e. Any other relief the court may deem fit to grant.
2. Together with the plaint, the plaintiff filed an application for injunction, so as to have the defendants restrained from the suit property pending hearing of the suit. I directed parties to go to the ground and prepare survey reports and this court also visited the site. Survey reports were prepared and presented. I heard the application for injunction and ordered that the status quo be maintained pending hearing of the dispute, for it was apparent that what was before court was more than a simple case of trespass.
  3. Subsequently, the 1<sup>st</sup> defendant filed defence and counterclaim. In the Statement of Defence, the 1<sup>st</sup> defendant pleaded that he was constructing perimeter walls for several properties within Mombasa and could not have encroached in any property belonging to the plaintiff. He contended that the place where the suit property is located was hived off a road reserve which has always been an access road for the land parcels MN/15676, MN/1/11350, MN/I/9229 and MN/I/7886 planned for educational facilities and which require high accessibility and mobility. The suit property was described to be a hammerhead/cul-de-sac access road shown in a survey plan FR No 284/22 which connects to Links Road Mombasa and the Mombasa – Malindi Highway. He asserted that the suit property was a road reserve and was not available for alienation. He pleaded that what he was engaged in was carrying out boundary construction walls for Shree Cutch Satsang Swaminarayan Temple, construction of SOS Children’s Village, and improvement of the educational complexes and access roads in the area. In the counterclaim, he pleaded that the certificate of title of the plaintiff was illegally acquired in that the land is a road reserve. He asked for an order that the plaintiff’s title be cancelled for being illegally acquired as it was hived off a road reserve. He also pleaded that he has suffered loss and damage as he had to stop construction works. He claimed a total of Kshs 12, 200,000/= for this loss.
  4. The 2<sup>nd</sup> defendant filed a defence which was more or less a basic denial of the plaintiff’s claim and asked for the suit to be dismissed with costs.
  5. On 8 October 2020, the second suit, Mombasa ELC No 179 of 2020, was filed. The suit was filed by SOS Children’s Village Kenya, the Registered Trustees of Shri Cutch Satsang Swaminarayan Mandir (Temple) and V. Naran Mulji Properties Limited against Technology Investments Limited. The 1<sup>st</sup> plaintiff in this suit pleaded to be the owner of the land parcel Subdivision No 2458/I/MN, delineated in Grant No CR/15707 and Land Survey Plan No 102493, measuring 6.322 Ha and Subdivision No 1469/17 delineated in Grant CR 12723/1 and Land Survey Plan No 76550. She averred to be



operating a school known as SoS School on the said parcels of land. The 2<sup>nd</sup> plaintiff pleaded to be the owner of the land parcel MN/I/7888 measuring 3.642 Ha, delineated in Grant No 23196 and Survey Plan No 158779 upon which she operates the school known as Shree Swaminarayan Academy. The 3<sup>rd</sup> plaintiff pleaded to be the owner of the land parcel MN/I/7886, delineated in Grant CR 22499 and Land Survey Plan No 158779, measuring 3.762 Ha. It is pleaded that the two titles for SoS and the land parcels MN/I/7886, MN/I/7887, and MN/I/7888, were created vide an approved PDP No CT/12/25/85/2 dated 6 November 1985. It is added that the Plan provided for a 20 metre road reserve to serve these parcels of land and connecting onto Links Road Mombasa and the Mombasa-Malindi Highway. It is further pleaded that the area where the parcels of land are situated was zoned for educational purposes, and that since time immemorial, they have been enjoying seamless access to these plots using the 20 metre road reserve which also served as an emergency/alternative exit for their institutions and as a cul-de-sac for turning of vehicles. They complained that on 5 September 2020, Technology Investments placed 20 foot containers and iron sheets across the 20 metre road thus blocking access which they contended to be illegal. In the plaint, they asked for the following orders :-

- a. A declaration that the road provided by the approved PDP Plan No CT/12/25/85/2 dated 6 November 1985 for titles CR 15707, CR12723/1, CR23196, CR 22499, and CR 22498 is a public road.
  - b. A mandatory injunction compelling the defendant to forthwith open the 20 metre public access road and remove the containers and barricades thereon.
  - c. A permanent injunction to restrain the defendant from blocking the 20 metre public access road.
  - d. Costs of the suit.
6. Technology Investments Limited filed defence. She asserted to be the owner of the land parcel LR No MN/I/9596 and contended that the existence of the alleged 20 metre road is a figment of the imagination of the plaintiffs and does not exist. She pleaded that the plaintiffs were not in existence in the year 1985 when their plots were allegedly created. She asked that the plaintiffs' suit be dismissed.
7. I observed that the two suits are closely related and ordered their consolidation. To avoid confusion on who is plaintiff and defendant, and purely for ease of reference, Technology Investments Limited will be considered as plaintiff in the consolidated suits and the other parties will be considered as defendants with counterclaims and references hereinafter to plaintiff and defendants will be as above unless the context otherwise shows.

## **B. Evidence Of The Parties**

### **i. Plaintiff's Evidence**

8. PW-1 was Michael Munyao, a director and shareholder of Technology Investments Limited. He is personally an electronics engineer by training. He elaborated that Technology Investments is engaged in the construction business and also imports and deals with construction materials. He relied on a pre-recorded witness statement as his evidence in chief. In it, he stated that through a sale agreement dated 13 July 2017, the plaintiff purchased the land parcel MN/I/9596 from the previous proprietor, one Tobias Okoth Otieno (Mr Tobias) for Kshs 100,000,000/= (Kenya Shillings One Hundred Million). At the time of purchase, due diligence was carried out and it was determined that Mr Tobias had purchased the property in the year 2009, and had been in quiet possession of it since. It was also learnt that the vendor had charged the property to Consolidated Bank of Kenya Limited and wished to sell



it, so as to sort out the bank loan, as the bank had threatened to exercise its statutory power of sale. He averred that the plaintiff obtained all approvals from the County Government of Mombasa, the Land Registrar Mombasa, as well as the bank. After completion of the purchase in the year 2017, the plaintiff took possession and put up a fence and remained in quiet occupation. In the month of May, 2020, the caretaker placed on the land had to take leave and when he came back on 20 May 2020, he found the land invaded by the 1<sup>st</sup> defendant. A report to the police was made and this suit subsequently filed. He feared that the intention of the 1<sup>st</sup> defendant was to create a parallel title to the land. He produced as exhibits the sale agreement, the transfer instrument, an official search, discharge of charge, stamp duty payments, rates receipts, consent to transfer, a demand letter, the title document and a Deed Plan.

