



**Ndegwa v Chweya & 2 others (Environment & Land Case
359 of 2013) [2023] KEELC 18410 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18410 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 359 OF 2013
FM NJOROGE, J
JUNE 29, 2023**

BETWEEN

JACKSON KAMAU NDEGWA PLAINTIFF

AND

MERCY MAKENA CHWEYA 1ST DEFENDANT

DISTRICT LAND REGISTRAR, NAKURU 2ND DEFENDANT

VIJAY LAXMI SHAH 3RD DEFENDANT

JUDGMENT

Introduction

1. The undisputed facts of the present suit are that it commenced with the plaintiff who owned the suit property and applied for its subdivision in vain. While stuck in the subdivision process, he met some persons who agreed to assist him subdivide the property. It appears that the property was finally subdivided and the plaintiff admits in his plaint to having disposed of one parcel out of the two that resulted from the subdivision to one Alice Wambui Njoroge. No lease or certificate of lease was immediately issued in respect of the second parcel, no 223, which happens to be the suit property herein. The evidence adduced by the plaintiff brings to the fore the fact that the lease to the suit land was finally registered in his name after the subdivision process he had commenced was finalized by other persons. The defendants do not dispute that fact. However, it was his evidence that he was never issued with a certificate of lease after the lease to the suit land was registered in his name. The plaintiff states that after the lease was issued for plot no 223 and registered in his name, the defendants colluded and fraudulently procured a certificate of lease in the name of the 1st defendant without issuance of a certificate of lease in the plaintiff's name and the 1st defendant quickly sold the land to the 3rd defendant, hence the orders sought in the plaint to nullify the 1st and 3rd defendants' certificates of lease and for issuance of a fresh lease in the plaintiff's name. The 1st defendant defended herself stating that she



purchased the property at an auction which disposed of the suit premises pursuant to execution of a decree for Kshs 501,500/- in a case filed against the plaintiff herein in the Children's Court. The plaintiff admitted that such a case existed but charged that he was never involved in its hearing and that it "went underground" from 2005 when he applied for a DNA test only for it to resurface in 2012 when a warrant of attachment of goods was obtained. The plaintiff states that the land was advertised for auction which auction took place on 15/4/2011 after it was postponed from 16/3/2011. The plaintiff relies heavily on allegations of breach of the Auctioneer's Rules before, during and after the auction in order to establish fraud. In attempting to establish that the transfer to the 1st defendant was illegal, the plaintiff's principal thrust was that the auction took place on a date for which it was not advertised; that the advertisement was in respect of a different property; that no valuation was conducted on the suit premises prior to the auction and that the warrant of attachment was in respect of movable goods only; that though the venue of the auction was to be in Nakuru the sale occurred in Nairobi and that by the time of the auction Block 12/223 was not in existence and could not therefore be the subject of any auction. The further transfer of the suit land to the 3rd defendant is faulted by the plaintiff for having been carried out on 30/5/2013 while there was an order of court issued on 13/5/2013 barring the same but the 2nd defendant denies that any such order was ever served on the land registry. As stated herein earlier, the 1st and 2nd defendants aver that the suit land was regularly transferred to the 1st defendant after purchase at a public auction. Consequently, they state that her transfer of the suit land to the 3rd defendant was valid. All the 3 defendants concur on the auction of the suit property which purportedly occurred on 15/4/2011 but jointly disagree with the plaintiff's claim of fraud.

2. Long after an auction that disposed of his land had been conducted, the plaintiff on 26/7/2017 filed Nairobi Petition Number 368 of 2017 claiming constitutional violations. He sought various declarations inter alia, that the manner in which the trial magistrate allegedly alienated the suit land to the 1st defendant herein without jurisdiction and that the transfer to the 3rd defendant contravened his right to human dignity. The petition also sought other orders that the auction be reversed, that the suit land be reinstated back to him and that the 3rd defendant do vacate from it and that goods taken from his house on the suit land be returned. That petition was transferred to Nakuru High Court where in a ruling dated 26/7/2018 it was struck out for inter alia violation of the res sub judice rule, lack of precision and failure to demonstrate how the respondents have violated the plaintiff's constitutional rights. That led to the lodging of the present suit.

Pleadings

Plaint

3. The plaintiff filed a Plaint dated 10/05/2013 on 13/05/2013 which he amended on 21/01/2014. The amended plaint seeks the following prayers:
 - a. That the certificate of lease issued in the 1st and later in the 2nd defendant's names be cancelled and a fresh one be issued in the plaintiff's names.
 - b. That the defendants jointly or severally be condemned to pay the costs of this suit.
4. The plaintiff averred that he was the original allottee and title holder of land parcel No. Nakuru Municipality Block 12/170 (hereinafter "Bk 12/170" or "plot no 170 for brevity"; that he subdivided the said parcel of land into two portions; that land parcel No. Nakuru Municipality Block 12/224 (hereinafter "Bk 12/224" or "plot no 224 for brevity" was registered in the name of Alice Wambui Njoro; that a lease was issued in the plaintiff's name for the other parcel which turned out to be Nakuru Municipality Bk 12/223 (hereinafter "Bk 12/223" or "plot no 223 for brevity"; that the defendants colluded and illegally procured a certificate of lease in the names of the 1st defendant who has



since fraudulently transferred it to the 3rd defendant during the pendency of the present suit hence the orders sought for the cancellation of the Certificate of Lease dated 20/03/2013 and orders compelling the same to be registered in his name. The plaintiff avers that the titles were obtained by criminal and corrupt means. The alleged particulars of fraud and illegality are listed in paragraph 5 of the amended plaint.

1st Defendant's Defence

5. The 1st defendant filed her initial statement of defence dated 16/05/2013 on 19/05/2013 and later filed an amended version dated 03/03/2014 on 18/3/2014. She denied the plaintiff's claims of fraud, illegality and collusion and averred that the suit property Nakuru Municipality Block 12/223 initially belonged to the plaintiff before it was sold to her in a public auction pursuant to a warrant of sale issued in Nairobi Children's Court Case No. 148 of 2004. The 1st defendant also averred that the orders issued in the Nairobi Children's case have never been faulted by any superior court on appeal hence there is no justifiable cause for the cancellation of the certificate of title issued to the 1st defendant on 20/03/2013.

