



**Kenya Anti-Corruption Commission v Mwaura & another (Environment and Land Case Civil Suit 524 of 2008) [2023] KEELC 17857 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17857 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 524 OF 2008**

**SO OKONG'O, J  
JUNE 12, 2023**

**BETWEEN**

**KENYA ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**JOHN FAUSTIN KINYUA ..... 1<sup>ST</sup> DEFENDANT**

**IRENE MUTHONI MWAURA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit against the defendants on 28<sup>th</sup> October 2008 through a plaint of the same date. The plaintiff averred that it was a body corporate established under the [Anti-Corruption and Economic Crimes Act](#), No. 3 of 2003 and that it brought the suit pursuant to the provisions of the said Act. The plaintiff averred that at all material times, the 1<sup>st</sup> Defendant was a supervisor and/or manager with Trident Insurance Company Limited (hereinafter referred to as “Trident”) while the 2<sup>nd</sup> defendant was a director of finance and corporate services with the Kenya Re-Insurance Corporation Limited (hereinafter referred to only as “Kenya Re”) which is a public corporation.
2. The plaintiff averred that Kenya Re and Trident had some contractual dealings as re-insurer and insurer respectively out of which Trident would pay Kenya Re cash call credits as found due. The plaintiff averred that at all material times, Kenya Re was the registered proprietor and/or grantee of all that parcel of land known as L.R No. 209/10611/173 I.R No. 77586 situated at Villa Franca Estate, Nairobi on which stood a residential house No. 304 (hereinafter referred to as “the suit property”) among other developments.
3. The plaintiff averred that on or about 31<sup>st</sup> July 2002, the 2<sup>nd</sup> defendant caused Kenya Re to offer the suit property for sale to the 1<sup>st</sup> defendant at a price of Kshs. 3,000,000/-. The plaintiff averred that the 1<sup>st</sup> defendant purported to accept the said offer and indicated that she had deposited a cheque No. 000188 for Kshs. 3,422,586.50 in settlement of the consideration and other charges. The plaintiff averred that



on or about 24<sup>th</sup> September 2002, the 1<sup>st</sup> defendant formally entered into a sale agreement with Kenya Re and received payment of the sum of Kshs. 321,514.50 purportedly being a refund of overpayment of the purchase price and discount less legal fees and stamp duty. The plaintiff averred that pursuant to the said sale agreement, Kenya Re transferred its leasehold interest in the suit property to the 1<sup>st</sup> defendant on or about 16<sup>th</sup> April 2003. The plaintiff averred that the defendants fraudulently and illegally caused Kenya Re to enter into the agreement for the sale and transfer of its leasehold interest in the suit property to the 1<sup>st</sup> defendant. The plaintiff pleaded several particulars of fraud and illegality against the defendants. The plaintiff averred among others that the 1<sup>st</sup> and 2<sup>nd</sup> defendants represented to Kenya Re that the sum of Kshs. 3,422,586.50 which was paid through cheque No. 000188 was on account of the purchase price for the suit property while knowing that the representation was false. The plaintiff averred further that the 2<sup>nd</sup> defendant caused Kenya Re to credit the said sum of Kshs. 3,422,586.50 as money paid by the 1<sup>st</sup> defendant towards the purchase of the suit property with the knowledge that the same rightly belonged to Kenya Re from Trident. The plaintiff averred that the defendants caused the directors of Kenya Re to execute a transfer of the suit property in favour of the 1<sup>st</sup> defendant fully aware that the 1<sup>st</sup> defendant had given no consideration for the property. The plaintiff averred that the defendants misrepresented to Kenya Re that the 1<sup>st</sup> defendant had made an overpayment of Kshs. 321,514.50 and the 2<sup>nd</sup> defendant authorized a refund of the said amount to the 1<sup>st</sup> defendant by Kenya Re with the full knowledge that the 1<sup>st</sup> defendant had not made any payment leave alone overpayment to Kenya Re. The plaintiff averred further that the defendants used their offices improperly to confer benefits upon themselves. The plaintiff averred that the 1<sup>st</sup> defendant acquired the suit property which was a public property fraudulently.

4. The plaintiff averred that the 1<sup>st</sup> defendant recorded a statement on 29<sup>th</sup> March 2007 in which she admitted that cheque No. 000188 for Kshs. 3,422,586.50 issued by Trident in favour of Kenya Re was converted and used to pay for the suit property. The plaintiff averred that as a result of the defendants' conduct, the 1<sup>st</sup> defendant had been unjustly enriched by the transfer to her of the suit property and the payment to her of the sum of Kshs. 321,514.50 at the expense of Kenya Re. The plaintiff averred that the suit property was developed with a four-bedroomed maisonette. The plaintiff sought judgment against the defendants jointly and severally for;
  1. A declaration that the transfer of the suit property by Kenya Re to the 1<sup>st</sup> defendant was illegal, fraudulent, null and void.
  2. An order for cancellation of the said transfer.
  3. In the alternative, the 1<sup>st</sup> defendant be ordered to execute such documents or deeds as are necessary to transfer the suit property back to Kenya Re and in default, the Deputy Registrar of the court do execute the said documents.
  4. A mandatory injunction directing the 1<sup>st</sup> defendant to vacate the suit property.
  5. A permanent injunction restraining the 1<sup>st</sup> defendant from alienating, encumbering, disposing of, wasting, and trespassing upon or in any other way interfering with the suit property.
  6. Kshs. 321,514/50 together with interest at commercial rates from 26<sup>th</sup> March 2002 until payment in full.
  7. Mesne profits.
  8. Costs of the suit.
  9. Any other relief that this court may deem fit to grant.



### **The 1<sup>st</sup> defendant's defence:**

5. The 1<sup>st</sup> defendant filed a statement of defence on 6<sup>th</sup> July 2010. The 1<sup>st</sup> defendant contended that the plaintiff's suit was bad in law since the court lacked jurisdiction to entertain the claim. The 1<sup>st</sup> defendant denied that she had any dealings with the 2<sup>nd</sup> Defendant in relation to the suit property. The 1<sup>st</sup> defendant averred that her dealings in relation to the suit property were with Kenya Re and not with the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant averred that she was the registered proprietor of the suit property. The 1<sup>st</sup> defendant denied all the particulars of fraud and illegality pleaded against her in paragraph 10 of the plaint. The 1<sup>st</sup> defendant averred that her dealing with Kenya Re in relation to the suit property was on the basis of a willing buyer and a willing seller. The 1<sup>st</sup> defendant averred that all her dealings with Kenya Re were lawful and above-board. The 1<sup>st</sup> defendant denied that she acquired the suit property fraudulently. The 1<sup>st</sup> defendant averred that she did not occupy a public office and as such could not have used a non-existent office improperly for her benefit.
6. The 1<sup>st</sup> defendant averred that she was charged at Kibera Law Court with the offences of conspiracy to defraud, obtaining money by false pretence and obtaining registration by false pretence and was acquitted of all the charges because the charges could not be sustained. The 1<sup>st</sup> defendant averred that there was no appeal against the said acquittal. The 1<sup>st</sup> defendant urged the court to dismiss the plaintiff's suit with costs.

### **Reply to the 1<sup>st</sup> defendant's statement of defence:**

7. The plaintiff filed a reply to the 1<sup>st</sup> defendant's statement of defence on 28<sup>th</sup> July 2010. The plaintiff denied all the allegations in the 1<sup>st</sup> defendant's defence save for admissions. The plaintiff averred that the 1<sup>st</sup> defendant acted in concert with the 2<sup>nd</sup> defendant to fraudulently acquire the suit property without making any payment therefor. The plaintiff averred that in addition to the suit property, the 1<sup>st</sup> defendant received a further sum of Kshs. 321,514.50. The plaintiff averred that since the 1<sup>st</sup> defendant gave no consideration for the suit property, the plea of a willing buyer and a willing seller was not available to the 1<sup>st</sup> defendant. The plaintiff averred that the transaction through which the 1<sup>st</sup> defendant acquired the suit property was illegal and fraudulent. The plaintiff averred that the fact that the 1<sup>st</sup> defendant was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya as the owner of the suit property could not legitimize the illegality.
8. The plaintiff averred further that the 1<sup>st</sup> defendant could not benefit from the fruits of her fraudulent and criminal actions and was under an obligation to make restitution to Kenya Re. As concerns the acquittal of the 1<sup>st</sup> defendant, the plaintiff averred that the 1<sup>st</sup> defendant was acquitted on technical grounds and that an appeal had been preferred against the acquittal. The plaintiff averred that the said acquittal did not validate the criminal and fraudulent acts in which the 1<sup>st</sup> defendant was involved and did not make the acquisition of the suit property lawful.