9. Cross-examined by Mr Onyony, learned counsel for the 1<sup>st</sup> defendant, he did affirm that the title held by the plaintiff has a Deed Plan No 198180 dated 6 September 1995, signed by G.O Obara, Director of Surveys. He was referred to another Deed Plan in a survey report dated 5 June 2020 prepared by Edward Kiguru licenced surveyor (who was his appointed surveyor at the time the injunction application was under address) and he could see that the Deed Plan annexed therein, though being the same Deed Plan, had initials and not a signature. He was cross-examined on the date of payment of stamp duty and transfer. The documents show that stamp duty was paid on 9 October 2017 and transfer was registered on 11 April 2018. The Stamp Duty indicates payee as Electrogen Technologies (International) which was not the plaintiff though he explained that this was a sister company of the plaintiff.
10. Cross-examined by Ms. Mango, learned counsel for the plaintiffs in the suit No 179 of 2020, he acknowledged that the Deed Plan in the title held by his company does not show the neighbouring plots. He was also questioned on his due diligence and how the land was first allotted. He stated that he did not get to see the application by the first allottee for the land. He did not get the (first) allotment letter nor any Gazette Notice that the land was available for allocation. He did not check to see if the terms of allotment were complied with. He stated that he found the property vacant and was not aware of any term that it was to be developed within 24 months of the grant nor any extension of this period. He did not get a surveyor to show him the ground at the time of purchase. He described the property as fenced with a stone wall and he only put a chain link at the entrance. He was not aware of the building approvals for the walls. He was not aware that the area is set aside for educational use. He did a search for the property which he produced as an exhibit.
11. Cross-examined by Mr Wachira, for the State Law Office, he testified that he purchased the Survey Plan that he produced as an exhibit from the Survey of Kenya. This was FR 284/22 and was a survey by Mr Kiguru. He observed that it is blank on the part “approvals.” He did not consider getting services of a surveyor at the time of purchase of the property. He did not read the conditions in the title document nor observe the condition for development within 24 months.
12. Re-examined, he testified that he did not try and find out who his neighbours were when he purchased the property. He stated that the previous owner had had the property for over 10 years and nobody claimed that it was a road. He was the fifth owner of the property.
13. PW-2 was Tobias Okoth Otieno He also relied on a pre-recorded witness statement. He affirmed to be the previous owner of the disputed property and that he sold it to Technology Investment Limited for Kshs 100,000,000/= in the year 2017. While he was proprietor, he had charged the suit property to Consolidated Bank of Kenya, and part of the purchase price was paid directly to the bank to offset his loan. He mentioned that he had developed a well, a chain link round the plot, and a semi-permanent structure for the caretaker. He had a caretaker on the land for 8 years.
14. Cross-examined, he testified that he did due diligence before purchasing the land and engaged a firm of advocates. He purchased the property from Mazin Development and at that time he was informed



that the title was clean. The bank also did its due diligence before charging it. He charged the property for Kshs 90 million in the year 2014. He never had a dispute with anyone while he owned the property. He did not conduct a survey. He did not seek approval to construct the semi-permanent structure on the land. He stated that he had wanted to develop an 11 storey office block on the land and that his development plans were approved in the year 2011. He was not aware that the area is zoned for educational purposes. He stated that his neighbours accessed their parcels of land from Links Road and Malindi Road. He recalled that there was an allotment letter for the land though he did not see its acceptance. He could not recall seeing any Gazette Notice inviting offers for purchase of the land. He explained that he is not a specialist in land matters.

15. With the above evidence, the plaintiff closed his case.

## ii. Defence evidence

16. DW-1 was Philip Osiemo Manwa, the Engineering Surveyor, County Government of Mombasa. He works in the Roads Section and holds a Bachelors Degree in Civil Engineering and a Diploma in Land Survey. He has worked for the County Government and its predecessor, the Municipal Council of Mombasa, for over 22 years. He is responsible for all engineering works including keeping of the roads inventory and engineering drawings for roads. His evidence was that the plot in issue is a road falling under the County Government and responsibility is on him to ensure that there is no encroachment on such roads and for their maintenance. He produced a letter dated 28 September 2020 written by the County Chief Officer- Infrastructure and Public Works which outlined the history of the land in question. He described the disputed land as a road. He stated that a donor had asked to improve the road so as to make it motorable and link Mombasa-Malindi Highway with Links Road, Nyali. From Links Road is a 435 metre long road which is 20 metres wide and there is a cul-de-sac at the end. Thereafter is a 3 metre wide path connecting the cul-de-sac with Mombasa-Malindi Highway.
17. He testified that the road was created through approved Part Development Plan No 104 of 6 November 1985. On the PDP, he identified SoS to the right and the Secondary School for the Physically Disabled to the left. In between is the disputed property which he noted to be identified as a road in the PDP. His position was that the plaintiff's plot consumes the road that separates SoS and the Secondary School for the Physically Disabled. He testified that all subsequent developments need to respect a previous approved Part Development Plans (PDP) and a PDP must be taken to stakeholders and neighbours before approval. He testified that this road serves the neighbouring parcels and connects them to Links Road. The end of it is a cul-de-sac, hence wider, and whose purpose is to allow for turning of cars and school buses, so that they do not have to reverse all the way to Links Road. He elaborated that all the surrounding plots are served by this road. He added that roads serve many other purposes including walk ways, storm drains, and fibre pipes. He testified that the disputed plot now blocks access to Links Road for the neighbouring Plot No 5676 owned by the Mombasa Secondary School for the Physically Handicapped. It also blocks rear accesses for the Plots No 11350, 9229. He added that it also blocks the 3 metre wide access road leading to the Mombasa-Malindi Highway. He testified that they approved development of the neighbouring Plot No 7886 part of which was to put up an exit gate which spills into the disputed plot as a road. He testified that the SoS's plot No 11351, is also to have an exit into the disputed plot as a road, to so as to do away with the gate spilling into the busy Links Road. He stated that a donor had offered to improve the road and the County gave its approval. He testified that this was a critical road and that is why it is 20 metres wide. He testified that a survey plan F/R No 190/55 of 1988 (which merged two plots belonging to Mombasa School for the Physically Handicapped) also identified the plot as a road.



