



Sheikh & another v Mas Constructions Limited & 5 others (Environment & Land Case 1480 of 2014) [2023] KEELC 19163 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1480 OF 2014**

**OA ANGOTE, J
JULY 27, 2023**

BETWEEN

ABDUL WAHEED SHEIKH 1ST PLAINTIFF

ABDUL HAMEED SHEIKH 2ND PLAINTIFF

AND

MAS CONSTRUCTIONS LIMITED 1ST DEFENDANT

JOSEPH NDERITU T/A JOGANDRIES AUCTIONEERS 2ND DEFENDANT

HASSAN ABDI SALAN 3RD DEFENDANT

MAHAT ADAN ABDIRAHMAN IBRAHIM 4TH DEFENDANT

NAIROBI CITY COUNTY 5TH DEFENDANT

CHIEF LAND REGISTRAR 6TH DEFENDANT

JUDGMENT

1. The Plaintiffs instituted this suit vide a Complaint dated December 24, 2014 in which they sought the following orders:
 - a. A declaration that the order of October 10, 2014 and proceedings in Milimani, CM Misc Appln. No 972 of 2014, pursuant to which the 1st and 2nd Defendants levied distress for rent on property land reference number 209/1916/5 is null and void ab initio.
 - b. A declaration that Grant number IR 147524 for property land reference number 209/1916/5 dated February 18, 2013, or any such Grant pursuant to which the 1st, 3rd and 4th Defendants claim entitlement to ownership to property land reference number 209/1916/5 is null and void ab initio.



- c. The 1st and 2nd Defendants be ordered to pay the Plaintiffs general damages for unlawful execution, attachment and trespass.
 - d. The 1st, 2nd, 3rd and 4th Defendants by themselves or by their agents, officers, servants or otherwise howsoever be restrained from entering or remaining upon property land reference number 209/1916/5 and/ or any manner whatsoever interfering with the Plaintiffs' occupation of the property.
 - e. The 5th Defendant by itself or by its agents, officers, servants or otherwise howsoever be restrained from approving any development applications and drawings, issuing any permits, permissions or authorizing for any demolition or construction works of whatever nature over property land reference number 209/1916/5 at the behest of the 1st, 3rd and 4th Defendants.
 - f. The 6th Defendant by itself or by its agents, officers, servants or otherwise howsoever be restrained from registering against the register of property land reference number 209/1916/5 any documents adverse to the interests of the Plaintiffs at the behest of the 1st, 3rd and 4th Defendants or at all.
 - g. The Defendants be ordered to pay the Plaintiffs cost of this suit together with interest thereon at court rates from the date of filing of suit until payment in full.
 - h. Any such other or further relief as this Honourable Court may deem appropriate.
2. According to the Plaintiffs, the property land reference number 209/1916/5 contained in Grant IR 94707 dated February 26, 2003 (the suit property) is registered in the name of the late Sheikh Fazal Ilahi (deceased) and that this is pursuant to a transfer registered on July 2, 1937, a provisional certificate of title registered on September 20, 1989 and a Grant registered on April 5, 2004.
 3. The Plaintiffs averred in the Plaint that the Estate of the late Sheikh Fazal Ilahi (deceased) has met its obligations and duties attendant to the ownership of the property, including payment of land rates and land rent to the 5th and 6th Defendants respectively; that the land rent and rates accounts for the property are in the name of the Estate of the deceased and that the Estate of the late Sheikh Fazal Ilahi (deceased) has been in occupation of the suit property since 1937 and the property is currently occupied by the Plaintiffs' caretaker.
 4. The Plaintiffs averred that on October 10, 2014, the 1st and 2nd Defendants wrongly broke and entered into the house on the property, seized and took possession of furniture, goods and chattels therein and carted them away in a purported distress for rent and enforcement of an order made in Milimani, CM, Misc Application No 972 of 2014.
 5. It is the Plaintiffs' case that their appointed caretaker and husband were not tenants of the 1st Defendant; that there was no rent due or owing for the use and occupation of the house on the suit property to the 1st Defendant; that the 1st and 2nd Defendants' actions aforesaid were attempts at dispossessing the Plaintiffs of the suit property without the permission of the Plaintiffs and that the 1st and 2nd Defendants' actions amount to trespass.
 6. The Plaintiffs iterated that in furtherance of the 1st, 2nd, 3rd and 4th Defendants' scheme to dispossess them of the suit property, the 1st Defendant has created a rates account in its name with the 5th Defendant over the suit property misrepresenting that it is the registered and ratable owner of the suit property and that the 1st Defendant unlawfully procured drawings number CPF AF dated April 10, 2010 for the construction of apartments on the land.