### **The 2<sup>nd</sup> defendant's defence:**

9. The 2<sup>nd</sup> defendant filed his statement of defence on 29<sup>th</sup> November 2011. The 2<sup>nd</sup> defendant admitted his description in paragraph 4 of the plaint and the practice in the insurance sector pleaded in paragraph 5 of the plaint. The 2<sup>nd</sup> defendant averred that Kenya Re had a distinct department dealing with real estate that was separate from the finance department and that, part of Kenya Re's business was to build and sell residential houses to the public. The 2<sup>nd</sup> defendant averred that he was a stranger to any deposit that had been made in settlement of the purchase price for the suit property. The 2<sup>nd</sup> defendant averred that he was also a stranger to the agreement for sale that Kenya Re entered into with the 1<sup>st</sup> defendant



in respect of the suit property and the transfer of the property to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant denied all the particulars of fraud and illegality pleaded against him and averred that he was a stranger to the same.

10. The 2<sup>nd</sup> defendant averred that the plaint disclosed no or any reasonable cause of action against the 2<sup>nd</sup> defendant and urged the court to dismiss the same as an abuse of the process of the court. The 2<sup>nd</sup> defendant averred that the plaintiff caused the defendants to be arraigned before Kibera Law Court in Criminal Case No. 2568 of 2008 in which the defendants were acquitted.

### **The evidence tendered by the parties:**

#### **The plaintiff's evidence:**

11. At the trial, the plaintiff called Suresh Santram Bachheta (PW1) as its first witness. PW1 told the court that he was a financial consultant and that in 2002 he was working with Trident as a financial controller. PW1 adopted his witness statement dated 26<sup>th</sup> October 2007 as his evidence in chief. He stated that when he was working with Trident, the Chief Executive Officer of Trident was Mr. R.L.Mathur. He stated that Mathur was approached by Kenya Re over some money that Kenya Re claimed was owed to them by Trident. He stated that the amount claimed in Kenya Re's letter dated 17<sup>th</sup> May 2002 was Kshs. 12,690,393/-. He stated that the letter was followed by a fax message of 24<sup>th</sup> May 2002 in which Kenya Re claimed Kshs. 10,668,854/-. He stated that the demand was discussed internally and it was agreed that the amount that was being demanded be paid through monthly installments. He stated that the 2<sup>nd</sup> defendant who was Kenya Re's financial controller came to Trident's office and the proposal to pay the outstanding amount in installments after verification was discussed and agreed upon. He stated that the first instalment was Kshs. 3,422,586.50, the second instalment was of a similar amount, the third instalment was Kshs. 2,922,856.50 and the fourth instalment was a similar sum of Kshs. 2,922,856.50. PW1 stated that upon verifying the claim, they forwarded payment of the 1<sup>st</sup> instalment under cover of a letter dated 17<sup>th</sup> July 2002. He stated that the payment cheque was collected by the 2<sup>nd</sup> defendant. He stated that Trident paid the second instalment through a cheque dated 14<sup>th</sup> August 2002 for Kshs. 3,422,586.50. He stated that the payment voucher for this payment indicated that the payment was on account of cash call credits. He stated that receipt of this payment was acknowledged by Kenya Re through a letter dated 16<sup>th</sup> August 2002 signed by the 2<sup>nd</sup> defendant. He stated that the cheque No. 000188 for Kshs. 3,422,586.50 that the 1<sup>st</sup> defendant purported to use to settle the purchase price for the suit property on 15<sup>th</sup> August 2002 was Trident's cheque which was issued to Kenya Re in settlement of the cash call credits.
12. On cross-examination by the advocate for the 1<sup>st</sup> defendant, PW1 stated that Trident's reinsurance department was headed by Mr. Mathur who was being assisted by the 1<sup>st</sup> defendant. He stated that when a claim was made against them and they had no cash to settle the claim, they would approach a reinsurance company to give them cash to settle the claim and they would pay back later. He stated that these were what were being referred to as cash call credits. He stated that Trident owed Kenya Re about Kshs. 23,000,000/- on account of cash call credits and that they did not refuse to pay. He stated that they did not have sufficient funds to clear the debt at once and made arrangements to pay the same in instalments. He stated that the whole amount was paid. He stated that the 1<sup>st</sup> defendant was the assistant manager for reinsurance and that she was the one who used to follow up on the payments for cash call credits. He stated that Trident would write a cheque and then the same would be handed over to the reinsurance department for dispatch to the payee. He stated that the reinsurance department would then arrange on how the cheque would be collected.



13. On cross-examination by the advocate for the 2<sup>nd</sup> defendant, PW1 stated that cash call requests were made in writing by Trident and that Trident used to pay back the money quarterly. He admitted however that at the time they agreed to pay the outstanding cash call credits to Kenya Re in 2002, some of the cash credits had remained outstanding since 1991. PW1 stated that he did not know how the cheque No. 000188 for Kshs. 3,422,586.50 came to be used by the 1<sup>st</sup> defendant to pay for the suit property.
14. The plaintiff's next witness was Margaret Otega (PW2). PW2 told the court that she was an advocate of the High Court of Kenya and that in 2002 she was working for Kenya Re as its Company Secretary. She stated that apart from being the Company Secretary, she was also in charge of legal matters at the company. She stated that she was the one who used to liaise with the external lawyers who acted for the company in the sale of properties. He stated that with regard to the suit property, the agreement for sale was prepared for Kenya Re by R.O.A Otieno & Company Advocates. She stated that the said firm of advocates was Kenya Re's external lawyer. She stated that the agreement for sale was between Kenya Re and the 1<sup>st</sup> defendant and it was in respect of the suit property. PW2 stated that the purchase price for the suit property was Kshs. 3,000,000/- and the purchaser was to meet all taxes and lawyers' fees. She stated that a sum of Kshs. 201,072/- was payable for legal fees and disbursements. PW2 stated that the agreement for sale was executed on 24<sup>th</sup> September 2002 and that she signed the same in her capacity as Kenya Re's Company Secretary. She stated that Kenya Re's said advocates also prepared the instrument of transfer in favour of the 1<sup>st</sup> defendant in respect of the suit property. She stated that she also executed the transfer as Kenya Re's Company Secretary. She stated that before executing the transfer, she confirmed that the full purchase price for the suit property had been made by the purchaser. She stated that Gimco Ltd. (Gimco) was Kenya Re's agent in the sale of among others the suit property. She said that the 1<sup>st</sup> defendant paid the purchase price for the suit property through a cheque No. 000188 for Kshs. 3,422,586.50. PW2 stated that during her tenure as Kenya Re's Company secretary, there was no policy of rewarding employees or other persons who gave information leading to the recovery of insurance premiums.
15. On cross-examination by the advocate for the 1<sup>st</sup> defendant, PW2 stated that as far as she was concerned the transaction between Kenya Re and the 1<sup>st</sup> defendant was lawful at the time she was involved in it. She stated that she was not privy to the subsequent events that cropped up after the transfer. She stated that she did not sign the sale agreement and transfer under compulsion or by mistake.
16. On cross-examination by the advocates for the 2<sup>nd</sup> defendant, PW2 stated that Kenya Re was in the business of buying and selling land. She stated that the 2<sup>nd</sup> defendant was her colleague at Kenya Re. She stated that she was not familiar with cash call credits. She stated that it was the finance department that was responsible for collecting premium debts. She stated that it was J.K.Mbugua who confirmed to her that the purchase price for the suit property had been paid in full by the 1<sup>st</sup> defendant. She stated that any refund had to be authorized by the finance department and the Chief Executive Officer who was Peter Kenneth by then. She stated that Peter Kenneth and she signed the agreement for the sale of the suit property and the transfer in favour of the 1<sup>st</sup> defendant. PW2 stated that as at the time she left Kenya Re, no complaint had been raised by Kenya Re that it had suffered any loss in the transaction.
17. On re-examination, PW2 stated that she signed the agreement for sale and the transfer on the basis of the information that she had received that the 1<sup>st</sup> defendant had paid the purchase price in full. She stated that if she had known that the 1<sup>st</sup> defendant had not paid the purchase price, she would not have signed the said agreement for sale and the transfer.
18. The plaintiff's next witness was Michael Mbeshi (PW3). PW3 was Kenya Re's General Manager in charge of property and administration. He told the court that in 2002 he was working with Kenya Re



as director of property and investment. PW3 adopted the statement that he recorded with the plaintiff as part of his evidence in chief. He stated that he received a request from the 2<sup>nd</sup> defendant who was the then Financial Controller of Kenya Re to offer a house for sale to the 1<sup>st</sup> defendant. He stated that Kenya Re had retained Gimco to assist it in selling its houses that were on sale. He stated that he wrote to Gimco to prepare a letter of offer in respect of the suit property in favour of the 1<sup>st</sup> defendant. He stated that in response to that request, Gimco prepared a letter of offer in favour of the 1<sup>st</sup> defendant in which the suit property was offered to the 1<sup>st</sup> defendant for sale at Kshs.3,000,000/-. He stated that the 1<sup>st</sup> defendant accepted the offer and returned a copy of the letter to Kenya Re. He stated that the 1<sup>st</sup> defendant indicated in the letter of offer that she returned that she had made a payment of Kshs. 3,422,586.50 to Kenya Re through cheque No. 000188. PW3 stated that he also received an internal memo dated 26<sup>th</sup> August 2002 from Assistant Chief Accountant John Mbugua to the effect that the 1<sup>st</sup> defendant had paid the full purchase price for the suit property. He stated that in the said memo, John Mbugua added that the 1<sup>st</sup> defendant had made an overpayment of Kshs. 221,514.50. He stated that upon receipt of this confirmation, the suit property was handed over to the 1<sup>st</sup> defendant. He stated that the 1<sup>st</sup> defendant subsequently requested for a 10% discount and a refund of the payment she had made over and above the purchase price. He stated that the request for the discount and the refund were approved and the necessary payment was made to the 1<sup>st</sup> defendant.