18. On the manner of allotment of the disputed land, he testified that he could not get in the County offices any document concerning creation of the plot and the County Government is not aware of any allotment of this land. He testified that before allotment, comments are collected from the County Government. He testified that on receiving the complaint herein, his office requested for documents from the National Land Commission (NLC) which were supplied. These comprised of an allotment letter, receipts for payment of stamp duty, some approvals, acceptance by the allottee, a transfer done by the original allottee before grant was issued, the grant itself, and a letter of indent. He could see that title was allocated for residential purposes though the area is for learning institutions and he was not aware of any change of user. On the survey plan F/R No 284/22, he testified that there is no approval as it is not signed. He could not tell the circumstances leading to survey to create the disputed plot which survey was done by Mr EMJ Kiguru. His view, however was that this was not a proper survey as it did not have details of the allotment letter, PDP, and those who approved. He added that the plaintiff's PDP does not indicate the neighbouring plots. He pointed at Mr Kiguru's survey report (done during the injunction application) which stated that the survey of the suit property was only provisional and elaborated that a provisional survey plan cannot create a Deed Plan. He also testified on the grant of the plaintiff. He identified that it required submission of development plans within 6 months and for a 24 month period for completion of developments which was not done. He stated that the user is said to be residential which is inconsistent with the nature of use of the area, which is educational. He also identified difference between the Deed Plan annexed to the title and the Deed Plan which Mr Kiguru annexed in his survey report. He found it abnormal that there was variance in the Deed Plans.
19. He referred to the process of allotment of the land and made reference to the documents supplied by the NLC on how the suit land was allotted. He could see that there was application dated 16 June 1995 from Brayastone Limited and Mary S. Wanjohi for two plots measuring 0.199 Ha and 0.5020 Ha being Commercial/Residential. Recommendation was on 18 July 1995 and approval on 21 July 1995. He referred to the allotment letters supplied which bore the date 22 June 1995 and observed that the allotment letters came prior to the approval. There were two allotment letters supplied, one by the County Surveyor, and the other by the NLC. He pointed at discrepancies in the two letters of allotment. The one supplied by the Land Registrar, has the land being allotted as "LR MN/I/2458 – Residential Plot- Mombasa", whereas the other supplied by the NLC has the plot identified as "Uns. Residential Plot." Both refer to land measuring 0.500 Ha. The receipt was also for the Plot MN/I/2458 and not the Plot No 9596. The allottee is however the same i.e Mary Symbua Wanjohi and the reference letter in the allotment letters is the same, i.e 31500/XXI/139. He pointed out that acceptance was on 2 August 1995 after the 30 days indicated in the allotment letter. He found it odd that the letter of allotment only indicates one name yet the applicants were two persons. He stated that an allotment letter would have a PDP attached but these ones did not have any but instead had a photocopy of the survey plan for the next plot, which is the plot for the Secondary School for the Physically challenged. He added that the acceptance references Plot MN/I/2458. He elaborated that this Plot MN/I/2485 is the plot belonging to SoS. He also referred to documents supplied by the NLC from the Cadastral Checking office and to comments made on 31 August 1995. His interpretation was that it was stated that the survey was approved for Data Only and not for creation of a plot, as it was noted that 'plot curved from road.'
20. Cross-examined by Mr Agwara, learned counsel for the plaintiff, he testified that on the face of it, the title of the plaintiff looks authentic. The Deed Plan also looks authentic only that the survey plan number is not indicated. He could see that there are residential plots also within the area. He reiterated that an allotment letter needs circulation but there is no record of the allotment letters reaching the local authority. He acknowledged however that the County Government has issued rates clearance for the disputed plot though he stated that one can generate payment for rates even when the County



has no data on the property. He was aware that at some point the owner of the disputed plot applied for its development but it was cancelled. He acknowledged that the plaintiff's title does not show any inhibitions. He could see that the PDP No 104 was not signed by the Commissioner of Lands.

21. DW-2 was Samuel Kariuki Mwangi, a Senior Registrar of Titles working in Mombasa. He testified that the suit plot was registered on 14 November 1995 as a new grant from the Government. The first owners on registration were Jeannine Wyser and Rudolf Hunziker as tenants in common. It has changed hands several times to the current proprietor who is the plaintiff. He testified that the process of allotting land is that land is allocated in Nairobi and what they get in the registries is a forwarding letter requesting for registration. He denied that the registry wished to create a parallel title as claimed in the plaint. He was cross-examined on deed plans for the abutting plots, all of which he stated do contain particulars of neighbouring plots, save for the deed plan for the plot in dispute which does not capture them. He affirmed that the plaintiff is the entity registered as proprietor of the disputed land as the fifth owner.
22. DW-3 was Savio Ochieng Omalla, a licenced surveyor. He had a report dated 12 June 2020 which he produced as an exhibit. He stated that he was instructed to undertake a topographical survey aimed at developing a masterplan for SoS. There was intention to improve the roads and schools in that area. In his professional opinion, the disputed plot is a road reserve. He also testified on two survey reports, the one of Mr Kiguru (prepared during the injunction application) and the one of Mr Teddy Mulusa (Mombasa District Government Surveyor), dated 22 June 2020. He referred to Mr Kiguru's report which provides a provisional survey plan F/R No 284/22 and testified that it was not possible to create a title based on a provisional survey plan. According to him, this survey plan was used "for data only" and he referred to the authentication section of the survey plan bearing these words. He also had a look at the computations file for this survey. He found that the notes therein stated that it was survey for a new grant for residential plot adjacent to MN/I/2458 and the authority for survey was the allotment letter of 22 June 1995. He found the computed area to be 0.3820 Ha yet the acreage was 0.500 Ha which he found unusual. He also found it curious that the computations file would have a letter of allotment bearing the plot MN/I/2458 which is the SoS plot. He pointed out that the computations file does not have an approved PDP yet it is the PDP which would indicate what was being surveyed. Instead of a PDP, only a sketch was annexed. According to him, the survey was approved for data only and he referred to comments by the Cadastral Checking Office on 31 August 1995. He concluded that the survey was only provisional as it missed a PDP and could not be used to produce a deed plan or a title. He testified that from a survey standpoint, there would be no plot created. He faulted the survey report of Mr Mulusa for concluding that the survey was not provisional. He also identified that the allotment letter in the computations file is not signed yet that in the records of the NLC is signed. He testified that they should mirror each other. One allotment letter also had some signatures on circulation and the other did not have. He added that the acceptance letter of 2 August 1995 bore the title MN/I/2485, which is the SoS plot. On the form GA1 used to apply for allocation of land, he found it unusual that two plots are indicated. He stated that the principle is that one form is used for allocation of one plot. He referred to the letter dated 2 August 1995 by Mary Syombua transferring her interest in the unsurveyed plot. He also questioned how the transfer by Mary received on 13 September 1995 would lead to instruction to prepare a new grant on the same day, for it would not be possible to survey the land, take it for checking, and come up with a new grant and lease on the same day. He observed that the grant was forwarded for registration on 15 September 1995. He queried how, land that was being transferred as unsurveyed on 13 September 1995, would have a new grant for registration on 15 September 1995 and the new grant was picked on 22 September 1995. He stated that it would not be normal for the process to move from unsurveyed land to a grant being registered and collected within one week. He was of opinion that there was fraud in acquiring public land. He did state that