7. According to the Plaintiffs, the records available at Parklands Police Station indicate that the 3rd and 4th Defendants transferred their alleged interest in the Grant to the 1st Defendant on March 10, 2014 and that the 1st, 3rd and 4th Defendants have deposited construction materials on the suit property.
8. The 1st Defendant opposed this suit vide a Defence dated February 10, 2015, in which it averred that it is the registered proprietor of the property LR No 209/1916/5 registered as IR 147524 situated in Parklands Nairobi; that it has paid land rates to the 5th Defendant and land rent to the 6th Defendant up to 2015 and that any rates account created in its favour is legitimate.
9. The 1st Defendant denied that the Plaintiffs have been in occupation of the suit property since 1937 to date and that the 1st Defendant instructed the 2nd Defendant to evict the occupants of the suit property to enable it clear it in readiness for its intended construction of executive apartments.
10. It was the 1st Defendant's averment that it entered into a sale agreement with the 3rd and 4th Defendants for the sale and transfer of the suit property; that it complied with all the requirements for the transfer of the suit property and that all necessary clearances and consents were obtained and duty was duly paid for, as evidenced through searches dated March 12, 2014, July 2, 2014 and October 17, 2014.
11. The 1st Defendant deposed that through a letter dated December 2, 2014, their Advocates sought from the 6th Defendant a clarification over the ownership of LR No 209/1916/5 and that in a reply dated December 17, 2014, the 6th Defendant confirmed that the property LR No 209/1916/5 registered as IR 147524, and not IR 94707 as alleged by the Plaintiffs is owned by the 1st Defendant.
12. It was averred by the 1st Defendant that the letter by the 1st Defendant confirmed that the Plaintiffs' title documents were not legitimate; that the 6th Defendant further confirmed the 1st Defendant's ownership of the suit land through an official search dated December 17, 2014 and that the Plaintiffs have forged documents and perjured themselves in an attempt to deny the 1st Defendant its rightful claim to the suit property.
13. The 1st Defendant averred that it sought the succession cause proceedings for the late Shiekh Fazal Ilahi in Nairobi Succession Cause No 445 of 1986 and noted that the late Sheikh Fazal Ilahi died in 1955 leaving behind a Will and Codicil and that the Will and Codicil do not mention the suit property.
14. According to the 1st Defendant, in the Letters of Administration sought by Abdul Shakoor Sheikh, in his affidavit of 6th June 1986, he lists LR No 209/1916/2 and not LR No 209/1916/5; that the Plaintiffs similarly do not mention LR No 209/1916/5 as an asset of the estate and that the Plaintiffs in the Affidavit dated 19th May 2011 seeking to confirm the Grant of the Estate of the late Shiekh Fazal Ilahi listed LR No 209/1916/2 as among the deceased's assets.
15. The 3rd and 4th Defendants, through their Defence dated February 10, 2015, averred that the Grant produced by the Plaintiffs does not confer any title to the Plaintiffs; that the said Grant is a forgery and that the estate of the deceased is in law, incapable of owning property. The 3rd and 4th Defendants averred that at all material times before the sale of the suit property to the 1st Defendant, the suit property was registered in their name.
16. It is the 3rd and 4th Defendants' case that their ownership of the suit property has never been challenged or cancelled in any way whatsoever and that any documents that confer ownership of the property to the Plaintiffs are not authentic and are fraudulent.
17. The 3rd and 4th Defendants averred that the payment of rent and rates do not confer title or ownership to the Plaintiffs and is not a ground for claiming valid ownership of the suit property and that the



Plaintiffs and their agents are guilty of trespass with the aim of dispossessing the lawful owners of the suit property.

18. According to the 3rd and 4th Defendants, the property LR No 209/1916/5 was registered as IR. 147524 in their names and not as IR. 94707 as claimed by the Plaintiffs, which registration is fraudulent and that the suit property was sold to the 1st Defendant for valuable consideration after following all lawful procedures.
19. The 3rd and 4th Defendants lastly stated that at the time of obtaining the Letter of Allotment dated March 3, 1997, the suit property had neither been leased nor allotted to any person; that the ownership of the suit property was pursuant to a Grant registered as IR 147524 dated February 18, 2013 and issued to them after complying with all the requirements in the Letter of Allotment dated March 3, 1997.
20. In his Defence, the 6th Defendant averred that the suit property LR No 209/1916/5 is registered as IR No 147524 and is currently held by the 1st Defendant; that the 1st Defendant was registered as the bona fide proprietor on March 10, 2015 vide a transfer instrument from the previous owners, the 3rd and 4th Defendants and that the 3rd and 4th Defendants were registered as tenants in common in equal shares on July 30, 2014 vide a Grant (IR No 147524 and LR No 209/1916/5) signed by the Commissioner of Lands on February 18, 2013.
21. It was averred by the 6th Defendant that the 3rd and 4th Defendants were issued with a letter of allotment over the suit property dated March 3, 1997 at which time the property had neither been leased or allotted to any other party and that the title exhibited by the Plaintiffs as LR No 209/1916/5, IR No 94707 held by Abdul Shakoor Sheikh as administrator of the Estate of the late Sheikh Fazal Ilahi does not emanate from the 6th Defendant's office.
22. It is the position of the 6th Defendant that it does not have any record of the letter of allotment shown by the Plaintiff as issued on July 21, 2003 to Abdul Shakoor Sheikh; that the suit property was not held by the Plaintiffs or the late Shiekh Fazal Ilahi before April 1, 2003 or at all and as such, there was no Lease or Grant to be renewed in the deceased's favor.
23. The 6th Defendant stated that the properties described as LR No 209/1916 and 209/1916/5 are different properties; that the documents produced by the Plaintiffs in relation to the payment of land rent are not in the deed file or in the correspondence file of LR 209/1916/5; that the payment of rates and rent in any particular name does not confer title to the person named therein and that the 3rd and 4th Defendants and subsequently the 1st Defendant, have been paying land rent for the suit land since registration of the title to date and the Plaintiffs have no claim over the suit property.