2nd and 3rd Defendant's Defences

6. The 3rd defendant filed a statement of defence to the amended plaint dated 28/01/2014 on 29/01/2014 where the averments in the plaint were denied. The 2nd defendant filed its statement of defence dated 21/03/2014 on 25/03/2014 and also denied the plaintiff's claim.

Evidence

Evidence

7. Jackson Kamau Ndegwa, the plaintiff, testified as PW1 and produced a copy of title for Nakuru Municipality Block 12/170 as PExh.1, a copy of lease issued on 14/01/2013 for Nakuru Municipality Block 12/223 as PExh.2 and the photographs of the plaintiff's premises on Nakuru Municipality Block 12/223 as PExh.3 (a) to (f). He testified that Nakuru Municipality Block 12/170 belonged to him. He also testified that he had developed a nine bedroom building on it which he rented out to those not willing to stay in hotels; that he later applied for subdivision of Nakuru Municipality Block 12/170 but there were issues that arose and he was not able to subdivide the land; that on 7/04/2013, he was served by his lawyer with breaking orders which indicated that the suit property had been subdivided and sold two years before; that the property had been subdivided into Nakuru Municipality Block 12/223 and Nakuru Municipality Block 12/224, with the former registered in the 1st defendant's name. It was his evidence that he realised that rather than act for him, his advocates were acting for the opposite party; that on 8/04/2013 a break-in order had been issued and auctioneers broke into the house and took items that were inside. He conceded that the break-in order arose from a child maintenance case but asserted that he had never been served with process in that case and that he learnt that the property had been sold to the 1st defendant for Kshs. 5,000,000/= against a possible market value of Ksh. 50,000,000/=. He testified that after the auction he obtained a stay order which he showed to the auctioneer and his goods were returned. Later on, the 1st defendant and the then OCPD by the name Japheth Mwirichia went to the house and took him and his workers to the police station where he was detained up to 10 pm; the police declined his request that he be allowed to lock his house; after several days, he was charged in court and released but when he went back, he found his house completely empty and he stayed with neighbours; that while the stay order was in place, the 1st defendant after processing a subdivision using the plaintiff's name, sold the suit premises and transferred them to the 3rd defendant; that when the public auction was being conducted, Nakuru Municipality Block 12/223 was not in



- existence and therefore could not be sold through a public auction. He sought cancellation of the titles issued in the name of the 1st and 3rd defendants and asked that title be issued in his name.
8. Upon cross-examination by Mr Konosi, PW1 confirmed that he did not transfer Plot No. 224 to Alice Wambui but had given her blank transfer forms; that Alice worked at the lands registry; that his previous attempts to subdivide the land had earlier on failed and so he had sought Alice's help; that he came to know of the Children's Court case in 2005 upon service by FIDA; that upon his seeking a DNA test the case remained "underground" until 7/04/2012 when the warrant of attachment of movable goods came; that he never even attended any session of the matter in a courtroom; that he had visited the FIDA office and he was then ready to pay for maintenance. He stated that the way the house was sold was not proper; that the warrant of attachment was for movable goods only; that even just one car, if attached, could have satisfied the decretal sum of Kshs 500,000/= that the advertisement for sale of Block 12/123 was meant for sale of the suit property on 16/03/2011 but the sale is said to have taken place later on 15/04/2011. He further admitted that he later recovered from the events and got documents in the children's case and sought a review which review was declined by the children's court; he then filed Nairobi Petition No. 368/17 which was struck out on the basis that the issues raised in the said petition ought to have been raised in the present matter. He confirmed that he went to the Court of Appeal where a three judge bench also advised him to pursue the present case.
 9. Upon cross-examination by Ms. Wanjeri, he stated that he was not aware of any subdivision. He stated that he went to the lands office in 2008 and that the officer to whom the case was minuted had a friend called Alice Wambui; that he met Alice at the lands office; that Alice was a lawyer cum conveyancing officer; that he even paid her fees for her work; that he never paid anything for the transfer; that he simply wanted to get money to solve a problem he had; that he had asked Alice to assist him which she did not. The matter went to court and Alice was disciplined. He claimed to be still in possession of the original title to Block 12/170.
 10. Upon cross-examination by Mr Kisilah, PW1 admitted that his amended plaint stated that he owned Block 12/170 which he had applied to subdivide into plots no. 223 and 224; that Plot 223 was sold by the 1st defendant to the 3rd defendant; that Plot 223 was sold in execution of the decree in Children Court Case No. 148 of 2004 where one Sophia Mburu was claimant and he was the defendant; that when he applied for a review of the said orders, the magistrate declined jurisdiction; that the order dated 13/05/2013 which stayed any action was extended until the hearing of the suit. He insisted that the 3rd defendant was not innocent but an accomplice of the 1st defendant.
 11. Upon re-examination, he admitted to having executed an undated transfer; that the proceeds were expected to be transmitted later; that at the time of the auction plot No. 223 was non-existent and therefore the auctioneering was illegal and that the subdivision was done by the 1st defendant. At the conclusion of his cross-examination, the plaintiff's case was closed.
 12. However, on 20/02/2023, the plaintiff's case was re-opened and the plaintiff recalled. When he was referred to the certified copy of the register for plot no 223 filed by the 2nd defendant on 07/03/2023, he stated that he was never summoned by the District Land Registrar and neither was he ever issued with a certificate of lease in respect of the suit property. Upon cross-examination by Mr Kisilah, PW1 stated that though he agrees that entry No. 1 on the green card for plot no 223 shows that he was the owner of the suit property and entry No. 2 showed that the property had been registered in the name of Makena, he does not understand how Block 12/170 was subdivided and sold since he had tried to subdivide it but was not successful; that the suit is in respect of Block 12/223 which was a result of the subdivision of Block 12/170; that he challenged the registration of Makena as the owner of the



suit property through a High Court petition which failed, prompting him to approach the Court of Appeal.

13. Upon further re-examination he stated that he had filed an interlocutory application dated 13/5/2013 in the present matter; that the property was subdivided two years after the auction and that plot No.223 was auctioned while under his name. The plaintiff's case was then marked closed.