- there is another plot that exists bearing the same number as the suit plot, i.e MN/I/9596 which came about from subdivision of a Plot No 492 Section I/MN. The title therein is for Nyalı Development Company Limited.
23. DW-4 was Hasmukh Kanji Patel the 1<sup>st</sup> defendant in the suit filed by Technology Investments. He is the CEO and Managing Director of Mombasa Cement Limited. He testified that they (Mombasa Cement) allocated funds for Community Social Responsibility (CSR) in Mombasa including refurbishment of buildings, institution boundary walls, and community roads. For the subject dispute they were involved in construction of the boundary wall for SoS, the School for the Deaf and Physically Disabled. They also did some works for Swaminarayan School. Swaminarayan had acquired a neighbouring plot owned by Vulji Mulji Limited and requested for assistance in fencing it. They asked for access from the County Government for the hammerhead access road. While continuing with construction, their hoarding was pulled down. A container was also placed and access blocked. He testified that he has no personal interest on the land. Owing to the stoppage of works he stated that he has suffered loss and claimed the amounts in his counterclaim. On cross-examination by Mr Agwara, he acknowledged that he has not presented a copy of the contract and not supplied receipts confirming expenditures in the counterclaim.
24. DW-5 was Teddy Mulusa who served as District Surveyor Mombasa. He presented two reports, one dated 22 June 2020 and another dated 5 October 2020. The first report was prepared when the application for injunction was under address. The second report was subsequently made and contains additional information. His evidence was that the survey for the plot being FR No 284/22 was done by Mr Kiguru and final approval given on 1 September 1995. He stated that what was used was a provisional survey. He affirmed that the allotment letter did not have a proper PDP and what was attached does not qualify as a PDP. He acknowledged that plan FR 284/22 does not indicate when it was approved and he could also see the words “for data only” which was on 31 August 1995. He however was of opinion that there may have been approval for it on 1 September 1995 by the Director of Surveys. He testified that reservation for a road is not done by the survey department but by the planning department and survey does not deal with land allocation. His view of the area was that no plot was locked out from accessing the main roads and highway. He was of opinion that the suit land exists as a private plot. He acknowledged that it was there before a road but it is now a private plot. He could not however tell how it changed from being a road to a plot.
25. DW-6 was Mepani Naran Valji, the Chairman of Shree Cutch Satsang Swaminarayan Mandir Temple. His evidence was that on the Plot No 7888 is the school Shree Swaminarayan Academy which they own. He stated that the plot was created through PDP No CT/12/25/85/2 dated 6 November 1985 and that the PDP provides for a 20 metre road connecting Links Road and a 3 metre wide foot lane to access Mombasa-Malindi Road. He referred to the Deed Plans for the plots and pointed out that they do indicate the suit plot as a road. He testified that the title to Plot No 7888 was issued on 27 July 1992.
26. DW-7 was Ketel Patel, a director of the 3<sup>rd</sup> plaintiff in the case No 179 of 2020. They are currently the registered proprietors of the land parcels MN/I/7886 and 7887 though they are in the process of transferring the same to Shree Cutch Satsang Swaminarayan Temple. He referred to the Deed Plans in the two titles which are Plans No 158779 and 158780 and stated that they indicate the road in issue. The grants to the two plots were issued on 14 April 1992 and 15 April 1992. He pointed out that these titles came prior to the plaintiff’s title which was issued in 1995. He also added that the deed plan attached to the plaintiff’s title does not show neighbouring plots. He was cross-examined by Mr Agwara inter alia on the use indicated in the titles which shows residential.
27. DW-8 was Solomon Mbuthia, a Senior Legal Officer working with the National Land Commission. He also had a pre-recorded witness statement which he adopted as his evidence in chief. In it, he stated



inter alia that the disputed plot was first offered as a letter of allotment Ref No 31500/XXI/139 dated 22 June 1995 to Mary Syombua with an attached plan 31500/XXI/136B. The land being allotted was MN/I/2458. The allotment was approved vide signatures from both the Permanent Secretary and the Minister for Lands. The allottee accepted the offer by paying Kshs 183,535/= vide letter dated 2 August 1995. By the letter dated 28 August 1995, Mary Syombua transferred the land, now referenced as MN/I/9596 to Jeanine Wyser and Rudolf Hunziker. The form of transfer was duly signed by the Commissioner of Lands with instructions to create a new grant dated 13 September 1995. A draft grant dated 14 September 1995 was prepared to Jeanine Wyser and Rudolf Hunziker as tenants in common and stamp Duty was paid. Under cross-examination, he did state the land was allotted as unsurveyed land and subsequently a parcel number was given. He extrapolated that there must have been a survey. His file did not however have the survey plan. He stated that when Mary Syombua paid for the allotment, the land appears to have been MN/I/2458, and her letter of acceptance also bears reference to the plot MN/I/2458. There was no explanation in his file how the plot changed from No 2458 to No 9596. From his experience, change of number would arise from a survey process, but there was no correspondence to this effect in his file. He did not wish to speculate as the NLC took over the file as it is. There was no ground report in their file and no PDP. He affirmed that what is in the file is an allotment letter for unsurveyed land and there is no payment for stand premium for the Plot MN/I/9596. He affirmed that ideally, an application in the GA1 form should be for one property and that authority to allocate land should come before issue of the Letter of Allotment. The ground report, PDP and allotment letter should be in the file but they did not have a PDP or ground report.