Hearing and Evidence

24. The Plaintiffs' first witness, PW1, was a licensed land surveyor practicing under the firm name "Ardhi Survey Consultant Ltd". PW1 testified that the Plaintiffs were the owners of the suit property and that he was tasked by the Plaintiffs to trace the history of how the suit property came to be registered as LR No 209/1916/5 and deed plan No 244601 issued.
25. PW1 stated that the original number of the land was LR No 209/1916 that there was a subdivision of the land in 1930 which yielded two portions, 209/1916/1 and 2091/1916/2; that 209/1916/2 was further sub divided in 1952 and the resultant plots were 209/1916/3 (original 209/1916/2/1), LR No 209/1916/4 (original 209/1916/2/2), LR No 209/1916/5 (original 209/1916/2/3) and LR No 209/1916/2/R (a road which occupies 0.076 acres).



26. The witness referred to a letter dated September 2, 2002 from AJ Oyato, a licensed surveyor, which set out the condition for extension of Lease; that once a deed plan was submitted, an extension of the Lease was to be granted to the Plaintiffs and that the details set out in Survey Plan No 3, which is in respect to the suit land, are the ones captured in the original deed plan annexed to the title document.
27. With respect to the Plaintiffs' title, PW1 averred that the area is 0.506 hectares, which appears to be erroneous; that the area in the Survey Plan is 0.505 acres which if converted to hectares, becomes 0.2044 hectares; that he wrote a letter to the Director of Surveys dated March 24, 2015 seeking to know the origin of Deed Plan no 244601 for LR No 209/1916/5 and that the grant issued to the 3rd and 4th Defendants was issued on February 18, 2013 while the Grant issued to the Plaintiffs was in 2003 and was therefore first in time.
28. It was the evidence of PW1 that in the Affidavit annexed to the 1st Defendant's letter dated April 22, 2015 and sworn by Mr. Mahat Ibrahim, he fraudulently averred that his deed plan was lost yet there was no way he would have had a deed plan before he got a Letter of Allotment; that Mr. Mahat Ibrahim purported to have lost his deed plan when this was not the case and that it was on the basis of this letter that the 3rd and 4th Defendants were issued with a certified copy of the deed plan.
29. The 2nd Plaintiff, PW2, relied on his witness statement in which he recanvassed the facts set out in the Plaint. PW2 testified that the Plaintiffs are administrators of the Estate of their late father, the late Sheikh Fazal Ilahi; that his late father acquired the suit property and the house standing on it in 1937 and that he was issued with the Grant for the suit property January 6, 1989. PW2 produced photographs which were taken before the suit was filed. He averred that the house was no longer there having been demolished by the Defendants.
30. According to PW2, the Grant of letters of administration in their favor was registered on December 27, 2012; that following the demise of their father on March 22, 1955, his brother Abdul Ghafoor Sheikh obtained limited Grant of probate in respect of the estate and that when he migrated to Britain, his brother Abdul Shakoor Sheikh obtained Grant of letters of administration on July 22, 1987. He averred that the Grant of letters of administration issued to Abdul Shakoor Sheikh was duly registered on December 21, 1988 and a Provisional Certificate of Title was issued on January 6, 1989.
31. PW2 testified that the Grant for the property registered on April 5, 2004 is an extension of the lease contained in the Provisional certificate of title registered on September 20, 1989 for which an application was made by his brother, Abdul Shakoor Sheikh and a letter of allotment issued on July 21, 2003 by R. O Olando and that his brother Abdul Shakoor Sheikh died on May 3, 2010 before completing the distribution of the Estate of his late father.
32. It was the evidence of PW2 that his brother's certificate of death was duly registered against the suit property's title on December 27, 2012. PW2 averred that they were issued with a letter of allotment as the lease had expired and there was a renewal.
33. According to PW2, noting interferences with the rates account and register of the suit property, they wrote to the 5th and 6th Defendants on December 23, 2013 and January 19, 2014 notifying them of the said interferences; that they also mounted a caveat emptor notice on the roof of the house erected on the property, warning the property was not for sale and that the interference with the register of the suit property at the lands office led to their request to register a deed of indemnity to enable the reconstruction of the deed file which was reported as missing.
34. PW2 testified that the order made on October 10, 2014 in Milimani CM Misc Appln No 972 of 2014 was obtained by fraud and deceit; that the 1st and 2nd Defendants have fraudulently purported to make



a claim of ownership and possession against the Plaintiffs who are the lawful owners in succession and have been in continuous and uninterrupted possession of the suit property and that in November 2013, there was a similar attempt by Baseline Auctioneers acting on behalf of Dur0Sons Holdings Limited to levy distress on the suit property on instructions of S.S. Malonza & Company Advocates, which turned out to be a non-existent firm.