19. On cross-examination by the 1<sup>st</sup> defendant's advocate, PW3 stated that when the transaction between the 1<sup>st</sup> defendant and Kenya Re was taking place, it appeared as if it was a normal transaction. He stated that it later transpired that the money that was used by the 1<sup>st</sup> defendant to pay for the suit property was a premium that was due to Kenya Re from Trident. He stated that this fact was not detected during the transaction. On cross-examination by the advocate for the 2<sup>nd</sup> defendant, PW3 stated that the refund that was made to the 1<sup>st</sup> defendant was approved by the Managing Director of Kenya Re and that the issues giving rise to the suit came up following investigations by the plaintiff.
20. The plaintiff's next witness was George Gachihi (PW4). PW4 was a former land registrar at Ardhi House until 2014 having joined the Ministry of Lands in 1993. PW4 adopted the statement he recorded with the plaintiff on 17<sup>th</sup> January 2008 as his evidence in chief. He stated that the suit property was initially registered in the name of Kenya Re on 26<sup>th</sup> August 1998 and that the same was transferred to the 1<sup>st</sup> defendant on 16<sup>th</sup> April 2003.
21. The plaintiff's next witness was Rosemary Gitau(PW5). PW5 told the court that she was working with Kenya Re in the property department and that in 2002, she was working in the same department but in the marketing unit. PW5 adopted the statement that she had recorded with the plaintiff as her evidence in chief. On cross-examination by the advocate for the 1<sup>st</sup> defendant, PW5 stated that she met the 1<sup>st</sup> defendant in 2002 as a purchaser of one of Kenya Re's properties. She stated that she was the one who handed over the suit property to the 1<sup>st</sup> defendant on the instructions of PW3. On cross-examination by the advocate for the 2<sup>nd</sup> defendant, PW5 stated that the 2<sup>nd</sup> defendant called her to his office and handed over to her a routing slip. She stated that although her immediate boss was PW3, she could take instructions from any senior officer in the corporation.
22. The plaintiff's next witness was John Lolkoloi(PW6). PW6 told the court that he was working with the plaintiff as Deputy Director in charge of forensic investigations. He adopted the statement that he recorded on 23<sup>rd</sup> February 2015 as part of his evidence in chief. He stated that the plaintiff received a report that the 1<sup>st</sup> defendant had been allocated a house irregularly. He stated that this was one of the many irregular sales that had been conducted by Kenya Re. He stated that the plaintiff carried out investigations that established that the 1<sup>st</sup> defendant did not make any payment for the suit property. He stated that the 1<sup>st</sup> defendant used the payment that her employer Trident had made to Kenya Re



for premium as consideration for the suit property. PW6 stated that the plaintiff established that the payment did not originate from the 1<sup>st</sup> defendant but from Trident. PW6 stated that Kenya Re sold the suit property to the 1<sup>st</sup> defendant but was paid for the property using its own money. PW6 stated that the plaintiff came to the conclusion that the suit property was irregularly transferred to the 1<sup>st</sup> defendant. PW6 stated that the payment that was made by Trident to Kenya Re was misrepresented as payment made by the 1<sup>st</sup> defendant for the purchase of the suit property. He stated that Kenya Re issued a receipt for this payment and it was indicated in the receipt that the payment was made by Trident on account of the 1<sup>st</sup> defendant for the purchase of the suit property. PW6 stated that the purchase price for the suit property was Kshs. 3,000,000/- and that the payment made by Trident that was converted to be the purchase price paid by the 1<sup>st</sup> defendant was Kshs. 3,422,586.50. He stated that the plaintiff sought and was granted a discount of Kshs. 100,000/- on the purchase price. He stated that the purchase price was now reduced to Kshs. 2,900,000/-. He stated that the total costs for the suit property inclusive of legal costs of Kshs. 201,072/- came to Kshs. 3,101,000/-. He stated that the 1<sup>st</sup> defendant thereafter asked for a refund from the said sum of Kshs. 3,422,586.50. that she allegedly paid for the property and was paid a sum of Kshs. 321,514.50 by Kenya Re. PW6 stated that this payment was irregular in that the 1<sup>st</sup> defendant made no payment in respect of which a refund could be made to her. He stated that the 1<sup>st</sup> defendant acquired the suit property without any consideration and on top of that she was being given a refund of money that belonged to Kenya Re. PW6 stated that the explanation that was given by the defendants for the irregular manner in which the suit property was transferred to the 1<sup>st</sup> defendant was not convincing. He stated that if the 1<sup>st</sup> defendant was to be compensated for the information that she gave to the 2<sup>nd</sup> defendant regarding the debt that was owed to Kenya Re by Trident, the compensation should have been given formally by Kenya Re. He stated that it was not necessary to convert a cheque that was paid by Trident to Kenya Re for such arrangement. He stated that the Company Secretary of Kenya Re confirmed that Kenya Re did not have any arrangement for compensating persons giving information to it. He stated that this was just one of a series of such transactions involving Kenya Re and Trident. He stated that there was also a case of Kshs. 1,835,978/- that was paid by Trident to Kenya Re to settle outstanding premium. He stated that this payment was converted by the 2<sup>nd</sup> defendant who credited the same to his own account. He stated that the 2<sup>nd</sup> defendant was charged in respect of that misappropriation of the funds belonging to Kenya Re and was convicted. PW6 also referred to a civil case that the plaintiff brought against the 2<sup>nd</sup> defendant and one, Charles Kinuthia which involved cheques that were issued by C.F.C. Heritage Insurance in favour of Kenya Re which were diverted by the 2<sup>nd</sup> defendant and the said Charles Kinuthia as payment by Charles Kinuthia for a house that was sold by Kenya Re to Charles Kinuthia. He stated that the suit was determined in the plaintiff's favour and the defendants in the suit were ordered to surrender the house. PW6 urged the court to order that the suit property be returned to Kenya Re since the 1<sup>st</sup> defendant did not pay for the same. He also urged the court to order the 1<sup>st</sup> defendant to refund the sum of Kshs. 321,514.50 that was paid to her by Kenya Re together with interest from the date on which she received the same until payment in full.

23. On cross-examination by the advocate for the 1<sup>st</sup> defendant, PW6 stated that he was part of the team that investigated the irregular transfer of the suit property to the 1<sup>st</sup> defendant. He stated that the investigations followed a report that the plaintiff received from an anonymous source. He stated that the plaintiff investigates all allegations whether anonymous or otherwise to establish their veracity. He stated that the plaintiff preferred a charge against the 1<sup>st</sup> defendant at Kibera Law Court. He stated that the plaintiff's complaint against the defendants was that they fraudulently caused Kenya Re to transfer the suit property to the 1<sup>st</sup> defendant.
24. On cross-examination by the advocate for the 2<sup>nd</sup> defendant, PW6 stated that the criminal case that the plaintiff had preferred against the defendants at Kibera Law Court was dismissed when the prosecutor



failed to appear in court. He stated that if the 1<sup>st</sup> defendant was to be paid, such payment ought to have been made regularly if there was a whistle-blower policy at Kenya Re. He stated that Kenya Re did not have such a policy.