1st Defendant's Evidence

14. Mercy Makena Mbogori Alias Mercy Makena Chweya, the 1st defendant, testified as DW1. She adopted her witness statement dated 21/5/2020 as part of her evidence and produced the documents in her list of documents as exhibits DExh.1 – DExh.23. Her evidence is that on 24/02/2011 she came across an advertisement in The People newspaper of sale of land parcel No. Nakuru Municipality Block 12/123; the said advertisement had been put up by Muhatia Pala Auctioneers upon receiving orders from Nairobi Children's Court Case No. 148 of 2004 - Sophia Mburu V Jackson Kamau Ndegwa; she participated in the auction on 15/04/2011 and she was declared the highest bidder. She stated that she paid the purchase price and on 5/09/2011 she was issued with a certificate of sale. On 25/04/2012 she made an application to court for orders directing the Registrar of Titles to transfer and register the suit property in her name and the orders were issued on 26/04/2012 to that effect. The property was then transferred to her name upon payment of stamp duty and she was issued with a certificate of lease on 20/03/2013. Later she sold the suit property to the 3rd defendant. She believed that she acquired the suit property procedurally.
15. Upon cross-examination by Mr Kariuki she confirmed that the auction took place in Nairobi while the suit property is located in Nakuru; she confirmed that she was the highest bidder but she could not remember how much stamp duty was paid. She further confirmed that there was no valuation report and that there were no reasons given as to why the property was being sold. Regarding DExh-3, she confirmed that the amount of money due was Kshs. 501,500/= and reiterated that what she paid for the property was Kshs. 5,000,000/=. She admitted that there was a three to four bedroom maisonette on the property and when she went to take occupation, the plaintiff was present and there were no movables in the house. She also admitted that she had to get a court order to enable her to access the property and that later she sold it at Kshs. 18,000,000/= having bought it at Kshs. 5,000,000/= a short while earlier. She further stated that she did not know about the suit property before it was advertised; that the property was advertised as Block 12/123; she was positive that it was the property that she bid for on 15/4/2011.
16. Upon cross-examination by Mr. Kisilah, she asserted that she bought the suit property pursuant to an order of court issued on 30/12/2010 in a case between the plaintiff and another person. She also asserted that she bought land parcel number Nakuru Municipality Block 12/223, paid some sums to the court, acquired the property and subsequently sold it to the 3rd defendant. The 1st defendant's case was then closed.
17. Vijay Laxmi Shah testified as DW2. She adopted her witness statement dated 28/01/2014 as part of her evidence-in-chief and produced the documents in her list of documents dated 5/12/2019 as evidence. She also testified that she was sued by the plaintiff herein in a Petition and produced the pleadings in that petition as evidence; she purchased land parcel No. Nakuru Municipality Block 12/223 from the 1st defendant in the year 2013 for Kshs. 18,000,000/=; she conducted a search over the title; she found that the title was clean and she then signed the land sale agreement, the land was transferred to her and she got a title deed; she has been in possession thereof since 2013 to date and has only effected a slight improvement thereon.



18. Upon cross-examination by Mr. Konosi, DW2 stated that when she bought the property, it was not fenced but its boundaries were distinct.
19. Upon cross-examination by Mr Kariuki, it emerged that she was informed by her brother that there was a sale of some property in Nakuru; that she did not ask the 1st defendant how she acquired the suit property but left everything to lawyers; she entered into the land sale agreement on 20/5/2013 and the green card shows that the title deed was issued on 31/5/2013. She also averred that when she took possession of the house there were no chattels inside. The 3rd defendant's case was then closed.
20. Collins Liyai Aliela, Land Registrar Nakuru, testified as DW3. It was his evidence that the subdivision of Block 12/170 resulted in Block 12/223 and Block 12/224; the white card for Block 12/224 showed that the register was opened on 26/8/2008, the acreage was 0.193Ha, the government of Kenya as the Lessor and Jackson Kamau Ndegwa as the Lessee. Rent was Kshs. 1325/- revisable term 79 years from 1/11/1984. It was registered in the name of the plaintiff Jackson Kamau Ndegwa; a second entry was made on 18/11/2008 to Alice Wambui Njoroge and a certificate of lease issued on the same day. A restriction was placed on it on 12/2/2009 which indicated that there was to be no dealings without the consent of Alice. On 28/10/2009 a court order issued in HCCC 112/2008 was registered against the title restricting dealings with the land. DW3 produced a certified copy of the white card and the lease document dated 26/8/2008.
21. He also testified that he had in court the white card for the suit land, Block 12/223 that was opened on 15/2/2013 and registered in the name of Jackson Kamau Ndegwa. The rent payable was Kshs. 1,325/=, the land measured 0.1936 Ha and had a lease term of 99 years from 1/1/1984. The first entry dated 15/02/2013 was in the name of Jackson Kamau Ndegwa; it was later registered in the name of Mercy Makena Chweya on 20/3/2013 and a certificate of lease was issued on the same day. Vide an entry dated 30/5/2013 it was registered in the name of Vijay Laxmi and certificate of lease issued same day. A restriction of dealings was registered at entry No. 7 by the firm of Sheth & Wathigo Advocates. The transfer from Jackson to Mercy was initiated by a court order dated 26/4/2012 from the Children's Court at Nairobi in Children's Court Case No. 148/04 Sophia Mburu Vs. Jackson Kamau & Mercy Makena Chweya and Nathan Auctioneers. He also had a transfer of lease for Block 12/223 from Magistrate to Mercy Makena Chweya dated 26/04/2012. Accompanying the transfer was a valuation requisition for stamp duty form for plot 223 dated 20/3/2013, a stamp duty payment slip to National Bank for Kshs. 230,000/= and a registration payment receipt for Kshs. 1,000/= dated 20/3/2013. Copies of those documents as well as the white card, the transfer of lease, Court order, customer transaction voucher and a transfer receipt for payment were produced in evidence by DW3. It was his evidence that the subdivision process was initiated by Jackson Kamau Ndegwa, the plaintiff, and surrender was done at Central Registry Nairobi; upon surrender, normally a surrenderor is then issued by the Central Land Registry with a surrender of lease which comes alongside several sub-leases and he leaves with them. Two sub-leases were yielded by the subdivision of Block 12/170; DW3 testified that the original lease for plot No. 170 had been surrendered. He produced the surrender, receipt and copy of certificate of lease for Block 170 in evidence. According to him there was no fraud and all the requisite procedures were followed.
22. Upon re-examination by Mr Kariuki, he stated that there are no timelines fixed for transfer and issuance of title; that the order of 13/5/2013 issued in the present case was never served upon the lands office; that the only order that office was served with was issued on 16/8/2013; that the transfer and court order were lodged by Mercy Makena and were signed by a Magistrate. At that juncture the 2nd defendant's case was then marked as closed. Thereafter the plaintiff filed his submissions on 22/03/2023 the 1st defendant on 04/05/2023, the 2nd defendant on 23/03/2023 while the 3rd defendant filed her submissions on 05/04/2023.