35. According to PW2, the Grant held by the 1st, 3rd and 4th Defendants does not relate to the suit property and was acquired through fraud, misrepresentation, error or misdescription by such parties; that these Defendants cannot claim to have acquired title without notice as there has always been a caveat emptor notice on the roof of the house erected on the suit property.
36. DW1, a director of the 1st Defendant company, relied on his witness statement dated February 10, 2015, in which he reiterated the facts as set out in the 1st Defendant's Defence. DW1 testified that the 1st Defendant purchased the suit property, LR No 209/1916/5 in Parklands 1st Avenue, from the 3rd and 4th Defendants for Kshs. 25 million in cash and that all requirements and documentation to complete the transfer of the suit property were met.
37. DW1 stated that the 1st Defendant intends to construct executive apartments on the suit property and that it has sought and paid for building approvals from the Nairobi City County (5th Defendant) and the National Environment Management Authority (NEMA). DW1 averred that the Plaintiffs have no color of right over the suit property and only occupied it an attempt to defraud the registered owners.
38. DW1 admitted that the 1st Defendant instructed the 2nd Defendant to evict the occupants to enable it clear the suit property in readiness of the mentioned construction; that the 6th Defendant, through a letter dated December 17, 2014, confirmed that the suit property, LR No 209/1916/5 is registered as IR 147524 (and not IR 94707 as alleged by the Plaintiffs) and owned by the 1st Defendant, and that the letter further confirmed that the title documents held by the Plaintiffs were not legitimate.
39. In cross-examination, DW1 testified that before he purchased the suit property from the 3rd and 4th Defendants, he visited it in 2013 and found a male adult on the suit property in a small guard house; that the 3rd and 4th Defendants told him that the person guarding the property was their agent and that the metal rods on the suit property were delivered there by himself. It was his evidence that the deed plan he produced was a certified copy of the original and that he did not know where the original deed plan was.
40. DW1 denied knowing a person called Jackson Muema or an advocate called SS Malonza; he admitted to demolishing the structure which was on the suit property and that he gave instructions to the 2nd Defendant auctioneers to act on his behalf.
41. DW2, the 4th Defendant, reiterated the facts as set out in the 3rd and 4th Defendants' Defence. He averred that himself, and the 3rd Defendant, were allotted the suit land in 1997; that they paid Kshs. 102,804/- within 30 days as per the letter of allotment and that they had receipts to confirm the payment.
42. In cross-examination, DW2 denied knowledge of the provisional certificate in respect to IR 2605/1; that he sold the suit property to the 1st Defendant in 2013 for a consideration of Kshs. 25 million; that he was not aware that the original deed plan of the suit property had disappeared; that the number on the receipt on page 3 of his bundle is 250924 which is the same number that appears in the letter of allotment and that the letter of allotment was accompanied by a plan, which he did not have in court.
43. The Principal Land Registrar at the Ministry of Lands, DW3, stated that in the deed filed for Grant IR 2605 which is held by the Chief Land Registrar as the official record, a copy of the original title