**The evidence by the 1<sup>st</sup> defendant:**

25. The 1<sup>st</sup> defendant adopted her witness statement dated 20<sup>th</sup> June 2022 as part of her evidence in chief. She stated that she was an employee of Trident in 2002. She stated that she was an insurance supervisor. She stated that the payments that Trident admitted to being due to Kenya Re were cash calls that had not been paid to Kenya Re. She stated that the amount that was due from Trident to Kenya Re was Kshs. 12,690,346/-. She stated that she helped Kenya Re to collect the said amount from Trident after she was approached by the 2<sup>nd</sup> defendant and requested to do so. She stated that she played a role in the reconciliation of the accounts of the two companies that unearthed further payments due to Kenya Re. She stated that she assisted Kenya Re to recover a total sum of Kshs. 23,359,250/- from Trident. She stated that she did not play any role in the preparation of cheque No. 000188 dated 14<sup>th</sup> August 2002 for Kshs. 3,422,586.50 by Trident. She denied that she converted that cheque to her own use. She stated that she received the letter of offer for the sale of the suit property from Kenya Re. She stated that she was called by Kenya Re to go and collect the letter from their office. She stated that she picked up the letter from the office of the 2<sup>nd</sup> defendant. She stated that it was the 2<sup>nd</sup> defendant who had requested her to assist with the recovery of the amounts that were due from Trident. The 1<sup>st</sup> defendant stated that the 2<sup>nd</sup> defendant promised her that Kenya Re would pay her for assisting it to recover the money that was due from Trident. She stated that the 2<sup>nd</sup> defendant told her that a part of the money that was recovered would go towards her fees as a whistleblower and that was agreed at Kshs. 3,000,000/-.
26. The 1<sup>st</sup> defendant stated that the 2<sup>nd</sup> defendant told her that it was not possible to pay her in cash and that Kenya Re had decided to pay her in kind in the form of a house. She stated that the property was offered to her by Gimco. She stated that she accepted the offer on 15<sup>th</sup> August 2002 and thereafter signed a sale agreement at the office of the Company Secretary of Kenya Re. She stated that the 2<sup>nd</sup> defendant told her that Kenya Re had decided to treat her as a whistleblower. She stated that Kenya Re fulfilled the promise and transferred the suit property to her. She stated that that was the property that she was occupying. She stated that her title to the property was taken away by the plaintiff in 2008. She stated that the plaintiff preferred criminal charges against her of which she was acquitted on 20<sup>th</sup> April 2010. She stated that the suit property was still registered in her name.
27. The 1<sup>st</sup> defendant stated that it was the 2<sup>nd</sup> defendant who told her to request for the balance of the money that Kenya Re was to pay to her and she did so. She stated that it was the 2<sup>nd</sup> defendant who told her that one of the payments that had been made by Trident to Kenya Re had been converted as her payment. She stated that she collected a sum of Kshs. 321,514.50 from Kenya Re being the balance of the said payment that was made by Trident to Kenya Re after the deduction of the purchase price and associated charges. The 1<sup>st</sup> defendant stated that she did not know the employees of Kenya Re who facilitated the transfer of the suit property in her favour. She stated that it would be unfair to grant the reliefs sought by the plaintiff against her. She stated that she worked for the suit property and that it was given to her as her payment for the services rendered.
28. On cross-examination by the advocate for the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant stated that Trident owed Kenya Re some money and that the debt was acknowledged by Trident in writing. The 1<sup>st</sup> defendant stated that she did not own the suit property jointly with the 2<sup>nd</sup> defendant.
29. On cross-examination by the plaintiff's advocate, the 1<sup>st</sup> defendant stated that she was an employee of Trident and not Kenya Re. The 1<sup>st</sup> defendant stated further that she was not a consultant for Kenya Re.



She stated that the memo dated 7<sup>th</sup> June 2002 over the outstanding cash calls was prepared by her in the course of her duty at Trident and that she was being paid by Trident to do such work. The 1<sup>st</sup> defendant reiterated that she assisted Kenya Re to recover the cash call credits. She however admitted that she had no documentary evidence to prove the assistance that she rendered. She stated that there was no written agreement between her and Kenya Re on the assistance she was to give. The 1<sup>st</sup> defendant stated that there was no written communication from Kenya Re requesting her to assist it in the recovery of the outstanding cash call credits from Trident. The 1<sup>st</sup> defendant stated that she received the letter of offer from the 2<sup>nd</sup> defendant. She stated that she was the one who entered the details of cheque No. 000188 for Kshs. 3,422,586.50 in the acceptance part of the letter of offer. She stated that it was the 2<sup>nd</sup> defendant who advised her on how to fill out the acceptance form. She stated that Kenya Re did not write to her informing her that they were going to give her the suit property as her whistleblower benefit. The 1<sup>st</sup> defendant denied that the role of the 2<sup>nd</sup> defendant was limited to introducing her to Kenya Re as a buyer of the suit property. She admitted that in addition to the suit property, she also received a further sum of Kshs. 321,514/- from Kenya Re as a refund. She admitted that she had not made any payment to Kenya Re. She admitted that she was the one who wrote to Kenya Re requesting for a discount on the basis that she had already overpaid for the suit property. She stated that she requested for a discount based on the cheque for Kshs. 3,422,586/-. The 1<sup>st</sup> defendant admitted that she was acquitted under section 202 of the Criminal Procedure Code because the prosecutor was not in court. She stated that she got the letter of offer from the 2<sup>nd</sup> defendant who was a representative of Kenya Re. She stated that she did not pay any money to Kenya Re and that the suit property was transferred to her without her having paid any money to Kenya Re.

30. After the close of the 1<sup>st</sup> defendant's evidence, the advocate for the 2<sup>nd</sup> defendant informed the court that the 2<sup>nd</sup> defendant did not wish to tender any evidence in his defence. The court thereafter directed the parties to make closing submissions in writing.

#### **The Plaintiff's submissions:**

31. The plaintiff filed submissions dated 1<sup>st</sup> August 2022. The plaintiff framed five issues for determination by the court. The first issue was whether the suit property was fraudulently transferred to the 1<sup>st</sup> defendant. The plaintiff submitted that the 1<sup>st</sup> defendant did not deny that cheque No. 000188 dated 14<sup>th</sup> August 2002 for Kshs. 3,422,586.50 that was used to purportedly settle the purchase price for the suit property was the same cheque that was issued by Trident in settlement of the debt it owed Kenya Re. The plaintiff submitted that this was an act of fraud. The plaintiff submitted that the 1<sup>st</sup> defendant placed no documentary evidence before the court showing that she was entitled to any whistleblower benefit from Kenya Re. The plaintiff submitted further that no evidence was placed before the court showing that the board of directors of Kenya Re or its Managing Director had authorised such payment. The plaintiff submitted that in the absence of any documentary evidence supporting the 1<sup>st</sup> defendant's claim that the money used to pay for the suit property was her whistleblower benefit, the only inference that can be drawn was that the suit property was fraudulently transferred to the 1<sup>st</sup> defendant through the use of a cheque that was intended for the payment of cash call credits as the payment for the purchase price of the same. The plaintiff submitted that the suit property was transferred to the 1<sup>st</sup> defendant without consideration.
32. The second issue framed by the plaintiff was whether the 2<sup>nd</sup> defendant was involved in the fraud. The plaintiff submitted that the 2<sup>nd</sup> defendant was in charge of finance and that the fraud against Kenya Re could not have been executed without the involvement of the 2<sup>nd</sup> defendant. The plaintiff submitted that the 2<sup>nd</sup> defendant acknowledged receipt of the cheque from Trident but caused the cheque to be posted in the books of account of Kenya Re as the purchase price for the suit property rather than



as payment for a debt that was due to Kenya Re from Trident. The plaintiff submitted that the 2<sup>nd</sup> defendant also recommended the giving of a discount of Kshs. 100,000/- on the purchase price to the 1<sup>st</sup> defendant hence the purported refund. The plaintiff submitted that the 2<sup>nd</sup> defendant's participation in the fraud was laid bare by the evidence of the 1<sup>st</sup> defendant who told the court that she picked the letter of offer of the suit property from the 2<sup>nd</sup> defendant and that it was the 2<sup>nd</sup> defendant who told her to indicate in the said letter of offer that cheque No. 000188 was to be used as the purchase price for the suit property. The 1<sup>st</sup> defendant submitted that the 2<sup>nd</sup> defendant had engaged in similar fraudulent activities with other accounts in the same manner as he did with this particular one for Trident. The plaintiff cited ELC No. 322 of 2008, KACC v. John F. Kinyua and Charles Kinuthia where the 2<sup>nd</sup> defendant had credited a cheque paid to Kenya Re for the settlement of a Fire Insurance Claim to Charles Kinuthia's property account. The plaintiff submitted that the 2<sup>nd</sup> defendant had also been charged and convicted of the offences of abuse of office through fraud that involved a number of properties belonging to Kenya Re. The plaintiff cited the cases in which the 2<sup>nd</sup> defendant was charged and convicted. The plaintiff submitted that the 2<sup>nd</sup> defendant was involved in the fraudulent transfer of the suit property to the 1<sup>st</sup> defendant.