Plaintiff's Submissions

23. Submitted for the plaintiff: two issues arise for determination: (1) whether the plaintiff has proved legal and actual proprietorship of the suit property and (2) whether the auction process that saw the suit property shift from the ownership of the plaintiff to the 1st defendant was done procedurally. On issue (1): the only issue is how the 1st defendant acquired the suit property; plaintiff was absolute owner thereof and was issued with a certificate of lease on 20/03/2013; plaintiff was involved in Milimani Children's Case No. 148 of 2004 with Sophia Mburu but the 1st defendant unprocedurally acquired the suit property; notably, during the hearing, the 1st defendant could not remember the details of the auction especially money paid on the day of the alleged auction, money paid for stamp duty and venue of alleged auction; no prior valuation was done on the suit property prior to sale; (see Rule 11 1(b), 18 and 15(d) and (e) of the Auctioneering Rules;) the auctioneer's advertisement was for Nakuru Municipality Block 12/123 which is a different parcel; further the 1st defendant could not explain how she came to know of the venue yet the dates of the auction were changed without any re-advertisement being done. (see: Rule 16 and 17 of the Auctioneers Rules;) the only receipt the 1st defendant attached to DW1's list of documents is dated 26/04/2011 and is for Kshs. 910,580/= which even she could not remember having paid; given the circumstances upon which the 1st defendant acquired the suit property, it is questionable whether the 3rd defendant could be regarded as an innocent purchaser for value; (see: cases of Musk Deer Ltd vs Benjamin K. Kipkurui & another [2018] eKLR, John Kuria Mathenge T/A Aberdare Filling Station v Caltex Oil (K) Ltd & another [2015] eKLR; Consequently the sale of the suit property and the 3rd defendant's title deed ought to be nullified. On issue (2): on 13/05/2013 Hon. Lady Justice Waithaka issued orders halting any transactions over the property; despite affidavit of service being filed the 3rd defendant proceeded to acquire the premises in contravention of the said orders; (see the case of Hassan Mohammed Haji v Mohamed Keynan & another [2019] eKLR); the 1st defendant acquired the land fraudulently; (see Section 80(1) of the [Land Registration Act](#), Sections 107(1), 109 & 112 of the [Evidence Act](#), the case of Kwanza Estates Limited v Dubai Bank Kenya Limited [2013] eKLR); the plaintiff has hence discharged his burden of proof; prayers in plaint should be allowed as prayed.

1st Defendant's Submissions

24. Submitted for the 1st defendant: 3 issues arise for determination: (a) Whether the suit was instituted in a court of competent jurisdiction (b) Whether the orders sought should issue; (c) Who should bear the costs of this suit. On issue (a): relying on Republic vs Chairman Uasin Gishu Land Disputes Tribunal & another Ex-parte John Arusei Kipto & 13 Others & others [2014] eKLR, West Kenya Sugar & Co. Limited v Matayo Ingoshe & others [2021] eKLR the present suit was instituted in the High Court in the year 2013; at the time, the Environment and Land Court had been established thus suit was incompetent ab initio and the transfer to this court did not cure the incompetency. On issue (b): that the plaintiff seeks that the Certificate of lease issued in the 1st and 3rd defendant's names be cancelled and a fresh one be issued in the plaintiff's name; however, the general law on auction sales is that the plaintiff's interest in the suit property was extinguished at the fall of the hammer. See: Ze Yu Yang v Nova Industrial Products Limited [2003] 1 EA 362; that the suit property was sold in execution of the decree in Nairobi Children's Court Case No. 148 of 2004-Sophia Mburu v Jackson Kamau Ndegwa which decree the plaintiff has never challenged or set aside, see: Rift Valley Enterprises Ltd vs Antony Michael Hughes (Sued as administrators of the Estate of Alexandra Theresa Hughes(Deceased) & 2 Others [2020]eKLR and Nairobi City County v Ite Farmers' Co-operative Society Limited & another [2018] eKLR; further, see: Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others [2014] eKLR for the proposition that she is entitled to costs of defending the present suit.



2nd Defendant's Submissions

25. Submitted for the 2nd defendant: two issues arise for determination: (1) whether the plaintiff has proved fraud on the part of the 2nd defendant and (2) whether the plaintiff is entitled to the reliefs sought. On issue (1) see: Section 54 of the [Land Act](#), and *R. G Patel vs Lalji Makani* cited in the case of *Gladys Wanjiru Ngacha vs Theresa Chepsaat & 4 others* [2013] eKLR; the plaintiff has not proved the pleaded fraud against the 2nd defendant to the required standard; further, see *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR, Sections 109 and 112 of the [Evidence Act](#); that by stating during cross-examination that he was not aware of any subdivision the plaintiff contradicts contents of his amended plaint and his written statements which alluded to him subdividing the suit property into two separate titles; that the 2nd defendant had produced evidence establishing that the plaintiff surrendered the original lease of land parcel Nakuru/Municipality Block 12/170 (original parcel) which was subdivided into two Nakuru/Municipality Block 12/223 and 224; that it is notable that the plaintiff did not dispute the fact he sold parcel 12/224 to Alice Wambui Njoroge; that the plaintiff has not adduced evidence to show that he set aside the decree that had been issued in Nairobi Children's Case No. 148 of 2004. On issue no (2): since the plaintiff has not adduced evidence that he successfully appealed the decree in Nairobi Children's Case No. 148, he cannot maintain the present suit for cancellation of title; see Section 27 of the [Civil Procedure Act](#), the case of *Joshua Mungai Mulango & another vs Jeremiah Kiarie Mukoma* [2015] eKLR and Order 2 Rule 6 of the Civil Procedure Rules.