- 209/1916 IR.2605 for a term of 99 years from April 1, 1904 to 1 April, 2003 exists and that the original title has an annexed Deed Plan No 27380 dated January 22, 1929 for an area measuring 4.85 Acres.
44. DW3 informed the court that at entry No 5 of the grant IR 2605, a transfer was registered in favour of Sheikh Fazal Ilahi under presentation No 1641 and registered on July 2, 1937; at entry no21 there is a caveat registered under presentation No 913 registered on July 28, 1962 by Abdul Ghafoor Sheikh as trustee of the Sheikh Fazal Ilahi Noordin Charitable Trust claiming a purchaser's interest of LR 209/1916/5 absolutely, and the last entry in the grant is entry No 28 presentation No 1467 registered on June 26, 1996 which is a caveat by Abdul Hameed Sheikh claiming beneficial interest absolutely.
 45. DW3 further testified that she was unable to obtain the deed file for grant IR.94707 LR 209/1916/5 registered on April 5, 2004 for a term of 99 years from April 1, 2003 in consideration of renewal of lease in favour of Abdul Shakoor Sheikh although from the letters on the Plaintiffs' bundle, the same seems to have been missing for a while at the land registry allegedly courtesy of "unscrupulous persons and brokers."
 46. DW3 testified that since she filed her written statement, they were able to retrieve the deed file for LR No 209/1916/5; that her records reveal that the registered owner of LR No 209/1916/5 is David Wanjohi, who acquired title on January 23, 2018. She however averred that this title was not genuine; that the details of the title do not appear in the IR register and that the title is purported to have been signed by Mr. Birundi who has since denounced the title.
 47. DW3 further testified that according to their records, there is deed file No IR 147524 opened on August 21, 2013 which contains the following set of documents a Memorandum of Registration of Transfer of Land for a document dated February 18, 2013 between the President of the Republic of Kenya and Hassan Abdi and Mahad Aden as tenants in common.
 48. DW3 averred that she was not aware of the process and the procedure under which grant IR 147524, LR 209/1916/5, which was a new Grant, came into being as registration is the last stage before a title is issued and that her department is not involved in the allocation process.
 49. Having perused the Plaintiff's grant and the Defendant's grant, DW3 stated that: the original grant IR.2605 for LR 209/1916 was for a term of 99 years from April 1, 1904 to 1st April, 2003; that the Plaintiffs' grant IR.94707 indicates to be in consideration of renewal of lease to Abdul Shakoor Sheikh as administrator of the estate of the late Sheikh Fazal Ilahi for a term of 99 years from April 1, 2003 and that the 1st Defendant's grant IR.147524, LR 209/1916/5 was registered on July 30, 2013.
 50. It was the evidence of DW3 that the inland registry (IR) numbers are distinct and are issued consecutively thus IR 94707 was issued way before IR 147524; that its unprocedural to have one suit land with two distinct Inland Registry numbers and that the issuance of Land Registry numbers is the domain of the Director of Surveys.
 51. DW3 testified that she had a deed of indemnity in respect of IR 94707 which was registered on December 17, 2013 given by Abdul Shakoor Sheikh, yet the said Abdul Shakoor Sheik died on May 3, 2010 and that the leasehold of the mother title expired on April 1, 2003 but she could not see any evidence of a surrender which resulted in new grants after expiry of the 99 year lease.
 52. DW3 averred that a Deed Plan is prepared by the Director of Surveys, which plan is then used to generate a title. According to DW3, considering the Plaintiff's letter of allotment was dated July 21, 2003 and the title is dated February 26, 2003, these documents were not issued procedurally because the letter of allotment always comes first, then a deed plan and finally a title document.



Submissions

53. Counsel for the Plaintiff submitted that Deed Plan No 244601 dated October 7, 2002 for LR No 209/1916/5 measuring 0.2044 hectares is attached to both the Plaintiffs' Grant IR 94707 and the 1st Defendant's Grant IR 147524. Counsel submitted that Grant No IR 94707 and Grant No IR 147524 refer to the same property and that the Plaintiffs are the only one with an original Deed Plan.
54. According to Counsel, while the 1st Defendant claimed to have lost its Original Deed Plan, they fraudulently procured a certified true copy of the original in order to secure a parallel Grant; that the title held by the 1st Defendant was procured through fraud perpetuated in two ways: through obtaining a certified true copy of Deed Plan No 244601 of which original the Plaintiffs hold and through procuring the opening of Deed File IR 147524 on 21st August 2013.
55. Counsel argued that it was in this file that the 3rd and 4th Defendants secured the registration of the parallel grant and the transfer thereof to the 1st Defendant. Counsel's submission was that Deed File 2605 confirms that the Plaintiffs' title contains all the entries relied upon by the Plaintiffs, save for those submitted for registration after the disappearance of the Deed File in 2013.
56. Plaintiffs' Counsel relied on the case of *West End Butchery Ltd & 6 others v Arthi Highway Developer Limited & 6 Others* [2012] eKLR where the Court invalidated the title obtained later in time. They also submitted that the 1st Defendant does not fit the description of an innocent purchaser for value without notice, as set out in *Katende v Harridas and Co. Ltd* [2008] 2 EA 173, especially considering that the 1st Defendant failed to present any evidence of payment of the purchase price.
57. The Plaintiffs' Counsel submitted that the Plaintiffs' Grant was first in time, is valid and take precedence against the 1st Defendant's title which was second in time, fraudulently procured and therefore invalid. Counsel thereby sought that pursuant to Section 80(1) of the *Land Registration Act*, this court rectifies the register in the Plaintiffs' favor and that an award of general damages be made to the Plaintiffs.
58. Counsel urged the court to be guided by the case of *Aster Holdings Ltd v City Council of Nairobi & 4 others* [2017] eKLR where the court issued an award of Kshs. 100 million, which was affirmed on appeal in *Cargot Investment Ltd v Aster Holdings Ltd & 4 Others* [2019] eKLR.
59. Counsel for the 1st Defendant submitted that DW3 had denied that the Plaintiff's Grant and Letter of Allotment originated from their office and that neither the Plaintiffs nor the late Sheikh Fazal Ilahi never held title over the suit property prior to Grant No IR 94707 and therefore there was no Grant to be renewed or terms to be extended.
60. The 1st Defendant's Counsel submitted that the 6th Defendant's evidence is supported by the evidence made in the mother title LR No 209/1916 which makes no reference to LR No 209/1916/5 ever being held by the Plaintiffs or Sheikh Fazal Ilahi, save for entry number. 21 which is a caveat by Abdu Ghafu Sheikh as a trustee of Sheikh Fazal Ilahi Noordin Charitable Trust claiming a purchaser's interest in respect of LR No 209/1916/5 and that this entry was removed on May 26, 1989.
61. It was submitted that the Plaintiffs have not presented any evidence proving the existence of a grant prior to Grant No IR 94707 registered on April 5, 2004; that LR No 209/1916/5 is not synonymous with LR No 209/1916 and that the former did not exist on July 2, 1937.
62. Counsel's further submission was that the only records the 6th Defendant holds are for Grant No IR 2605 in respect of LR No 209/1916 and Grant No IR 147524 in respect to LR No 209/1916/5. According to Counsel, the Plaintiff's evidence does not support the issuance of Grant No 94707 as



the letter of allotment was issued five months after the Grant, and further, that the letter of allotment has an acreage of 1.25 acres while the Grant has an acreage of 0.2044 acres and the deed plan has an acreage of 0.505 acres.