33. The third issue was whether the 1<sup>st</sup> defendant was unjustly enriched as a result of the conduct of both defendants by the transfer of the suit property to her and receipt of Kshs. 321,514.50 at the expense of Kenya Re. The plaintiff submitted that the cheque for Kshs. 3,422,586.50 which the 1<sup>st</sup> defendant purported to enclose in the offer letter in purported settlement of all costs related to the suit property was issued by Trident in settlement of a debt that was due to Kenya Re. The plaintiff submitted that the said cheque that was credited to the 1<sup>st</sup> defendant's property account did not belong to her and as such could not be used to pay for the suit property. The plaintiff submitted that if the 1<sup>st</sup> defendant had any claim against Kenya Re, the same should have been pursued in an open and transparent manner rather than through fraud. The plaintiff submitted further that if the 2<sup>nd</sup> defendant thought that the 1<sup>st</sup> defendant was entitled to some payment for the alleged whistleblowing on Trident, he should have made a recommendation to the board of Kenya Re or its Managing Director in an open and transparent manner for approval and not by assisting the 1<sup>st</sup> defendant to commit fraud on Kenya Re. The plaintiff submitted that in addition to acquiring a house without paying for the same at all, the 1<sup>st</sup> defendant received on top, Kshs. 321,514.50 as a refund of the overpayment.
34. The plaintiff cited Goff and Jones on Law of Restitution in which the authors set out the elements of unjust enrichment as; the defendant has been enriched by receipt of a benefit; he has been so enriched at the expense of the plaintiff, it would be unjust to allow him to retain the benefit, and there is no defence or bar to the claim. The plaintiff submitted that the 1<sup>st</sup> defendant was unjustly enriched by the receipt of the suit property and the sum of Kshs. 321,514.50 at the expense of Kenya Re. The plaintiff submitted further that it would be unjust to allow the 1<sup>st</sup> defendant to retain the benefit.
35. The fourth issue was whether the transfer of the suit property to the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant's title should be cancelled. The plaintiff submitted that the 1<sup>st</sup> defendant having received the suit property and the said sum of Kshs. 321,514.50 unjustly without consideration at the expense of Kenya Re, it would be against good conscience for her to keep the same. The plaintiff submitted that the 1<sup>st</sup> defendant should make restitution. In support of this submission, the plaintiff cited Lord Goff and Professor Gareth Jones's book on The Law of Restitution, 5<sup>th</sup> Edition (1988) pages 11 and 12 which was cited in Chase International Investment Corporation and another v. Laxman Keshra and others [1978]KLR at page 154. The plaintiff also cited Fibrosa Spolka Akayina v. Fairbairn Lawson Combe Barbour Ltd. [1943] A.C at page 61. The plaintiff submitted that the transfer of the suit property to



the 1<sup>st</sup> defendant should be cancelled and the 1<sup>st</sup> defendant ordered to pay Kshs. 321, 514.50 together with mesne profits.

36. On the last issue that concerned the significance of the discharge if any of the defendants in Kibra Criminal Case No. 2568 of 2008, Republic v. John Faustin Kinyua and Irene Muthoni Mwaura, the plaintiff admitted that the defendants were discharged after the prosecutor failed to turn up in court on time. The plaintiff submitted that the said acquittal that was not made after a trial was reversed on appeal in Republic v. John Faustin Kinyua and Irene Muthoni Mwaura [2015]eKLR.
37. In conclusion, the plaintiff submitted that it had proved its case on a balance of probabilities. The plaintiff prayed for judgment against the defendants jointly and severally as prayed in the plaint.

**The 1<sup>st</sup> defendant's submissions:**

38. The 1<sup>st</sup> defendant filed submissions dated 26<sup>th</sup> September 2022. The 1<sup>st</sup> defendant submitted that the suit property belonged to the 1<sup>st</sup> defendant in law and in fact and that the plaintiff's suit sought to change that state of affairs. The 1<sup>st</sup> defendant submitted that the plaintiff did not comply with Order 21 Rule 6 of the Civil Procedure Rules that required the plaintiff to produce before the court a certified copy of the title of the suit property before any judgment could be passed in its favour. The 1<sup>st</sup> defendant submitted that there was no evidence placed before the court showing that the plaintiff served upon the 1<sup>st</sup> defendant a notice under sections 26, 27 and 28 of the *Anti-Corruption and Economic Crimes Act, 2003* under which the suit was brought. The 1<sup>st</sup> defendant submitted that failure to serve the 1<sup>st</sup> defendant with a notice under the said provisions of the *Anti-Corruption and Economic Crimes Act, 2003* was not a mere technicality of procedure but a substantive requirement of the law and fair administrative action consistent with the protection of the fundamental right to property under section 75 of the former Constitution and Article 40 of the current Constitution. The 1<sup>st</sup> defendant submitted that the plaintiff's failure to comply with sections 26, 27 and 28 of the *Anti-Corruption and Economic Crimes Act, 2003* rendered the suit irregular and unconstitutional. The 1<sup>st</sup> defendant submitted further that under the *Anti-Corruption and Economic Crimes Act, 2003*, the plaintiff had no power to institute a suit for the recovery of public property and that under Part VI of that Act, the plaintiff could only recover the property value. The 1<sup>st</sup> defendant submitted further that public property is defined in the *Anti-Corruption and Economic Crimes Act, 2003* for the purposes of section 45 of the said Act which provides for criminal sanction for a person who among others fraudulently or otherwise acquires public property or a public benefit. The 1<sup>st</sup> defendant submitted that the only proceedings that the plaintiff can institute under the said Act are proceedings to prosecute a suspect for the offence created under the said section. The 1<sup>st</sup> defendant submitted that such proceedings could only be brought in the courts that could try criminal offences of which this court is not one. The 1<sup>st</sup> defendant submitted that section 45 of the *Anti-Corruption and Economic Crimes Act, 2003* gives power of restitution only to the court that tries the offence and convicts the offender. In support of this submission, the 1<sup>st</sup> defendant referred the court to section 54 of the Act that empowers the court convicting an accused under section 45 of the Act to order restitution.
38. The 1<sup>st</sup> defendant submitted that the *Anti-Corruption and Economic Crimes Act, 2003* envisaged the recovery of fraudulently or unlawfully acquired public property through a criminal process. The 1<sup>st</sup> defendant submitted that the plaintiff had instituted criminal proceedings against the defendants in 2008 in respect of the cause of action the subject of this suit. The 1<sup>st</sup> defendant submitted that the defendants were acquitted of the charges that were preferred against them by the plaintiff and that the said acquittal stands to date. The 1<sup>st</sup> defendant submitted that it was at the submissions stage that the attention of the court and the defendants was drawn to the fact that the plaintiff had preferred



- an appeal against the defendants' acquittal and the same was overturned and an order made for the hearing of the criminal case to start afresh. The 1<sup>st</sup> defendant submitted that the re-hearing of the case had not commenced contrary to Article 50(2)(c) of *the Constitution*. The 1<sup>st</sup> defendant submitted that she was not a party to the said appeal and as such as far as she was concerned, she remained acquitted.
38. The 1<sup>st</sup> defendant submitted that this suit was brought in a high-handed and unconstitutional manner. The 1<sup>st</sup> defendant cited *Isaac Gathungu Wanjohi & another v. Attorney General & 6 others* [2012]eKLR in support of this submission. The 1<sup>st</sup> defendant submitted that Article 40 of *the Constitution* does not protect a property found to have been unlawfully acquired. The 1<sup>st</sup> defendant submitted that whether or not a property has been unlawfully acquired can only be determined through a legally established process. The 1<sup>st</sup> defendant submitted that under the *Anti-Corruption and Economic Crimes Act*, 2003 public property acquired fraudulently or unlawfully can only be recovered through a criminal process followed by restitution on conviction.
39. The 1<sup>st</sup> defendant cited section 23 of the Registration of Titles Act (now repealed) and section 24 of the *Land Registration Act*, 2011 and submitted that the title held by the 1<sup>st</sup> defendant over the suit property could only be defeated if it was proved that the 1<sup>st</sup> defendant acquired the property fraudulently. The 1<sup>st</sup> defendant submitted that the plaintiff was under a duty to prove that the 1<sup>st</sup> defendant was a party to the fraud or illegality through which the suit property was allegedly acquired. The 1<sup>st</sup> defendant submitted that the 1<sup>st</sup> defendant's alleged participation in the alleged fraud had to be proved to the required standard and that vague allegations of fraud were not sufficient. In support of this submission, the 1<sup>st</sup> defendant cited *Central Kenya Ltd. v. Trust Bank Limited & 4 others* [1996]eKLR. The 1<sup>st</sup> defendant submitted that the plaintiff failed to call as witnesses several key persons in Kenya Re who were involved in the transaction in question which was a pointer to the fact that the said persons treated the transaction as valid Kenya Re having recovered over Kshs. 20,000,000/- through the efforts of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant submitted that no fraud or dishonesty was proved against her. The 1<sup>st</sup> defendant submitted that the payment from Trident that she was alleged to have converted was received by Kenya Re and a receipt was issued to Trident. The 1<sup>st</sup> defendant submitted that she was not involved in the drafting and signing of the letter of offer of the suit property and the refund of the overpayment to her. The 1<sup>st</sup> defendant submitted that the evidence adduced by the plaintiff did not meet the threshold for proof of fraud and illegality. The 1<sup>st</sup> defendant submitted that the standard of proof of fraud is higher than a balance of probabilities. In support of this submission, the 1<sup>st</sup> defendant cited *Urmila w/o Mahendra Shah v. Barclays Bank International Limited* [1979]eKLR 65. The 1<sup>st</sup> defendant submitted that taking into account the conduct of Kenya Re's key personnel in the transaction, this is a case in which section 53(5) of the *Anti-Corruption and Economic Crimes Act*, 2003 would apply to deny Kenya Re through the plaintiff restitution even if fraud and illegality were proved beyond a reasonable doubt.
40. The 1<sup>st</sup> defendant submitted that she had not been convicted of any wrong that would justify the cancellation of her title to the suit property. In support of this submission, the 1<sup>st</sup> defendant cited *Registered Trustees of the Sisters of Mercy (Kenya) T/A Mater Misericordiae Hospital v. John Muriithi & 2 others* [2019] eKLR. The 1<sup>st</sup> defendant submitted that the plaintiff's suit was a non-starter and urged the court to dismiss the same with costs to the 1<sup>st</sup> defendant.