3rd Defendant's Submissions

26. Submitted for the 3rd defendant: the following issue arise for determination (a) whether the right procedure for alienating the suit property to the 1st defendant and subsequently to the 3rd defendant was adhered to; (b) whether the 3rd defendant is a bona fide purchaser for value without notice with respect to her acquisition of the suit property, and (c) whether the plaintiff is entitled to the prayers sought in the amended plaint. On issue (a) that the right procedure was followed in the alienation of the suit property to the 1st defendant and subsequently to her; that the testimony of the 2nd defendant with respect to the history of the transactions is very clear and unchallenged in that respect; that the suit property was sold by way of public auction in compliance with the orders that had been issued in *Milimani Children's Case No. 148 of 2004* and the sale to the 1st defendant was adopted by the court on 26/04/2012 where Hon. A.K. Mwicigi issued an order to transfer and register the property to the 1st defendant; that before selling the suit property to her, the 1st defendant had thus acquired the suit property vide an auction that had been sanctioned by a decree of the court; the auction process undertaken by Muhatia Pala Auctioneers on the 15/04/2021 was conducted in compliance with the Auctioneers Rules Cap 526 Laws of Kenya; that in any event, the best remedy available to the plaintiff would be damages and not cancellation of title: see *Maina Wanjigi & another v Bank of Africa Kenya Ltd & 2 Others* [2015] eKLR among others cited. On issue (2): that 3rd defendant is a bona fide purchaser for value without notice with respect to her acquisition of the suit property and so her title is indefeasible and ought not to be impeached: see *Weston Gitonga & 10 others vs Peter Rugu Gikanga & another* [2017] eKLR; that she holds a certificate of title to the suit property which she had purchased in good faith; that on the strength of *Geoffrey Mureithi v Gerishon Karuare Kimanga & 2 Others* [2008] eKLR and *Musk Deer Limited v Benjamin K. Kipkurui & another* [2018] eKLR among others, she had no knowledge of the fraud; regarding issue (3), that the plaintiff has failed to prove his case on a balance of probabilities and it is for dismissal; see Section 107(1) of the [Evidence Act](#).



ANALYSIS AND DETERMINATION

27. Several facts are not in dispute in this case. It is not disputed that the plaintiff owned Block 12/170. Since the plaintiff admits that he disposed of the subdivision baptized Block 12/223, he can not be heard to query, as he did in his oral evidence, the process of subdivision of Block 12/170 or to claim that he never facilitated the same or that it was not conducted at his instance. The totality of the evidence in this case demonstrates that the plaintiff subdivided Block 12/170.
28. Another thing is that no certificate of title ever issued to the plaintiff in his name after the subdivision and before the transfer to the 1st defendant. The contents of the green card produced by the Land Registrar do not show that any certificate of lease was ever issued in the name of the plaintiff. No copy of such certificate of lease was ever produced by any of the parties including the Land Registrar who had the original parcel file at his disposal at the hearing. It is this court's conclusion that a certificate of lease was not issued to the plaintiff in respect of the suit land after his name was entered into the register, and one of the mysteries in this case is how the lease was effectively transferred to the 1st defendant without the certificate of lease having first issued to the plaintiff; that per se seems very irregular for under Section 25 of the *Land Act* the certificate of lease is normally considered as proof that a person owns the land, and the prior issuance thereof is the norm that precedes any transfer.
29. After considering the pleadings, the evidence and submissions this court finds that the following issues arise for determination:
- i. Whether the suit was instituted in a court of competent jurisdiction;
 - ii. Was the alienation of the suit land to the 1st defendant and thereafter to the 3rd defendant fraudulent.
 - iii. Who ought to pay the costs of the suit?
- The issues are discussed hereunder.

Whether the suit was instituted in a court of competent jurisdiction;

30. Regarding the issue raised by the 1st defendant as to whether the suit was instituted in a court of competent jurisdiction, it is her case that the present suit was filed in the High Court while this court was operational and later transferred to this court. The defendant avers that such filing was wrong ab initio and that the transfer never cured that defect which, to the 1st defendant, is fatal. It must be noted that this is the second time the plaintiff is meeting this sort of objection in his dispute with the defendants, the first having been successfully raised in the constitutional petition that he had filed hence its striking out. There is no doubt that this court is operational and has been so since November 2012 and that the High Court was not vested with jurisdiction by the time the present suit was instituted in May 2013. In *West Kenya Sugar Co Ltd V Matayo Ingoshe & Others* the High Court held as follows:

- “ 12. From the decisions in *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (2019) eKLR (Karanja, Gatembu & Sichale JJA) and *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR (Makhandia, Ouko & M'Inoti JJA), the Court of Appeal appears to take the position that the mere filing of a suit before a court without jurisdiction makes the suit itself incompetent, for want of jurisdiction of the tribunal before whom it is filed. Being incompetent renders the suit useless or dead, for the court cannot possibly proceed to dispose of it. Since it would



be a dead suit, there would be no legal foundation for its transfer to another court, where it would then acquire a life. The approach would be to ask the parties to withdraw the incompetent suit filed before the court without jurisdiction, so that the parties can consider filing a competent suit before the court with jurisdiction. The alternative is the dismissal or striking out of the incompetent suit. There are two arguments inherent in this approach, that the suit is incompetent, what purpose would it serve to transfer an incompetent suit. Secondly, the court lacks jurisdiction over the dispute, so where does it get the jurisdiction to order transfer of the suit in respect of which it has no jurisdiction to another court.”

31. That case is however a very recent decision. The present case was filed while the Environment and Land Court was only 7 months old. It was by that time a practice for parties to apply for transfer of suits filed in the court devoid of jurisdiction to the appropriate court. Old suits concerning land filed before the ELC were also being transferred to the ELC from the High Court and I think the impression created in the 1st defendant is that this was a suit under one or the other category of transfers mentioned herein.
32. However, page 1 of the handwritten proceedings in this case reads that it was Waithaka J, an ELC Judge, who dealt with the matter first on 13/5/2013 under certificate of urgency. The case was filed as ELC NO 359 of 2013 at Nakuru and that case number has never changed. Even though the plaint was entitled as “In the High Court of Kenya at Nakuru” it stated just below that title that the case was meant for the ELC court at Nakuru and it was instantly placed before an ELC Judge without any need for any transfer. The suit was therefore filed in this court and the minor errors in the intituling of the plaint can be overlooked in the interests of justice. I am for that reason persuaded that the objection that the suit was filed in a court without jurisdiction is frivolous and devoid of merit and it is hereby dismissed.

Was The Alienation of the Suit Land to The 1st Defendant and Thereafter to The 3rd Defendant Fraudulent?

a. Was the auction of the suit land properly conducted?