63. With respect to the Plaintiffs' counsel submission that the property claimed by the Plaintiffs is the same as that claimed by the Defendant, Counsel submitted that LR No209/1916 has an acreage of 4.85 acres; that as per entry number 3 on the mother title, the same was subdivided into LR No 209/1916/1 measuring 2.8 acres, which was transferred to Nahar Singh Nangat on March 26, 1931; that LR No 209/1916/2 measuring 2.0 acres was exchanged with Kanji Narangi on March 1, 1937 and that only 0.005 acres remained and an unsupported transfer was made to the late Sheikh Fazal Ilahi on July 2, 1937.
64. Counsel submitted that the Plaintiffs' own witness, PW1, testified that LR No 209/1916/5 is a subdivision of LR No 209/1916/2 and was created in 1952; that the Plaintiffs' documents are forgeries and that their title is a nullity in law. They relied on the cases *Macfoy v United African Co. Ltd* (1961) 3 All ER 1169 and *Abmed Ibrahim Suleiman & Another v Noor Khamisi Surur* [2013] eKLR
65. Counsel for the 3rd and 4th Defendants submitted that the Plaintiffs have failed to discharge their burden of proof that they are the owners of the suit property or that their Grant is valid; that the Plaintiffs did not trace their root of title and that the suit property wasn't provided in the deceased's probate proceedings or in his Will.
66. It was submitted that the letter of allotment was issued post the date of the Plaintiffs' Grant and Deed Plan which was not procedural; that the Plaintiffs failed to produce a copy of the expired Lease; that the acreage on the Plaintiff's Grant, Deed Plan and letter of allotment were all different and that the Plaintiffs' letter of allotment did not have a provision of stand premium and the Plaintiffs did not produce evidence to prove that they paid the stand premium.
67. Counsel relied on *Kinyanjui Kamau v George Kamau* [2015] eKLR where the Court of Appeal held that fraud must be strictly proved; that Plaintiffs have not proved the alleged fraud against the 3rd and 4th Defendants and that in the totality of the evidence, the Defendant's evidence is the genuine and valid grant.
68. Counsel for the 5th Defendant submitted that this court should only allow the order sought against it if it finds that the Plaintiffs are the legal proprietors of the suit property and that in as much as it is true that the 5th Defendant received land rates from the Plaintiff, at the time of approving the building plans of the Defendants, it could not have known whether the title of the suit property had exchanged hands as it does not hold records as to ownership of the property.
69. Counsel urged that the 5th Defendant has no claim over the suit property and was wrongly enjoined because it has no business with land ownership disputes and that the Plaintiffs ought to first have lodged a complaint or an appeal against the 5th Defendant's approval of the Defendants' development, as provided under Section 33(1) and (4) of the now repealed *Physical Planning Act*, and thereafter an appeal to this court under Section 33(5).
70. Counsel for the 6th Defendant submitted that the Plaintiffs have satisfied the burden of proof under Section 108 of the *Evidence Act*; that the root of title acquired by the 3rd and 4th Defendants was invited vide the letter of allotment dated March 3, 1997; that it was imperative that the allottees demonstrate that the suit property at the date of alienation was unalienated Government land and that the procedure of alienation was adhered to.



71. Counsel relied on the cases of *Moses Okatch Owuor & Another v Attorney General & Another* [2017] eKLR, *Rukaya Ali Mohamed v David Gikonyo Nambachia & Another, Benja Properties Limited v Syedna Mohammed Burbannudin Sabed & 4 Others* [2015] eKLR, *H.H. Dr. Syedna Mohammed Burbannudin Sabeb & 2 Others v Benja Properties Ltd & 2 Others* [2007] eKLR and *Francis Obae Machoka v Telecom Kenya Limited* [2017] eKLR