#### **The 2<sup>nd</sup> defendant's submissions:**

41. The 2<sup>nd</sup> defendant filed submissions dated 8<sup>th</sup> September 2022. The 2<sup>nd</sup> defendant submitted that the plaintiff wanted the court to believe that the 2<sup>nd</sup> defendant single-handedly caused the suit property to be transferred to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant submitted that several employees of Kenya



Re some of whom testified for the plaintiff admitted having participated in one way or the other in the transfer of the suit property to the 1<sup>st</sup> defendant and in the approval of a refund to her. The 2<sup>nd</sup> defendant submitted that it had no mandate to sanction the transfer of the suit property to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant submitted that that was the mandate of the board of directors of Kenya Re. The 2<sup>nd</sup> defendant submitted that the other civil and criminal cases involving the 2<sup>nd</sup> defendant which the plaintiff relied on to prove that the 2<sup>nd</sup> defendant was a serial fraudster were irrelevant and not admissible in these proceedings. The 2<sup>nd</sup> defendant cited The Encyclopedia Britannica for the definition of fraud and submitted that if at all the 2<sup>nd</sup> defendant committed fraud which was not admitted, PW2, PW3, PW4, and PW5 who were the 2<sup>nd</sup> defendant's co-employees were equally guilty of the same fraud. The 2<sup>nd</sup> defendant submitted that no explanation was given by the plaintiff for picking on the 2<sup>nd</sup> defendant alone for victimization and prosecution. The 2<sup>nd</sup> defendant submitted that he was being discriminated against by the plaintiff and Kenya Re. The 2<sup>nd</sup> defendant submitted that the plaintiff had not sought any relief against him and urged the court to dismiss the plaintiff's suit with costs to him.

### **Analysis of the issues arising and determination:**

42. I have considered the pleadings, the evidence adduced by the parties in support of their respective cases and the submissions by the advocates for the parties. The parties did not agree on the issues for determination by the court. Each party framed its own issues which it submitted on. From the pleadings, the issues arising for determination in this suit in my view are the following;
1. Whether this court has jurisdiction to entertain the plaintiff's claim.
  2. Whether the 1<sup>st</sup> defendant acquired the suit property fraudulently and illegally.
  3. Whether the 1<sup>st</sup> defendant was unjustly enriched by the transfer of the suit property and payment of Kshs. 321,514.50 to her at the expense of Kenya Re.
  4. Whether the plaintiff is entitled to the reliefs sought against the defendants.
  5. Who is liable for the costs of the suit?

### **Whether this court has jurisdiction to entertain the plaintiff's claim.**

43. This suit was filed on 28<sup>th</sup> October 2008. Sections 7(1), 51 and 53 of The *Anti-Corruption and Economic Crimes Act*, 2003 (hereinafter referred to as "the Act") that was in force at the time when this suit was filed provided as follows:

"7.

- (1) The Commission shall have the following functions —
  - (a) to investigate any matter that, in the Commission's opinion, raises suspicion that any of the following have occurred or are about to occur —
    - (i) conduct constituting corruption or economic crime;
    - (ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;



- (b) to investigate the conduct of any person that, in the opinion of the Commission, is conducive to corruption or economic crime;
- (c) to assist any law enforcement agency of Kenya in the investigation of corruption or economic crime;
- (d) at the request of any person, to advise and assist the person on ways in which the person may eliminate corrupt practices;
- (e) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures that, in the opinion of the Commission, may be conducive to corrupt practices;
- (f) to advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such bodies that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt practices;
- (g) to educate the public on the dangers of corruption and economic crime and to enlist and foster public support in combating corruption and economic crime;
- (h) to investigate the extent of liability for the loss of or damage to any public property and —
  - (i) to institute civil proceedings against any person for the recovery of such property or for compensation; and
  - (ii) to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya(emphasis added); and
- (i) to carry out any other functions conferred on the Commission by or under this Act or any other law.

44. Section 51 of the Act provides as follows:

“A person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered.”



Section 53(1), (2), (3) and (4) of the Act provides as follows:

- “(1) A person liable for an amount under section 51 or 52 shall also be liable to pay interest, at the prescribed rate, on the amount payable.
- (2) Nothing in section 51 or 52 affects any other liability a person may have.
- (3) An amount for which a person is liable under section 51 or 52 to a public body may be recovered by the public body or by the Commission on its behalf.
- (4) For greater certainty, nothing in the *Government Proceedings Act* (Cap. 40) prevents the Commission from instituting civil proceedings to recover amounts under subsection (3).” (emphasis added)

45. The foregoing provisions of the Act leave no doubt that as at the time when this suit was instituted, the plaintiff had the power to institute civil proceedings for the recovery of any public property lost or compensation for the loss or damage to such property. I am not in agreement with the submissions by the 1<sup>st</sup> defendant that the recovery of public property lost through corruption or economic crime was dependent on the conviction through a criminal trial of the person from whom the recovery is sought and that such recovery could only be enforced through the restitution provided for through such criminal process. My view that the plaintiff had and still has the power to institute civil proceedings for the recovery of public property lost through corruption or economic crime, or of compensation in respect thereof is further fortified by section 56(c) of the Act which came into effect in 2010;

Section 56C. of the Act provides as follows:

- “(1) Any funds recovered by the Commission shall be paid into the Consolidated Fund.
- (2) Notwithstanding any provision in this Act or any other written law, any asset or property, whether movable or immovable, recovered either in the course of, or upon conclusion of investigations, or upon commencement of court action or proceedings, whether such proceedings are of a civil or criminal nature or upon conclusion of such proceedings, shall be surrendered to the Permanent Secretary to the Treasury.” (emphasis added)

46. It is my finding from the foregoing that the plaintiff had the power to institute civil proceedings to recover the suit property that it claimed had been transferred to the 1<sup>st</sup> defendant fraudulently and illegally together with the payment that the 1<sup>st</sup> defendant is said to have received in the same transaction.

47. It is also my finding that this court has the jurisdiction to entertain the plaintiff’s suit. The jurisdiction of this court which is derived from *the Constitution* is set out in section 13 of the *Environment and Land Court Act*, 2011 as follows:

- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—



- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.”

48. The dispute before the court concerns the issue of whether the 1<sup>st</sup> defendant acquired the suit property lawfully and whether she holds a valid title in respect thereof. These are issues that can only be determined by this court. The sum of Kshs. 321,514.50 was paid to the 1<sup>st</sup> defendant pursuant to a purported agreement for the sale of the suit property between the 1<sup>st</sup> defendant and Kenya Re. The claim for the refund of the said amount is therefore intertwined with that for the recovery of the suit property. If the court finds the sale transaction between the 1<sup>st</sup> defendant and Kenya Re fraudulent and illegal, the court has jurisdiction to order the refund of the sum of Kshs. 321,514.50 paid to the 1<sup>st</sup> defendant pursuant to the said agreement. The court, therefore, has jurisdiction to determine the whole claim brought by the plaintiff against the defendants.

49. The 1<sup>st</sup> defendant had also raised the issue of the alleged failure by the plaintiff to serve her with a notice under sections 26 and 27 of The *Anti-Corruption and Economic Crimes Act*, 2003 (hereinafter referred to as “the Act”). Notices under sections 26 and 27 of the Act are not mandatory. Even if they were, I cannot see how non-service of the same divests this court of jurisdiction or compromises the 1<sup>st</sup> defendant’s right to a fair hearing or property guaranteed under *the Constitution*. The 1<sup>st</sup> defendant was given full opportunity to defend herself against the claim that was brought against her by the plaintiff herein which opportunity she made use of. I am therefore not persuaded that she was prejudiced in any way by none service of the said notices.