33. In order to establish that the auction was properly conducted an examination of the activities and documents that disposed the suit land and their comparison with the requirements in the Auctioneers rules is necessary. The plaintiff’s principal grounds for impugning the auction arise from the following pertinent questions: (i) Did the auction take place on a date for which it was not advertised? (ii) Was the advertisement in respect of a different property? (iii) Was Block 12/223 in existence as at the time of the auction? (iv) Was any valuation conducted on the suit premises prior to the auction and were the warrants of attachment in respect of movable goods only? (v) Was any competent letter of instruction or court warrant produced by the defendants to support the auction? (vi) Was any memorandum of sale produced? (vii) Was an appropriate notice issued to the plaintiff according to the auctioneers’ rules? (viii) Did the advertisement of the suit property conform with Rule 16 of the Auctioneer’s Rules? (ix) Did the auction follow strictly what was contained in the advertisement?

(i) Did the auction take place on a date for which it was not advertised?

34. The plaintiff brought evidence to court showing that the advertisement in the People Newspaper was placed on 24/2/2011 stating the auction of the land mentioned therein would occur on 16/3/2011 outside the Nakuru Post Office. That is the same advertisement that was produced by the defendants.



No other advertisement was produced rescheduling the auction to 15/4/2011 yet the 1st defendant avers that she purchased the suit land at an auction held on that date. The auction was therefore conducted on a date other than that in the advertisement. I find that it is correct for the plaintiff to state that the auction was irregular for being conducted on a date other than the one advertised.

(ii) Was the advertisement in respect of a different property?

35. The answer to this question is in the positive for the reason that the advertisement was in respect of Nakuru Municipality Block 12/123 while the suit land is number Nakuru Municipality Block 12/223. In the circumstances, it is the case that the suit land was never advertised for sale.

(iii) Was Nakuru Municipality Block 12/223 in existence as at the time of the auction?

36. It is urged that by the time of the auction Nakuru Municipality Block 12/223 was not in existence and could not therefore be the subject of auction. The auction took place on 15/4/2011. The lease in the name of the plaintiff was executed by the Commissioner of Lands on 14/1/2013 and registered at the Nakuru land office 15/2/2013. I have not seen produced in these proceedings any certificate of lease issued in the name of the plaintiff. What then was being sold if the lease and certificate of lease had not been issued in the plaintiff's name? In this court's view, there must have been considerable concerted action on the part of the 1st defendant and the auctioneer to obtain the lease in the plaintiff's name from Nairobi Central Lands registry Office and register it at the Nakuru Land Registry but it is evident that no certificate of lease was issued in the plaintiff's name thereafter. The whereabouts of the original lease so registered are unknown. It is a registered interest in land that was supposed to have been disposed of at that auction; however, the registration of the plaintiff as proprietor obviously occurred after the purported auction and the said auction is in my view irregular for that reason. The 1st defendant must be taken to have purchased land in respect of which no particulars were guaranteed, a lease having not issued by the time of sale and in this court's view, the sale and transfer to the 1st defendant were quite irregular.

(iv) Was any valuation conducted on the suit premises prior to the auction and were the warrants of attachment in respect of movable goods only?

37. When the plaintiff averred that contrary to rule 11 (1) (b) of the Auctioneers Rules 1997, there was no valuation conducted before the alleged auction, the burden of proof shifted to the defendants' shoulders to establish that such a valuation occurred before sale since it was a legal requirement.
38. Rule 11 (1) (b) (x) provides that the court warrant or letter of instructions shall contain the "reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale." Valuation was therefore necessary prior to auction. The answer to the question whether it was conducted or not lay within reach of the defendants yet they never presented to court any evidence to the effect that the land was valued before the alleged public auction and the only conclusion that this court arrives at in the circumstances is that no valuation was ever conducted regarding the suit land before it was purportedly sold. It is therefore not surprising that the same land fetched the 1st defendant some Kshs 18,000,000/= only months after she had purchased it for Kshs 5,000,000/= which to this court appears to be unjust enrichment which the valuation practice is meant to deter.



(v) Was any competent letter of instruction or court warrant produced by the defendants to support the auction?

39. It is the correct position that Rule 11(1) (b) of the Auctioneers Rules provides as follows:

“(1) A court warrant or letter of instruction shall include, in the case of—

- (a)
- (b) immovable property—
 - i. as in (i) to (v) in paragraph (a);
 - ii. the land reference number, file number, plot number, or flat number, as the case may be;
 - iii. the area in hectares or in square metres;
 - iv. the user and any restrictions by statute or otherwise on the disposition of the property or any interest in it;
 - v. the tenure and in the case of leasehold, particulars of the landlord and the annual land rent;
 - vi. the location, and in the case of land situated within a township or municipality, the amount of the most recently available annual site value tax;
 - vii. on accurate description of improvements and developments;
 - viii. the names, and addresses of encumbrancers on the title together with—
 - (aa) the estimated amount due to any encumbrancer; and
 - (bb) the estimated amount of arrears of land rent rates and taxes;
 - ix. the names addresses and titles of any persons in possession of the property to be sold or any part of it;
 - x. the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”

40. I have examined the warrant dated 29/12/2010 produced as “1DExh 3” and I find that it was a warrant in respect of movable goods belonging to the plaintiff and not land, and thus the purported court order produced as “1DExh 1” purportedly issued on the same date as that warrant may not be genuine. The defendants failed to prove that there was any court warrant or letter of instruction in existence which met all the qualifications set out in Rule 11 (b) above.



(vi) Was any memorandum of sale issued?

41. Rule 18 of the Auctioneers rules provides as follows:

“ 18. Proceeds of sale

- (1) Payment by a purchaser at a sale of seized goods shall be in form of cash, banker’s cheque or electronic funds transfer.
- (2) Payment by a purchaser in all other cases shall be in such forms as the auctioneer shall think fit.
- (3) On receipt of the proceeds of sale the auctioneer shall issue a receipt for it and in the case of immovable property sign a memorandum of sale.
- (4) The auctioneer shall remit the proceeds of sale less his charges to the court or the instructing party, as the case may be, accompanied by an itemised account in the case of movable property within fifteen days of the sale and in the case of immovable property as provided under Order 21, rule 74 of Civil Procedure Rules (Cap. 21, Sub. Leg.).”

42. The plaintiff averred that there was no memorandum of sale between the auctioneer and the 1st defendant who was allegedly the highest bidder in accordance with Rule 18(3) of the Auctioneers Rules and therefore shifted the burden of proof to her. Despite that, the fact remains that no memorandum of sale was ever produced by the defendants at the hearing and this court hence finds that the defendants never proved that any was ever issued pursuant to the alleged sale.