28. DW-9 was Bartholomew Mwanyungu a registered licenced surveyor. He had a report dated 25 September 2020 which he produced as an exhibit. He had been instructed to revisit the origin of the parcels No 11315, 7886, 78888 and 2458. On the Cadastral Checking office records, he differed with the opinion of Mr Mulusa. His view was that the survey was approved for data only on 31 August 1995, and he thought the approval of 1 September 1995 would be too short a period to have an approved PDP for it would only be one day later. In cross-examination by Mr Agwara, the deed plan to the plot No 9596 was put to him and his evidence was that it had no abuttals which is mandatory. On the cadastral check he could see the final approval to be that of 1 September 1995 and it showed “approved.”
29. No person from SoS came to testify and with the above evidence the defence (including plaintiffs in Mombasa ELC No 179 of 2020) closed their respective cases
30. Counsel were invited to file written submissions, which they did, and I have taken these into account before arriving at my disposition.

### **C. Disposition**

31. The plaintiff in this case does hold a title CR No 27815 to land registered as MN/I/9596. She asserts that this is a good title that ought to be protected. The 1<sup>st</sup> defendant on the other hand (and the plaintiffs in the suit Mombasa ELC No 179 of 2020) contend that this is not a good title as the land where it is located is actually a road reserve. The substantial issue for determination is whether the plaintiff’s title is legal or whether the land is actually a road reserve. If it is a road reserve then such title cannot be protected by dint of Article 40 (6) of The Constitution which provides that the right to property as outlined in Article 40, does “not extend to any property that has been found to have been unlawfully acquired.”
32. So is the title of the plaintiff a well created title or is it a road reserve ? This will be unearthed by tracing the history of the said title. From the evidence provided, the history of the land commences in a Form GA1 (affirmed to be the Form filled when applying to be allotted land by the Government in the 1990s) where two persons, namely, Brayastone Limited and Mary S. Wanjohi, applied to be allotted land by



the Government. That form was received on 16 June 1995. Both Mr Mbutia and the surveyors who testified had consensus that ordinarily, such form would only contain one plot for allocation, in other words, it would be one form for one plot, not one form for two plots. However, this form sought allocation for two plots said to measure 0.199 Ha and 0.5020 Ha which plots were said to be located in Mombasa. This application went through the Commissioner of Lands, W. Gacanja, who made the remark “recommended” on 18 July 1995; then the Permanent Secretary who also made remarked “issue” on 21 July 1995; then the Minister Hon J.K Mulinge who remarked “approved” on 25 July 1995. Prior to this form being filled and these approvals being given, there is no indication that the subject land was one that had been earmarked for issue of a grant and there is no evidence of it being advertised as required by Sections 12 and 13 of the Government Lands Act (GLA) (Cap 280) (repealed in the year 2012) which provided as follows :-

12. Leases of town plots shall, unless the President otherwise orders in any particular case or cases, be sold by auction.
13. The place and time of sale shall be notified in the Gazette not less than four weeks nor more than three months before the day of sale, and the notice shall state—
  - (a) the number of plots and the situation and area of each plot;
  - (b) the upset price at which the lease of each plot will be sold;
  - (c) the amount of survey fees and the cost of the deeds for each plot;
  - (d) the term of the lease and the rent payable in respect of each plot; and
  - (e) the building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot:

Provided that the lease of any plot may be withdrawn from sale by the Commissioner at any time before it is offered for sale

33. From Section 12 above, it will be observed that where a plot by Government was to be sold, then unless otherwise ordered by the President, such plot needed to be sold by auction and the sale would take place after Gazettement as required by Section 13. In our case, I have seen no evidence of any approval by the President pursuant to Section 12 above, and no evidence of any Gazettement or sale by auction pursuant to Section 13 above. Instead, what we have is a mere application by two individuals for plots in Mombasa, recommendation by the Commissioner of Lands; a sort of order ‘to issue’ by the Permanent Secretary; and an ‘approval’ by the Minister. I am not persuaded that there was adequate compliance with Sections 12 and 13 to enable a title issue in the first place.

34. I am not even persuaded that the three officers had power under the Government Lands Act to allocate public land to private individuals as private plots. Allocation of Government land was governed by Section 3(a) of the GLA which provided as follows :-

3. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—
  - (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;



There could be delegation of the powers of the President above to the Commissioner of Lands in the following cases only:-

- (a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;
- (b) for town planning exchanges on the recommendation of the Town Planning Authority, Nairobi, within the total value, and subject to the conditions, laid down by the President;
- (c) the sale of small remnants of land in the City of Nairobi and Mombasa Municipality acquired for town planning purposes and left over after those town planning needs have been met;
- (d) for the use of local authorities for municipal or district purposes, viz. office accommodation, town halls, public parks, native locations, fire stations, slaughter-houses, pounds, incinerators, mortuaries, crematoria, stock sale yards, libraries, hospitals, child welfare institutions, garages, housing schemes, markets and public cemeteries;
- (e) the extension of existing township leases on the fulfilment of the conditions specified therein as being precedent to such extensions;
- (f) the temporary occupation of farm lands on grazing licences terminable at short notice;
- (g) the sale of farms and plots which have been offered for auction and remain unsold, such grants being subject to the general terms and conditions of the advertised auction sale and the application therefor being submitted within six months of the date of the auction in the case of township plots and within twelve months in the case of farms, except that in the case of godown plots the power to sell shall not be limited to a period of six months from the date of sale.