**Whether the 1<sup>st</sup> defendant acquired the suit property fraudulently and illegally and whether the 2<sup>nd</sup> defendant was a party to the fraud and illegalities.**

50. In *Mwangi James Njehia v. Janetta Wanjiku Mwangi & another* [2021] eKLR, the Court of Appeal stated as follows:

“

“37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

51. For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, he must prove that:



1. he holds a certificate of title;
  2. he purchased the property in good faith;
  3. he had no knowledge of the fraud;
  4. he purchased for valuable consideration;
  5. the vendors had apparent valid title;
  6. he purchased without notice of any fraud; and
  7. he was not party to the fraud.”
52. In Black’s Law Dictionary 9<sup>th</sup> Edition at page 731 fraud is defined as:
- “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
- In *Railal Gordhanbhai Patel v. Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:
- “Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
53. In *Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 E.A KLR 269, it was held that:
- “Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.
54. In *Kampala Bottlers Ltd. v Damanico (UG) Ltd.* [1990-1994] E.A141(SCU), the Supreme Court of Uganda held that:
- “To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”
55. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:
- “(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.
56. The Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes it thus:
- “13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will



support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”
57. The burden was on the plaintiff to prove the allegations of fraud and illegalities pleaded against the defendants in relation to the acquisition of the suit property. I am satisfied from the evidence on record that the 1<sup>st</sup> defendant acquired the suit property fraudulently and illegally and that the 2<sup>nd</sup> defendant was a party to the fraud and the illegalities that surrounded the transaction.
58. From the evidence on record, I am not persuaded that the 1<sup>st</sup> defendant was an innocent purchaser of the suit property. The purported purchase of the suit property by the 1<sup>st</sup> defendant was a fraud against Kenya Re perpetrated by the defendants. No cogent evidence was placed before this court by the 1<sup>st</sup> defendant in proof of her contention that she was entitled to a whistle-blower benefit as she termed it from Kenya Re and that an agreement was reached between her and Kenya Re that the benefit would be the suit property. No evidence was placed before the court showing that Kenya Re had a policy for making payments or giving any other benefit to whistleblowers. No evidence was also placed before the court showing that there was an agreement between the 1<sup>st</sup> defendant and Kenya Re that she would be given a benefit for whistleblowing.
59. According to Black's Law Dictionary Tenth Edition page 1831, a whistleblower is defined as:

“An employee who reports employer wrongdoing to a governmental or law enforcement agency.”
60. From that definition, it is not clear how the 1<sup>st</sup> defendant could be said to be a whistleblower. There was no evidence that Trident had engaged in any wrongdoing. Trident owed Kenya Re money on account of cash call credits. There was no evidence that Trident had refused to pay the same or that it had falsified accounts so as to conceal the debt. It is therefore not clear as to what wrongdoing on the part of Trident the 1<sup>st</sup> defendant was blowing. All that the 1<sup>st</sup> defendant is said to have done that allegedly aided in the recovery of the debt that Trident owed Kenya Re was done by the 1<sup>st</sup> defendant in the normal course of her employment with Trident for which she was being paid. If any agreement was reached between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant that any payment would be made to the 1<sup>st</sup> defendant for assisting Kenya Re to recover the debt that was owed by Trident, the same was not produced before the court and the payment could not be for whistleblowing. Kenya Re is a public company run by a board of directors. If there was an agreement on the part of Kenya Re for such payment to be made, the payment ought to have been made openly by Kenya Re. There was no need of converting a cheque paid to Kenya Re by Trident to settle a debt into the alleged whistle-blower benefit to the 1<sup>st</sup> defendant. The manner in which the whole transaction was conducted left no doubt that those behind it were engaged in a shady deal. According to the payment voucher(PEXH.5) prepared by Trident on 14<sup>th</sup> August 2002 through which cheque No. 000188 dated 14<sup>th</sup> August 2002 for Kshs. 3,422,586.50 (PEXH.6) was issued, the said cheque was payable to Kenya Re for cash call credits. The receipt of the said cheque was acknowledged by the 2<sup>nd</sup> defendant through a letter dated 16<sup>th</sup> August 2002(PEXH.7). In the letter, the 2<sup>nd</sup> defendant acknowledged receipt of the payment on account of the outstanding cash call credit. The issuance of a receipt dated 16<sup>th</sup> August 2002 (PEXH.15) for Kshs. 3,422,586.50 by Kenya Re to Trident



showing that a cheque that was paid on account of outstanding cash call credit and acknowledged as such by the 2<sup>nd</sup> defendant was a payment made on the account of the 1<sup>st</sup> defendant for the purchase of the suit property is clear evidence of fraud in which the 2<sup>nd</sup> defendant who was the financial controller of Kenya Re who received the cheque and the 1<sup>st</sup> defendant in whose favour the cheque was converted were parties.

61. I wonder why the said cheque was not entered into Kenya Re's books as a debt payment and a fresh cheque issued by Kenya Re to the 1<sup>st</sup> defendant in settlement of her alleged whistleblower benefit if the transaction was being made in good faith. Why was it made to look like Trident had issued a cheque to settle the purchase price for the suit property on behalf of the 1<sup>st</sup> defendant which was not the case? There was so much hype by the defendants about the alleged recovery of over Kshs. 20,000,000/- by Kenya Re through the assistance of the 1<sup>st</sup> defendant. For the record, as at the time the cheque from Trident in the sum of Kshs. 3,422,586.50 was converted to settle the 1<sup>st</sup> defendant's personal liability, Trident had only paid to Kenya Re a sum of Kshs. 3,422,586.50 being the first instalment of the admitted debt. The sum of Kshs. 3,422,586.50 that was converted was the second instalment paid by Trident. One therefore wonders as to which payment had been made to Kenya Re that would have justified such payment to the 1<sup>st</sup> defendant. The alleged sum of over Kshs. 20,000,000/- had not been paid at the time the cheque from Trident for the second instalment was converted by the defendants as the purchase price for the 1<sup>st</sup> defendant's house.
62. In further proof of the fact that the transaction was fraudulent, the plaintiff placed before the court evidence showing that this was not the first such transaction in which the 2<sup>nd</sup> defendant had masterminded the theft of Kenya Re's property. The plaintiff placed before the court evidence of other cases involving the 2<sup>nd</sup> defendant in which Kenya Re had purportedly sold properties in a similar fashion paid for through the conversion of cheques from insurance companies meant to settle premiums. See, PEXH. 19 and PEXH.20. There is no doubt looking at the circumstances of this case as a whole that this to the 2<sup>nd</sup> defendant was just another "deal" but with a different willing participant. In the criminal cases cited by the plaintiff, the 2<sup>nd</sup> defendant was charged, tried and convicted of fraudulent acquisition of public property and abuse of office. In PEXH.19, the court found that the 2<sup>nd</sup> defendant directed Kenya Re's cashiers on how to make entries in Kenya Re's books of accounts. In that case, the 2<sup>nd</sup> defendant directed the cashier to credit to the 2<sup>nd</sup> defendant's own mortgage account a sum of Kshs. 1,835,978/- that was paid by Trident to Kenya Re as 18% treaty shares. Scheming and stealing from Kenya Re appears to have been the 2<sup>nd</sup> defendant's mode of operation at Kenya Re where he held the senior post of Financial Controller. PEXH. 20 involved a cheque for Kshs. 3,196, 896/- that was paid by Heritage Insurance Company Ltd. to Kenya Re in settlement of a fire insurance claim. In that case like in the present one, the said sum of Kshs. 3,196, 896/- was used by one of the senior managers at Heritage Insurance Company Ltd. with the assistance of the 2<sup>nd</sup> defendant as payment for the purchase of a property from Kenya Re. Like in the present case, the said cheque for Kshs. 3,196, 896/- was credited to the account of the said senior manager so that it reflected that the said manager had paid Kshs. 3,196, 896/- for the said property purchased from Kenya Re. The criminal court found the 2<sup>nd</sup> defendant guilty of abuse of office and Heritage Insurance Company Limited's said senior manager was found guilty of fraudulent acquisition of public property. In a civil suit by the plaintiff, the said manager was ordered to surrender the property that had already been transferred to his name back to Kenya Re.
63. In the circumstances, nothing in my view turns out on the other employees who participated in the transfer of the suit property to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant had set the ball rolling. He was the one who instructed PW3 to offer the suit property to the 1<sup>st</sup> defendant which letter of offer was picked



from his office by the 1<sup>st</sup> defendant. He was also the one who told the 1<sup>st</sup> defendant to indicate in the letter of offer that she had settled the purchase price for the suit property through cheque No. 000188 dated 14<sup>th</sup> August 2002 for Kshs. 3,422,586.50 from Trident. The 2<sup>nd</sup> defendant was also the one who received the said cheque from Trident and acknowledged receipt of it. According to the 1<sup>st</sup> defendant, it was also the 2<sup>nd</sup> defendant who told her to ask for a refund of the alleged over payment. Most of the employees of Kenya Re that the 2<sup>nd</sup> defendant claimed had also participated in the transfer of the suit property to the 1<sup>st</sup> defendant were junior to the 2<sup>nd</sup> defendant and took instructions from him. They all acted on the belief that this was a normal sale transaction as the 2<sup>nd</sup> defendant had made them to believe. The 2<sup>nd</sup> defendant made them to believe that the 1<sup>st</sup> defendant had paid for the suit property through a cheque from Trident which was not the case. The issue of the 2<sup>nd</sup> defendant having been singled out by the plaintiff for victimization does not arise. As the plaintiff had put it, the 1<sup>st</sup> defendant acquired the suit property for free and got money on top of it.