(vii) Was an appropriate notice issued to the plaintiff according to the auctioneers’ rules?

43. Again it is urged that the sale contravened rule 15 of the auctioneers’ rules which requires that upon receipt of a court warrant or letter of instruction the auctioneer shall give a notice in writing of not less than 45 days within which the owner may redeem the property on the payment of the amount set forth in the court warrant or letter of instruction or if default persists beyond the notice period, arrange for a sale of the property no earlier than 14 days after the first newspaper advertisement. The rule states as follows verbatim:

“

“ 15. Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

- (a) record the court warrant or letter of instruction in the register;
- (b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold; [Rev. 2012] CAP. 526 Auctioneers [Subsidiary] 31 [Issue 1]
- (c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;



- (d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
- (e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.”

44. The defendants never established that the appropriate notice under rule 15 was ever issued to the plaintiff thus rendering the sale to the 1st defendant irregular.

(viii) Did the advertisement of the suit property conform with Rule 16 of the Auctioneer’s Rules?

45. Rule 16 provides as follows:

“ 16. Advertisement

- (1) An advertisement by an auctioneer shall, in addition to any other matter required by the court, contain—
 - (a) the date, time and place of the proposed sale;
 - (b) the conditions of sale or where they may be obtained;
 - (c) the time for viewing the property to be sold;
 - (d) in respect of movable property other than perishable goods and livestock, an accurate description of the goods to be sold and a statement as to whether or not they are to be sold subject to a reserve price;
 - (e) in respect of goods of a perishable nature or livestock an accurate description of the goods to be sold and of their condition and a statement as to whether or not they are to be sold subject to a reserve price;
 - (f) in case of immovable property all the information required to be contained in the court warrant or letter of instruction except the amount to be recovered and the exact amount of any reserve price.
- (2) Except as may be ordered by a court, advertisement by an auctioneer of a sale by auction of any property, movable or immovable, shall be by way of an advertisement in a newspaper, provided that in the case of perishable goods and livestock advertisement in a newspaper may be dispensed with if adequate notice to prospective bidders in all the circumstances can be achieved by radio or television announcement, or handbills or posters, or other means of communication.”



46. That rule therefore among other things requires that an advertisement shall contain every information contained in the letter of instruction or in a court warrant except the amount to be recovered and the exact amount of the reserve price. The particulars that are mandatory to a court warrant or letter of instruction have been set out in rule 11 (1)(b) which I have set out herein above and there is no need to reiterate them here. Upon a cursory perusal of the advertisement produced as 1DExh 4, I agree with the plaintiff that the contents thereof fell far short of the contents required of it by Rule 16 of the Auctioneer's Rules.

(ix) Did the auction follow strictly what was contained in the advertisement as regards venue?

47. One of the vexing questions arising is whether the venue was retained as advertised. The plaintiff avers that though the venue of the auction was to be in Nakuru the sale occurred in Nairobi. It is indeed clear that the venue according to the advertisement produced by the defendant was to be outside the post office in Nakuru. The 1st defendant however confidently stated:

“The property was auctioned in Nairobi.”

48. There being no other advertisement produced by the defendants to show that the property was ever re-advertised for an auction in Nairobi, I find that the conduct of the auction in Nairobi while the property is situate in Nakuru as admitted by the 2nd defendant was highly irregular.

Was there was a valid order of court issued on 13/5/2013 barring the disposal of the property by the time the 3rd defendant was registered as proprietor and if so was it violated?

49. The further transfer of the suit land to the 3rd defendant is faulted by the plaintiff for having been carried out on 30/5/2013 while there was an order of court issued on 13/5/2013 barring the same but the 2nd defendant denies that any such order was ever served on the land registry. I have perused the record in respect of the present case and found that such an order was indeed issued. While the 2nd defendant avers that he was not served with any such order, the plaintiff points out that there is in the court record an affidavit of service dated 13/11/2013 showing that a Mr. Nyantika, a Land Registrar at Ardhi House, Nakuru was served with the order.

50. I have no doubt that service occurred, but the essential point to note here is that the service referred to was of a motion whose date is not provided on the face of the Affidavit of Service. However, I have perused the court record and found that when this matter came up for the first time on 13/5/2013 the court ordered service of the application dated 10/5/2015 which sought an injunctive order restraining the defendants from dealings with the suit land including disposal.

51. On the second court sitting on 17/5/2013, the 1st defendant was represented by Mr. Mongeri, who held brief for Mr. Ndubi, who came with his own application dated 16/5/2013. The court upon perusing that application ordered that the status quo as at that date be observed by the parties pending inter partes hearing. The status quo as at that date was that the lease was still registered in the name of the 1st defendant. How the land records changed in favour of the 1st defendant after the order was issued is a mystery and only the 1st defendant can explain, for by 30/5/2013 the 1st defendant had transferred the suit land to the 3rd defendant. Assuming that the day of presentation in the day book is the date that is transferred into the land register, it is clear that the transfer of the suit land to the 3rd defendant was presented and booked at the Nakuru Land Registry on 30/5/2013, a few days after the parties had been before court and after the status quo order was issued barring any disposal of the suit land. It is also clear that though the application to join the 3rd defendant was not made until 1/10/2013, the 1st defendant had known of the order restraining any transactions over the title. It therefore matters not



that the 2nd defendant states that his registry was not served with the order or that the 3rd defendant denies knowledge of the order. It was incumbent upon the 1st defendant to abide by the status quo orders issued on 23/5/2013 by restraining herself from disposing of the suit property or having any transfer thereof registered. The purpose of the lis pendens doctrine is to preserve suit property from disposal or wastage. In the case of Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR it was stated by the Court of Appeal as follows:

“Black’s Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L.J, in Bellamy vs Sabine [1857] 1 DeJ 566 held as follows: -

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

52. In Bernadette Wangare Muriu vs National Social Security Fund Board of Trustees Nambuye J & 2 Others [2012] eKLR observed that the doctrine of lis pendens was still applicable notwithstanding the repeal of the Indian Transfer of Property Act (ITPA.) In Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR the Court of Appeal proceeded to state that in the light of the provisions of Section 3 (1) of the *Judicature Act* Cap 8, the doctrine of lis pendens applied in that case also. In the case of Caroline Cheron Kirui v Liner Cheron Towett [2022] eKLR the court observed as follows:

“17. It is my view that the conduct of the defendant in subdividing the suit property after the suit was filed, was meant to defeat the ends of justice. Unknown to the Plaintiff and the Court in Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR, the Defendant had transferred the suit property to the Intended Interested Party during the pendency of the suit. The Plaintiff relied on the principle of lis pendens to defeat the Interested Party's claim on the suit property. The plaintiff in that case made an application for the joinder of the interested party to the suit. The court stated as follows:

“The Blacks Law Dictionary, 9th Edition, has defined lis pendens as the jurisdiction, power or control acquired by a court over property while a legal action is pending.