35. From the foregoing, the institution which had power to allocate unalienated Government land was the institution of the President. The Commissioner of Lands, or the Permanent Secretary, or the Minister, did not have power to alienate Government land save for what was specifically delegated to them. The delegation, as noted above, was only limited to grants for the following :-

- a. Religious, charitable, educational or sports purposes,
- b. For town planning exchanges,



- c. Sale of small remnants of land in Nairobi and Mombasa acquired for town planning purposes and left over after those town planning needs have been met,
  - d. Use by local authorities,
  - e. Extension of existing township leases,
  - f. Temporary occupation of farm lands on grazing licences,
  - g. Sale of farms and plots offered for auction and remain unsold.
36. The suit property certainly did not fall into any of the above categories. The grant was not issued by the President and it could not be issued by the Commissioner of Lands or the Permanent Secretary or the Minister under delegated authority as it did not fall under the categories of grants for which they were empowered to issue. I have already pointed out that even then, there was never any advertisement by auction of any such land to be granted. It follows that the purported allocation of land by the Commissioner of Lands, the Permanent Secretary, and the Minister was illegal and is null and void.
37. Be that as it may, an allotment letter was issued to Mary Symbua following her application in the GA1 Form. There are actually two different allotment letters bearing the same date, that is 22 June 1995, and the same reference number, which is reference No 31500/XXI/139, that were displayed within this suit and both letters are addressed to Mary Symbua Wanjohi. What is different in the two allotment letters is the description of the plot being allotted. One allotment letter describes the plot being allotted as “LR No MN/I/2458 – Residential Plot – Mombasa”, whereas the second allotment letter describes the land being allotted as “Unsurveyed Residential Plot – Mombasa.” Now, it is not clear which allotment letter gave rise to the suit property, but whatever the case, the land parcel MN/I/2458 could not have been allotted. The evidence adduced shows that the plot MN/I/2458 is actually the neighbouring land belonging to SoS Children’s Village, and it measures 6.322 Ha, and title to SoS had been issued on 8 August 1980, being a leasehold term of 99 years from 1 August 1976. I would believe that though the allotment letter to the plot MN/I/2458 was issued to Mary Symbua Wanjohi, no allocation of this land i.e MN/I/2458, was made to the said applicant. I will therefore make the assumption that the allotment was made pursuant to the allotment letter describing the land as “unsurveyed residential plot- Mombasa.” This indeed, tallies with the evidence of Mr Mbuthia, of the NLC, who did state that according to their records, the allotment letter that gave rise to the disputed land is that describing the land as “unsurveyed residential plot – Mombasa.” Well, if this is the case, then there is an instant anomaly for it is apparent that the allotment letter was issued even before the recommendation by the Commissioner of Lands, the directive to issue by the Permanent Secretary, and the approval by the Minister which came on 25 July 1995. Even assuming that the Commissioner of Lands, the Permanent Secretary and Minister could allocate the land, the allotment letter was issued before they made their recommendations for allocation, which would be irregular.
38. The above aside, the experts who testified herein held consensus that whatever land was to be allotted needed to be described in a PDP. It is this which would guide the surveyor on what land to go and survey for purposes of creation of title. All experts who testified were in agreement that the allotment letter issued herein did not have a PDP. Instead, what it had was a mere sketch. Without there being a PDP, I do not see how the process of survey could have commenced and be completed so that a deed plan is drawn and title prepared. Without a PDP, it cannot be said that the plot had been approved by the Planning Development Department for allocation.
39. The survey work nevertheless proceeded and survey was done by EMJ Kiguru , a private licenced surveyor. He did the computations and the computations file forms part of the records in the survey reports produced. However, the survey was not without controversy. When it came before the Assistant



Director on 31 August 1995, he made the remarks “Approved for data only. Plot curved for a road. Requires proper PDP from C/L (Commissioner of Lands).” However, on the following day, that is 1 September 1995, the following remarks were made, “Approved, see CR/269W/110/21.” This reference CR/269W/110/21 was said to comprise of a letter but this letter was never made available and we will never know what it stated.

40. There was of course huge debate as to whether the survey was approved or not, given the two disparate remarks made on 31 August 1995 and 1 September 1995. In my opinion, it really doesn’t matter whether the remarks of 1 September 1995 were an approval. You cannot approve an illegality. If the plot was a road, it doesn’t matter that a person sitting in his office, at a whim, decides that this is going to be a plot.
41. I am aware that in his submissions, Mr Agwara, learned counsel for the plaintiff, did venture to submit that there was no evidence tendered that can “even remotely demonstrate that the suit property is and/or was ever a road reserve.” I do not think that it is debatable that the subject plot was a road before the purported allocation. If it was not a road then what was it? It certainly was not a vacant plot. But as I am saying, it is beyond debate that it was a road. In as much as Mr Agwara tried his best to discount the PDP dated 11 October 1985 ref No CT/12/25/85/2, that to me is the actual PDP that existed in the year 1985. Indeed, all experts who testified confirmed that this is the proper PDP for that time and which allocated land for different users. If this was not the PDP, then you would expect the plaintiff to offer evidence of what he considered to be the correct PDP at that time, which evidence was never forthcoming. I am persuaded that this was the prevailing PDP as at 1985 and it clearly delineated the plots in the area, their use, and the roads accessing them.
42. The disputed plot was part of the road exiting from Links road, through Swaminarayan School and passed between a plot ‘E’ which is the plot for the Mombasa Secondary School for the Physically Challenged. It actually split this plot into two and also split into two, the plot belonging to Customs Training Centre before spilling into the Mombasa-Malindi Highway. Other survey plans that follow affirm that this was the position of the disputed plot as at 1985. For example, FR No 190/155 prepared on 20 July 1988, which consolidated the split plot for the School for the Physically Challenged, shows this plot as a road. What that survey did was to envelope the road to be within the plot for the School so as to have the existing road be a sort of hammer head cul-de-sac, though with a 3 metre wide foot road that allowed for foot traffic direct to the Mombasa-Malindi Road. If you look at the Deed Plans for the surrounding plots, they all show the disputed plot as a road. Deed Plan No 159779 of 7 January 1992 has this land as a road. So too, the Deed Plan No 158780 of the same date. It did not need a supply of the inventory of all roads in Mombasa, as suggested by Mr Agwara in his submissions, for there to be proof that the subject plot was a road. The existence of a road can be proved by PDPs, survey plans and other such documents, and in my view, there is overwhelming evidence of the subject plot being a road prior to title being carved out of it.
43. The next question that arises is whether a public road was one which could have been alienated into a private plot. Though no counsel referred me to the *Public Roads and Roads of Access Act*, Cap 399, Laws of Kenya, I think that it is actually this statute which is operative when it comes to conversion and alteration of public roads. It provides as follows at Section 14 :-

14. Power to cancel or alter road of access

- (1) It shall be competent for a board for sufficient cause to order the cancellation or alteration of the alignment of a road of access, provided due notice has been previously given to any person who might be affected by such order.



- (2) The board shall have power to make an order for giving effect to any matter or thing over which the board has jurisdiction under this Act, or for the cancellation or alteration of any order previously made:

Provided that the provisions of this Act respecting the procedure to be followed and the notices to be given as respects an application to construct a road of access shall apply mutatis mutandis to the cancellation or alteration of any order previously made, and to any other order made under this Act.