Analysis and Determination

72. Upon consideration of the pleadings, the evidence and submissions by the parties herein, the following issues arise for the court's determination:
- a. Whether the Plaintiff's Grant No IR 94707 for LR No 2209/1916/5 is valid
 - b. Whether the Defendant's Grant No IR 147524 for LR No 209/1916/5 is valid
 - c. Whether the Defendants lawfully levied distress for rent on the suit property.
 - d. Whether the 1st and 2nd Defendants should pay the Plaintiffs general damages for unlawful execution, attachment and trespass.
73. This suit revolves around the question of ownership of the suit property, LR No 209/1916/5 situated in Parklands Nairobi. The Plaintiffs' case is that the suit property was purchased by the late Sheikh Fazal Ilahi in 1937 and that the same has been occupied by the deceased and his Estate since 1937 to date.
74. It was the Plaintiffs' case that the Defendants have fraudulently obtained title to the suit property and unprocedurally seized and took possession of furniture, goods and chattels therein and wrongfully carted them away in purported distress for rent and enforcement of an order made in Milimani, Chief Magistrate Miscellaneous Application No 972 of 2014 and that the Plaintiffs and/ or their appointed caretaker and husband were not tenants of the 1st Defendant.
75. On the other hand, the Defendants have claimed that the 3rd and 4th Defendants obtained a Letter of Allotment to the suit property in 1997 and upon fulfillment of the terms of allotment, were issued Grant No IR 147524 with respect to the suit property and that they thereafter sold the suit property to the 1st Defendant who is the current legal owner and who is intending to construct executive apartments on the suit property.
76. Section 26 of the *Land Registration Act* provides that a certificate of title is prima facie proof of indefeasible title to land:
- “(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.”



77. In this matter, there are two certificates of title with respect to the same property. Both the Plaintiffs and the Defendants have averred that the opposite parties obtained their title fraudulently. The parties in this suit thereby bore the dual burden of proving the validity of their titles while proving that the opposing party obtained their title fraudulently.

78. With respect to proving the validity of title, it is trite that a party must go beyond the certificate of their title and establish its root. This was held by the Court of Appeal in *Munyu Maina v Hiram Gatbiha Maina* [2013] eKLR as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

79. A similar finding was made by this court in *Daudi Kiptugen v Commissioner of Lands Nairobi Lands & 4 others* [2015] eKLR as follows:

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title.”

80. On the basis of these decisions, it was incumbent on the parties to establish the root of their title, that is, the process through which they obtained title to the suit property.

81. With respect to the allegations of fraud, it is trite that fraud must be specifically pleaded and proved. This was ably espoused by the Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR where it stated that:

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, *Precedent of pleadings* 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App Cas 210 at 221). It is not allowable to leave fraud



to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 chD 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”. See *Insurance Company of East Africa v The Attorney General & 3 others* HCCC 135/1998.

Whether there was fraud is, however, a matter of evidence.”

82. The Plaintiffs’ contention is that the suit property contained in Grant number 94707 dated February 26, 2003 is registered in the name of the late Sheikh Fazal Ilahi (deceased); that this is pursuant to a transfer registered on July 2, 1937, a provisional certificate of title registered on September 20, 1989 and the Grant registered on April 5, 2004.
83. PW2 testified that the Grant for the property registered on April 5, 2004 is an extension of the lease contained in the provisional certificate of title registered on September 20, 1989 for which an application was made by his brother, Abdul Shakoor Sheikh and a title issued on July 21, 2003 by R. O Olando.
84. The sequence of events, according to the Plaintiffs, is that the late Sheikh Fazal Ilahi acquired the suit property on July 2, 1937; that following the demise of their father on March 22, 1955, his brother Abdul Ghafoor Sheikh obtained a limited Grant of Probate in respect of the estate; that when he migrated to Britain, the Plaintiffs’ other brother Abdul Shakoor Sheikh obtained Grant of letters of Administration on July 22, 1987 and that the Grant of Letters of administration issued to Abdul Shakoor Sheikh was duly registered on December 21, 1988 and a provisional certificate of title was issued on January 6, 1989.
85. According to the Plaintiffs, the Lease expired in April 2003 and the 6th Defendant issued them with a letter of allotment dated July 21, 2003; that their brother Abdul Shakoor Sheikh died on May 3, 2010 before completing the distribution of the Estate of his late father and that their brother’s certificate of death was duly registered against the property’s title on December 27, 2012. The Plaintiffs assert that Grant No 94707 held by them and Grant No 147524 held by the 1st Defendant refer to one and the same property.
86. The Defendants have challenged the validity of the Plaintiffs’ title on the grounds that the Will and Codicil of the late Sheikh Fazal Ilahi makes no mention of the suit property and that in the Letters of Administration sought by Abdul Shakoor Sheikh, in his affidavit of June 6, 1986, he lists LR No 209/1916/2 and not LR No 209/1916/5 and that similarly in the affidavit dated July 28, 2010 by the Plaintiffs, they refer to LR No 209/1916/2.
87. The land registrar, DW3, testified that the deed file for Grant IR 94707, indicates that the current owner of that land as David Wanjohi, who acquired the title on January 23, 2018; that this title was not a genuine one; that the details of the title do not appear in the IR register and that the title is purported to have been signed by Mr. Birundu who has since denounced the title.
88. It is not disputed that that the suit property is a subdivision of the original land known as LR No 209/1916 measuring 4.85 acres and issued to Charles Newtorn in 1926. According to the entries in the mother title, the land was sub divided and a subdivision plan was registered against the title on March 26, 1931.
89. The mother title shows that one of the sub division, LR No 209/1916/1 measuring 2.8 acres was transferred to Nahah Singh, and Grant IR 3306 was issue. The remaining portion of land known as LR No 209/1916/2 measuring 2.0 acres was transferred to the Plaintiffs’ kin, Sheikh Fazel on July 2, 1937.