64. The upshot of the foregoing is that the 1<sup>st</sup> defendant did not acquire the suit in good faith. The 1<sup>st</sup> defendant did not also give any consideration for the suit property. I am satisfied that the property was acquired by the 1<sup>st</sup> defendant fraudulently and illegally and that the 2<sup>nd</sup> defendant was part and parcel of the fraud.

**Whether the 1<sup>st</sup> defendant was unjustly enriched by the transfer of the suit property and payment of Kshs. 321,514.50 at the expense of Kenya Re.**

65. Goff and Jones on Law of Restitution that was cited by the plaintiff, set out the elements of unjust enrichment as follows;
1. the defendant has been enriched by receipt of a benefit;
  2. the defendant has been so enriched at the expense of the plaintiff;
  3. it would be unjust to allow the defendant to retain the benefit and;
  4. there is no defence or bar to the claim.
66. I am satisfied from the evidence on record that the plaintiff has satisfied the foregoing elements of unjust enrichment with regard to the ownership by the 1<sup>st</sup> defendant of the suit property. The 1<sup>st</sup> defendant received the suit property and the sum of Kshs. 321,514.50. Both belonged to Kenya Re. The 1<sup>st</sup> defendant was therefore enriched at the expense of Kenya Re. In the circumstances of this case, it would be unjust to allow the 1<sup>st</sup> defendant to keep the suit property that she never paid for and the said sum of Kshs. 321,514.50 that was paid to her as a refund while she made no payment at all to Kenya Re in respect of which she could have been entitled to a refund. On the last element, the 1<sup>st</sup> defendant has not put forward any defence that would make the claim for restitution unmaintainable. Due to the foregoing, it is my finding that the 1<sup>st</sup> defendant was unjustly enriched with the transfer to her of the suit property and payment to her of a refund in the sum of Kshs. 321,514.50.

**Whether the plaintiff is entitled to the reliefs sought against the defendants.**

67. The plaintiff sought several reliefs that I have set out herein earlier in the judgment. From the findings I have made above, the plaintiff is entitled to a declaration that the transfer of the suit property by Kenya Re to the 1<sup>st</sup> defendant was illegal, fraudulent, null and void. The plaintiff is also entitled to an order cancelling the title held by the 1<sup>st</sup> defendant in respect of the suit property so that the property reverts to Kenya Re. The 1<sup>st</sup> defendant had contended that its title that was issued under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) was indefeasible. A title issued under the



Registration of Titles Act can be challenged on the ground of fraud to which the holder was a party. Section 23 of the Registration of Titles Act provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

68. Section 26 of the *Land Registration Act*, 2012 which repealed the Registration of Titles Act, provides as follows:

“26.

- (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.”

69. Article 40 of *the Constitution* provides that:

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).



- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

70. I have already held that the 1<sup>st</sup> defendant’s title was acquired fraudulently and that the 1<sup>st</sup> defendant was a party to the fraud. Under the Registration of Titles Act and the statute that repealed it, the validity of a title to land can be challenged on among other grounds, fraud and misrepresentation. A title acquired fraudulently is illegal, null and void and cannot confer upon the holder a valid interest in the land the subject thereof. Such a title is also not protected under *the Constitution*.

71. In *Wambui v. Mwangi & 3 others*, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) the Court of Appeal stated as follows:

“70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3<sup>rd</sup> respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3<sup>rd</sup> respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme



herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.

72. In light of all the above, we reiterate that the Judge's reasoning as to why appellant's title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable."

72. The 1<sup>st</sup> defendant cannot benefit from an illegality. In *Macfoy v United Africa Co. Ltd.*(1961) 3 All E.R 1169, Lord Denning stated as follows at page 1172 concerning an act that is a nullity:

"if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

73. Due to the foregoing, it is my finding and I so hold that the plaintiff is entitled to an order cancelling the transfer of the suit property to the 1<sup>st</sup> defendant and reverting the same to Kenya Re. The plaintiff is also entitled to the injunctive reliefs sought. The court has held that the 1<sup>st</sup> defendant holds no valid title to the suit property, the 1<sup>st</sup> defendant's occupation of the property amounts to trespass in the circumstances. As a trespasser, the 1<sup>st</sup> defendant should deliver possession of the property to the owner thereof. The 1<sup>st</sup> defendant should also not interfere with the suit property pending such handing over of the same.

74. With regard to the claim for Kshs. 321,514.50, I have held that the purported sale of the suit property pursuant to which the 1<sup>st</sup> defendant received a refund of Kshs. 321,514.50 was fraudulent. The 1<sup>st</sup> defendant did not make any payment to Kenya Re pursuant to the purported agreement that would have entitled her to a refund of the said amount or at all. In the circumstances, the plaintiff is entitled to recover the said sum of Kshs. 321,514.50 from the 1<sup>st</sup> defendant together with interest from the date of payment until recovery in full.

75. The plaintiff had also claimed mesne profits and costs of the suit. In *Attorney General v. Halal Meat Products Limited* [2016] eKLR the Court of Appeal stated as follows on mesne profits:

"It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See *McGregor on Damages*, 18<sup>th</sup>Ed. para 34-42."

76. In *Rajan Shah T/A Rajan S. Shah & Partners v. Bipin P. Shah* [2016] eKLR the court stated as follows:

"The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits."



77. I have held that the 1<sup>st</sup> defendant is a trespasser on the suit property. The 1<sup>st</sup> defendant is therefore in wrongful occupation of the suit property and as such she is liable to pay mesne profits to Kenya Re through the plaintiff. The 1<sup>st</sup> defendant has been in occupation of the suit property since 29<sup>th</sup> August 2002; that is a period in excess of 20 years. The suit property is 4 bedroomed maisonette within Kenya Re Villa Franca Estate Nairobi. The court will take these factors into consideration while assessing mesne profits.
78. On the issue of costs, cost of and incidental to a suit is at the discretion of the court. As a general rule, costs follow the event unless the court for good reason orders otherwise. In the present case, the plaintiff has succeeded in its claim against the defendants. The plaintiff shall have the costs of the suit.

**Conclusion:**

79. In conclusion I hereby enter judgment for the plaintiff against the defendants as follows;
1. I declare that the transfer of all that parcel of land known as L.R No. 209/10611/173 I.R No. 77586 situated at Villa Franca Estate, Nairobi on which stands a residential house No. 304 by Kenya Reinsurance Corporation Limited (Kenya Re) to the 1<sup>st</sup> defendant was illegal, fraudulent, null and void.
  2. I hereby cancel the registration of the 1<sup>st</sup> defendant as the owner of all that parcel of land known as L.R No. 209/10611/173 I.R No. 77586 situated at Villa Franca Estate, Nairobi on which stands a residential house No. 304 that was effected on 16<sup>th</sup> April 2003 and revert the property to Kenya Reinsurance Corporation Limited.
  3. The 1<sup>st</sup> defendant shall vacate and hand over possession of all that parcel of land known as L.R No. 209/10611/173 I.R No. 77586 situated at Villa Franca Estate, Nairobi on which stands a residential house No. 304 to Kenya Reinsurance Corporation Limited within 60 days from the date hereof in default of which the plaintiff shall be at liberty apply for warrants for her forceful eviction from the property.
  4. A permanent injunction is issued restraining the 1<sup>st</sup> defendant by herself, her servants, agents and/or assigns from alienating, encumbering, disposing of, wasting, and trespassing upon or in any other way interfering with all that parcel of land known as L.R No. 209/10611/173 I.R No. 77586 situated at Villa Franca Estate, Nairobi on which stands a residential house No. 304.
  5. Kshs. 321,514.50 together with interest at court rates from 19<sup>th</sup> September 2002 until payment in full as against the 1<sup>st</sup> defendant.
  6. Kshs. 5,000,000/- together with interest at court rates from the date hereof until payment in full as against the 1<sup>st</sup> defendant being mesne profits for the unlawful occupation of the suit property.
  7. The plaintiff shall have the costs of the suit payable by the defendants jointly and severally.

**DELIVERED AND DATED AT KISUMU THIS 12<sup>TH</sup> DAY OF JUNE 2023.**

**S. OKONG'O**

**JUDGE**

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Litoro for the Plaintiff



Mr. Mwenesi for the 1<sup>st</sup> Defendant

Ms. Githae for the 2<sup>nd</sup> Defendant

Ms. J. Omondi -Court Assistant