44. It will be observed that the Board created under the said Act has power to cancel or alter a road of access. However, there needs to be notice and the procedure for construction of a road of access needs to be followed. The procedure for creation of a road of access is in Section 8 which provides as follows :-

8. Dedication of line of public travel

- (1) Whenever it is made to appear to the Minister that requirements exist for the establishment, alteration or cancellation of a line of public travel or for the conversion of a road of access into a line of public travel, the Minister may, by order published in the Gazette, dedicate, alter or cancel such line of public travel or convert such road of access into a line of public travel.
- (2) In every order made under this section, the line of public travel to be established, altered or cancelled or the road of access to be converted into a line of public travel shall be clearly described.
- (3) Where an order under this section dedicates a line of public travel or converts a road of access into a line of public travel, such line of public travel shall be absolutely dedicated to the public as a public road within the meaning of any law now or hereafter in force relating to public roads.
- (4) Before making and publishing any order under this section dedicating a line of public travel or converting a road of access into a line of public travel, the Minister may, where there is a board, call upon such board to investigate and report upon the necessity for, or desirability of, any such line of public travel and to advise as to the best alignment of such a line of public travel.

45. From the foregoing, it will be noted that any alienation or alteration of public roads, needs to be done by the Minister through a Gazette Notice. There is no Gazette Notice displayed in this case where the subject road is being alienated. What this means is that the space continued being a road and was not subject to alienation. That is why I say that it does not matter whether the Director of Surveys approved the survey plan FR No 284/22 which created the subject plot. As long as the plot was previously comprised within a public road, which it was, the process of alienation of the public road as required under CAP 399 needed to be followed, which was not. If there was no alienation and conversion of the public road into a plot, then the land remained alienated for purposes of use as a public road and it could not be allocated.

46. It has been held that where Government land had been set aside for specific use then the said land could not be allotted. For example in the case of *Chemey Investments v Attorney General & 2 others*, Nairobi



Civil Appeal No 349 of 2012 (2018) eKLR, land had been set aside for a public hospital, and it was held that it was not to be capable of alienation. It is the same position here. The land where the disputed plot falls, was prior to creation of title, a public road, and the process of decommissioning it as a road so that it can be a private plot was never followed. It doesn't matter whether a person undertakes survey for it, and whether the Director of Surveys and Director of Physical Planning approve creation of such plot. For so long as the process of decommissioning has not been undertaken under CAP 399, the land remains a road for the public. Moreover, assuming that a plot had been created for it, the process of allocation pursuant to Section 3, 12 and 13 of the Government Land Act needed to be followed and I have already demonstrated above that the said process was never followed. The land remained a road all along.

47. Being a road for the public, any person is at liberty to move court to have any title over it cancelled, for this is land belonging to the public. I make this statement in light of Mr Agwara's submissions, that the defendant and the plaintiffs in the suit No 179 of 2020 have no locus standi. It was argued that they are not public authorities and therefore have no locus standi to sue. That argument is misplaced. As I have mentioned, a public road is one for use by the public. Any member of the public is at liberty to move court to protect what belongs to the public. He/She does not need to have any permission from any public body in order to do so. He can assert rights over it because that property is dedicated to his use as well, for he/she is a member of the public, whether or not he uses the facility. To hold otherwise would be to go against public interest; any member of the public has a right to assert and protect public goods. The 1<sup>st</sup> defendant in the suit by Technology Investments and the plaintiffs in the suit No 179 of 2020, thus have every right to ask for the cancellation of the title of the plaintiff and are properly before this court. There was argument also that no evidence was forthcoming from SoS, which is the 1<sup>st</sup> plaintiff in the suit No 179 of 2020. It is immaterial. The court can rely on any evidence from any of the parties to determine whether or not the title of the plaintiff is genuine. Does it matter that one party did not testify? others did testify, and if their evidence is sufficient, irrespective of whether other parties testified, the court will proceed to make a determination on the title of the plaintiff.
48. From my discourse above, it will be seen that I am not persuaded that the title held by the plaintiff was properly created. It was illegally carved out of a public road. The next question is whether the title should stand or should be nullified.
49. In this case, the plaintiff has tried to make out a case of being an innocent purchaser for value and has urged that because of this, his title must be protected. She has also argued that this title has been transferred to various other persons before him and that he is the 5<sup>th</sup> owner. He has pointed out that the previous owner held the land for more than 8 years and even charged it. He thus believes that because of all this, his title should be upheld. To buttress the position of his client, Mr Agwara referred me to various cases concerning the protection of the title of an innocent purchaser for value. Significantly, Mr Agwara referred me to the case of *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others*, Civil Appeal No 156 of 2013 (2019) eKLR. In contrast, Ms. Mango, learned counsel for the plaintiffs in the suit No 179 of 2020, and Mr Onyony, learned counsel for the 1<sup>st</sup> defendant in the suit No 50 of 2020, did refer me to the case of *Kenya National Highway Authority v Shalim Masood Mughal & 5 others*, Civil Appeal No 327 of 2014 (2017) eKLR.
50. The facts in the case of Elizabeth Wambui Githinji were that in the year 2010, the homes of the appellants, located in Runda Mimosa, an upmarket estate in Nairobi, were earmarked for demolition for being on a road reserve. The appellants filed suit and inter alia claimed that their right to property under Article 40 of The Constitution was being violated. The trial court found that the land in issue formed part of what the Government had already compulsorily acquired for a road, which road was 80 metres in width, and that the road acquired was not 60 metres in width as claimed by the appellants.



The trial court thus held that the titles fell within a road reserve and liable for cancellation. On appeal, the majority (Ouko and Sichale JJAs) were of opinion inter alia that the appellants were innocent purchasers for value and their titles deserved protection. Odek JA was of a contrary opinion and held that the principle of indefeasibility of title cannot extend to land that is illegally acquired.