This common law principle, as defined above, is incorporated under section 52 of the Indian Transfer of Property, 1882 (now repealed.) This section provides as follows:

“During the active prosecution in any court having authority in British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any



decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.”

18 Just as in the Carol Silcock case I find that the argument raised by the defendant that the suit land that had been comprised in Land Parcel Number Njoro/ Ngata Block 2/2807 (Kirobon) does not exist is inimical to public policy and good and effective administration of justice. If that argument were to be upheld litigation would be an intrinsically complex and fatiguing affair where a judgment creditor, in order to execute his decree, would be compelled to start his claim all over again once the nature or ownership or status of the subject matter mentioned at the commencement of a suit is found to have changed midstream.”

53. On my part I find it appropriate to apply the doctrine of *lis pendens* in this case where the 1st defendant knowingly and in a hurry transferred the suit property to the 3rd defendant soon after status quo orders were made in the presence of her advocate, for that was obviously done within a suit that was under active prosecution within the common law meaning of *lis pendens*. In this court’s view, the 1st defendant and her advocate did not need to be served with the status quo orders for they were present in court at the issuance thereof. In all this I believe the Land Registrar, the 2nd defendant to be innocent as his record shows that a restriction order from the present suit was first registered against the title on 16/8/2013 and he may not have known of the order before that. However, the 1st defendant and by extension the 3rd defendant did, and consequently, I hold that the 1st defendant was at the time of the transfer to the 3rd defendant bound by the *lis pendens* rule. That being the case no transfer by her to any person could validly transfer any right or interest under that rule and the transfer registered on 30/5/2013 in favour of the 3rd defendant is therefore void and of no effect and must be revoked. The upshot of the foregoing is that this court finds that the auction that disposed of the property failed to meet the requirements of the Auctioneers Rules and the transfer of the suit land to the 3rd defendant violated the *lis pendens* doctrine.
54. The breach of the court’s orders of status quo, the glaring omissions in compliance with the auctioneers’ rules were just but strategies put in place by the 1st defendant her team of collaborators to ensure that the plaintiff lost the land to her. Nothing was presented to demonstrate that there were other bidders at the auction at which the 1st defendant purportedly purchased the land leaving this court to believe that no auction was held at all and the auctioneer merely handed the 1st defendant the suit property by private treaty in an office setting. The process applied by the auctioneer and the 1st defendant was so faulty that not only could the plaintiff not have had any opportunity to redeem his land but also that the 1st defendant herself admitted that she could not remember offhand the price or stamp duty she paid for the suit property, yet the purchase price in that vital transaction bore her a profit of Kshs 4,500,000/= in less than two years, quite a fortune during those days.
55. The plaintiff’s arrest and incarceration, the obvious misdescription of the suit property in the newspaper advertisement and the lack of notice to the plaintiff were all calculated at denying him the opportunity to redeem it, which this court has reason to believe he could have done. It is even more unfortunate that the plaintiff lost all his household goods during the execution and it is no wonder he lodged such a bitter petition against the defendants in which he was not successful. However, he complied with the guidance that he should approach a court possessed of jurisdiction for relief and this court has indeed found that serious criminal illegal and fraudulent acts were committed against him by the 1st defendant, the auctioneer and others.



56. Though Section 25 of the *Land Registration Act* guarantees the sanctity of title and states that it shall not be liable to be defeated, exception is provided for in Section 26 of the same Act which provides that title can be cancelled on the grounds of (a) 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. The totality of the evidence in this case leaves this court with the conclusion that there was fraud, illegality and a corrupt scheme perpetrated against the plaintiff's title by the 1st defendant, the auctioneer and others not before court within the meaning of the provisions of Section 26 of the *Land Registration Act*. They knowingly and jointly perpetrated those vices against the plaintiff. They also appear to have acted to wage some vendetta against the plaintiff, for one can not see how land apparently worth as much as five million shillings could have been so quickly disposed of over execution of a decree for less than one million shillings while evidence shows there were movable chattels that could have been attached to easily meet the decretal sum. Besides, an appropriate warrant was not obtained from court to enable execution of the decree against the plaintiff's immovable property and remained a warrant of execution by way of sale of movable property only which does not include land.
57. Consequently, the plaintiff's suit succeeds. I allow the plaintiff's claim in the amended plaint dated 21/01/2014 and I issue the following final orders:
- a. The certificate of lease issued in the 3rd defendant Vijay Laxmi Shah's name purporting her to be the registered proprietor of all that parcel of land known as Nakuru Municipality Block 12/223 is hereby cancelled and the 3rd defendant shall surrender the original thereof to the Land Registrar Nakuru forthwith;
 - b. All the entries identified as entry no. 4 and entry no. 5 in the register purporting to transfer the lease from Mercy Makena Chweya to Vijay Laxmi Shah and issuance of a certificate of lease over Nakuru Municipality Block 12/223 to Vijay Laxmi Shah are hereby cancelled;
 - c. All the entries identified as entry no. 2 and entry no. 3 in the land register purporting to transfer the lease over Nakuru Municipality Block 12/223 from Jackson Kamau Ndegwa to Mercy Makena Chweya and the issuance of a certificate of lease over Nakuru Municipality Block 12/223 to Mercy Makena Chweya are hereby cancelled;
 - d. The restrictions identified as entry No 6 and entry no 7 on the register for Nakuru Municipality Block 12/223 are hereby lifted thus leaving the title unencumbered.
 - e. Upon complying with the orders no. (a), (b) (c) and (d) herein above, the Land Registrar Nakuru shall issue a fresh certificate of lease in the name of Jackson Kamau Ndegwa forthwith;
 - f. That the 1st and 3rd defendants shall jointly or severally pay the costs of this suit to the plaintiff and to the 2nd defendant for having occasioned this litigation.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 29TH DAY OF JUNE 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.