90. According to the surveyor, PW1, LR No 209/1916/2 was sub divided in 1951, with the resultant plots being LR No 209/1916/3 (original 209/2/1); LR No 209/1916/4 (original number LR No 209/2/2); LR No 209/1916/5 (original number LR No 209/1916/2/3) and finally LR No 209/1916/2/R (a road measuring 0.076 acres). According to the evidence by the Plaintiffs, a Deed plan number 244601 for this land was issued on October 7, 2002 and a title issued to them on July 21, 2002.
91. Although the Land Registrar produced in evidence the Deed file for the mother title, it was her evidence that the Deed file for the Plaintiffs' title which was issued in 2003, Grant IR 94707 was missing; that she was in possession of the title in favour of the 3rd and 4th Defendants being Grant IR 147524 opened on August 21, 2013 and that she was not aware about the processes that were followed before the two Grants were issued.
92. The Land Registrar informed the court that Inland Registry (IR) numbers are distinct and that the issuance of those numbers is by the Director of surveys. According to her, and the evidence before this court, the two titles, although issued on different dates, have the same Deed Plans, the Deed Plan for the Defendants being a certified copy of the original that was used to prepare the Plaintiffs' title.
93. Indeed, as stated above, the Deed Plan No 244601 dated 7th October 2002 for LR No 209/1916/5 measuring 0.2044 hectares is attached to both the Plaintiffs' Grant IR 94707 and the 1st Defendant's Grant IR 147524. The property in Grant No IR 94707 and Grant No IR 147524 refer to the same property and the Plaintiffs are the only ones with an original Deed Plan.
94. While the 1st Defendant claimed to have lost its Original Deed Plan, the evidence before this court shows that they procured a certified true copy of the original in order to secure a parallel Grant. The Defendant did not have an original Deed Plan in the first place. It is the finding of this court that the title held by the 1st Defendant was procured through fraud perpetuated in two ways: firstly, by obtaining a certified true copy of Deed Plan No 244601 of which original the Plaintiffs held and secondly, procured the opening of a Deed File IR 147524 on August 21, 2013 for a piece of land whose title was already in existence.
95. Indeed, Deed File number 2605, which is the mother title, contains all the entries relied upon by the Plaintiffs, save for those submitted for registration after the disappearance of the Deed File in 2013. The Plaintiff's Grant was not only first in time after the Lease was renewed, but was part of the land that was issued to the Plaintiffs' kin way back in 1937.
96. Consequently, the said title is valid and take precedence against the 1st Defendant's title which was second in time, fraudulently procured and therefore invalid. Indeed, the Plaintiffs have all along been in possession of the suit property until the 1st Defendants purported to take possession of the land in the pretext that it was levying distress for rent.
97. Although this court was informed that the 1st Defendant demolished the building that was on the suit property, no valuation report was filed. However, having found that the 1st, 3rd and 4th Defendants trespassed on the suit property, the Plaintiffs are entitled to damages for trespass, which I assess at Kshs. 10,000,000.
98. For those reasons, I allow the Plaintiffs' claim as follows:
 - a. A declaration be and is hereby issued that the order of October 10, 2014 and proceedings in Milimani, CM Misc Appln. No 972 of 2014, pursuant to which the 1st and 2nd Defendants levied distress for rent on property land reference number 209/1916/5 is null and void ab initio.



- b. A declaration be and is hereby issued that Grant number IR 147524 for property land reference number 209/1916/5 dated February 18, 2013, or any such Grant pursuant to which the 1st, 3rd and 4th Defendants claim entitlement to ownership to property land reference number 209/1916/5 is null and void ab initio.
- c. The 1st Defendant be and is hereby ordered to pay the Plaintiffs damages for trespass of Kshs 10,000,000.
- d. 1st, 2nd, 3rd and 4th Defendants by themselves or by their agents, officers, servants or otherwise howsoever be and are hereby restrained from entering or remaining upon property land reference number 209/1916/5 and/ or any manner whatsoever interfering with the Plaintiffs' occupation of the property.
- e. The 5th Defendant by itself or by its agents, officers, servants or otherwise howsoever be and are hereby restrained from approving any development applications and drawings, issuing any permits, permissions or authorizing for any demolition or construction works of whatever nature over property land reference number 209/1916/5 at the behest of the 1st, 3rd and 4th Defendants.
- f. The 6th Defendant by itself or by its agents, officers, servants or otherwise howsoever be and are hereby restrained from registering against the register of property land reference number 209/1916/5 any documents adverse to the interests of the Plaintiffs at the behest of the 1st, 3rd and 4th Defendants or at all.
- g. The 1st Defendant to pay the Plaintiffs the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JULY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Havi for Plaintiff

Mr. Allan Kamau for 6th Defendant

Ms. Naazi holding brief Kethi for 5th Defendant

Court Assistant - Tracy