51. In the Shalien Masood Mughal case, there was a dispute over land abutting the Nairobi-Mombasa road at the junction of Likoni Road. A grant to the land in dispute was issued on 3 December 2002 for a 99 year lease from 1 March 1999. In the year 2005, the plot was sold to the 1<sup>st</sup> respondent, Mr Mughal, and he was issued with a Certificate of Title. In the year 2010, the appellant, KENHA, commenced construction of the Southern Bypass and as far as the appellant was concerned, the disputed plot formed part of the road reserve and they moved into it. This prompted the title holder to move to court. The trial court found that Mr Mughal was entitled to protection. This decision was reversed by the Court of Appeal. The Court of Appeal found that the plot actually fell within a previously acquired road reserve. It did not matter whether any exercise of due diligence would have revealed the extent of the reserve. What was important was that this was actually a road reserve and the court was of opinion that the whole world ought to have been aware of this fact. The court pronounced itself as follows :-

The Article (Article 40 of The *Constitution*) protects proprietary rights but under the current Constitutional regime those rights are not absolute. They can be limited and one of the limitations appears in Article 40 (6) under which the protection does not extend to any property that has been found to have been unlawfully acquired. One may ask whether the disputed plot in this matter was lawfully acquired but it is unnecessary to go there. One may even wonder whether, with the exercise of due diligence it was possible to establish the extent of the road reserve for the Nairobi/Mombasa Highway before the disputed plot was created. The fact of the matter is that there was in existence a road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any land register. It is an overriding interest and not an equitable interest. Indeed it is difficult in the circumstances of this case to accept that Mughal was not aware of these facts noting his evidence that he was literate enough to obtain information about the plot from the internet and further noting the information in the public domain from the Ndung'u report which rang alarm bells about irregular/unlawful plot allocations in the country.

39. ...I do not find that Mughal's rights were violated by the entry into the road reserve by Kenha since Kenha had the right to so enter and carry out the road works. Mughal was entitled to his property to the extent that such property did not encroach upon land that was acquired and set aside for a public purpose. It would otherwise be unlawful to superimpose a grant/certificate of title on land which is already lawfully alienated for public purpose.

52. In the above case, it will be seen that it did not matter that Mr Mughal was an innocent purchaser for value (though there was some doubt on this). What was important was that the title fell on a road reserve and given that position, Mr Mughal's title could not be protected.
53. I am of the same view as that expressed in the Mughal case and I think that this is in fact the correct interpretation of the current law as set out in Section 26 of the *Land Registration Act* which provides as follows :-

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.

54. It will be seen from above that title may be challenged on the two grounds set out in Section 26 (1) (a) and (b). The first challenge is on the ground of fraud or misrepresentation to which the title holder is proved to be a party. The second challenge is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. In the case of *Elijah Makeri Nyang'wara v Stephen Mungai Njoroge & another*, Eldoret ELC No 609B of 2012 (2013) eKLR, my view of Section 26 (1) (b) was that it is not necessary for the title holder to be party to any of the vitiating factors and I held as follows :-

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.

55. I am still of the same persuasion on the effect of Section 26 (1) (b). So long as a title is tainted with illegality, or was procured unprocedurally or through a corrupt scheme, such title may be impeached irrespective of whether or not the current title holder was party to any of the vitiating factors. A title that was created illegally, unprocedurally, or through a corrupt scheme, remains unlawful and null and void throughout its existence. It does not now become a lawful title by the mere fact that it has been turned over to several downstream purchasers. Title does not become sanitized by being charged or being sold. It carries its stain throughout its life and is always at risk of cancellation and nullification. It is like a rotten egg. You can turn it over several times, even pass it over to somebody else, but it will still remain a rotten egg. It will not change its character to now become a fresh egg by the mere fact that it has changed hands.
56. In our case, the plaintiff's title is subject to cancellation and nullification irrespective of how many times it has been sold. The title was not sanitized by the mere fact of sale and the plaintiff's title herein remains tainted by the fact that it was illegally created out of a road. It doesn't matter that rates are being paid on it. It also doesn't matter that there had been some development plans that were approved. The stain of illegality did not go away because of these. The fact remains that the title is based on land



which is reserved for public use as a road. It doesn't also matter that nobody had come to court before to assert that the title is a road. It is probable that nobody knew of the existence of the title or that it was on a road reserve and therefore had no need to come to court. The public certainly did come to court when the plaintiff dangled her title after the public wished to improve the road therein.

57. The plaintiff received an illegal title and that title is subject to cancellation by dint of Section 26 (1) (b) of the *Land Registration Act*. I am persuaded to cancel the title and I proceed to do so. I declare that the title CR No 27815 for the land parcel MN/I/9596 currently registered in name of Technology Investments Limited is located on a road reserve and it is an illegal title which this court hereby nullifies and proceeds to cancel. The Land Registrar, Mombasa, is hereby directed to proceed and make an entry in the register of that land parcel that the title is so cancelled and no further transactions should take place based on the said title. I was not shown any Registry Index Map (RIM), but if there is an RIM which contains the suit property as part of the titles, then I order that the RIM be duly amended so as to remove the suit land from the map. It follows that the plaintiff's case fails and it is hereby dismissed with costs.
58. The 1<sup>st</sup> defendant in the suit filed by Technology Investments had a counterclaim for Kshs 12, 200,000/=. There was no evidence tendered to support this claim. Despite making the pleading, nothing was offered as proof. Even in his submissions, Mr Onyony, learned counsel for the 1<sup>st</sup> defendant made no substantial submissions asking for the money in the counterclaim. I will thus dismiss the counterclaim in so far as it seeks the monetary award of Kshs. 12,200,000/=. The counterclaim otherwise succeeds in so far as it seeks cancellation of the title of the plaintiff. I will thus award costs of the counterclaim to the 1<sup>st</sup> defendant.
59. In the suit, Mombasa ELC No 179 of 2020, the plaintiffs also sought nullification of the title of Technology Investments Limited. They have succeeded. They also asked for orders of mandatory injunction to compel the defendant therein (Technology Investments) to remove whatever they have put that blocks access to the land and for a permanent injunction against her from any further blockage of the road. I grant these prayers. I direct Technology Investment Limited to carry away whatever it has put on the land within the next 14 days. If she does not do so, then the plaintiffs in the suit No 179 of 2020 are at liberty to proceed and remove any such items and pass over the costs to Technology Investments Limited. The plaintiffs have succeeded in their suit No 179 of 2020 and I award them costs of the suit.
60. I make no order as to costs in favour or against the 2<sup>nd</sup> defendant in the suit filed by Technology Investment.
61. Judgment accordingly.

**DATED AND DELIVERED THIS 29 DAY OF MARCH 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**MOMBASA**

