



**Somerset Africa Limited & another v Mwangi & 5 others (Environment & Land Case 436 of 2010) [2023] KEELC 20321 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20321 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 436 OF 2010  
LC KOMINGOI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**SOMERSET AFRICA LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**YUKEN MILLS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CECILIA WAMAITHA MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**JUSTUS WAINAINA NJUGUNA ..... 2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS ..... 3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**MOHANLAL DHARAMSHI SHAH ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs being companies incorporated under the *Companies Act* brought this suit vide a Plaint dated 20<sup>th</sup> September 2010. They claim that up until 2009, the 1<sup>st</sup> Plaintiff was the registered proprietor of Land LR No. 4953/IX/72, while the 2<sup>nd</sup> Plaintiff was the registered proprietor of Land LR No. 4953/IX/73 and LR No. 4953/IX/74 in Thika Municipality. However, on 16<sup>th</sup> July 2009 they conducted a search on the properties only to discover that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had changed the properties' registration system from the initial Registration of Titles Act (RTA) to Registered *Land Act* (RLA) with new references LR No. Thika Municipality Block 9/283, LR No. Thika Municipality Block 9/284 and LR No. Thika Municipality Block 9/285 and transferred them to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.



2. The Plaintiffs claimed that this change and consequent transfer was fraudulently, illegally and unprocedurally done on grounds that: the conversion was done without the Plaintiffs knowledge or consent; they were not issued with notices before the conversion of the Titles was undertaken; the new Titles were issued without surrender of the existing Titles under the Registration of Titles Act; the Titles under Registered Land Act were issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were not the genuine owners of the properties. Based on this they sought the following orders:

- i. An order of permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and/ or their agents, assigns and / or successors and/or any other person howsoever acting on their behalf from selling, offering for sale, charging and/or in any other manner interfering and/or dealing with the parcels of land known as LR No. Thika Municipality Block 9/283, LR No. Thika Municipality Block 9/284 and LR No. Thika Municipality Block 9/285 (also registered and known as Title No. LR No. 4953/IX/72, LR No. 4953/IX/73 and LR No. 4953/IX/74 situate within Thika Municipality within the Republic of Kenya);
- ii. A declaration that Somerset Africa Limited and Yuken Mills Limited respectively are the registered, lawful and bonafide proprietors/ owners of the suit properties, that is to say, all those parcels of land known as LR No. Thika Municipality Block 9/283, LR No. Thika Municipality Block 9/284 and LR No. Thika Municipality Block 9/285 (also registered and known as Title No. LR No. 4953/IX/72, LR No. 4953/IX/73 and LR No. 4953/IX/74 situate within Thika Municipality within the Republic of Kenya);
- iii. An order directed at the Chief Land Registrar and /or the Commissioner of the Lands, requiring them or either of them to cancel all such entries in the titles register, Land register and/ or any other such relevant title documents and/or registers that bear the names “Cecilia Wamaitha Mwangi and Justus Wainaina Njuguna” as proprietors/ owners of the suit properties that is to say, all those parcels of land known as LR No. Thika Municipality Block 9/283, LR No. Thika Municipality Block 9/284 and LR No. Thika Municipality Block 9/285 (also registered and known as Title No. LR No. 4953/IX/72, LR No. 4953/IX/73 and LR No. 4953/IX/74 situate within Thika Municipality within the Republic of Kenya);
- iv. An order directed at the Chief Land Registrar and /or the Commissioner of the Lands, requiring them or either of them to, forthwith enter the names Somerset Africa Limited as the lawful indefeasible owner/ proprietor of all that parcel of land known as LR No. Thika Municipality Block 9/283 and Yuken Mills Limited as the lawful indefeasible owner/ proprietor of all that parcels of land known as LR No. Thika Municipality Block 9/284 and LR No. Thika Municipality Block 9/285 285 (also registered and known as Title No. LR No. 4953/IX/73 and LR No. 4953/IX/74 situate within Thika Municipality within the Republic of Kenya);
- v. Costs of this suit;
- vi. Any other and further relief that this Honourable Court may deem fit to grant.



3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their statement of Defence dated 5<sup>th</sup> April 2011 and Amended on 31<sup>st</sup> October 2013 contested that the Plaintiffs claim stating that titles LR No. 4953/IX/72, 73 and 74 were non-existent on grounds that the land reverted back to the government after the Plaintiffs failed to adhere to set out conditions such as submitting building plans, sewage system etc. Consequently the properties were allotted to them as LR No. Thika Municipality Block 9/283, 284 and 285 on 10<sup>th</sup> December 2002.
4. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants went on to state that the Plaintiffs were placed under receivership and no vesting order was obtained to enable the properties be transferred to them and if any transfer was ever done in their favour it was null and void. They added that the caution placed on the properties by the Plaintiffs was lifted vide a Court Order dated 21<sup>st</sup> September 2010 in Chief Magistrate's Civil Suit No. 10 and 11 of 2010 and thereafter the properties sold off to the 6<sup>th</sup> Defendant for valuable consideration.
5. The 3<sup>rd</sup> – 5<sup>th</sup> Defendants in their Statement of Defence dated 18<sup>th</sup> September 2013, denied the Plaintiffs allegation and contested any relief sought.
6. The 6<sup>th</sup> Defendant contested the Plaintiffs allegation stating that he was the lawful owner and proprietor of the suit properties having purchased them for valuable consideration from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and thereafter issued a Certificate of Title by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He stated that he was not aware of the history of the change in registration system and that he was protected by Section 39(1)(c) of the Registered *Land Act* (repealed) from the need to search any register kept under the Registration of Titles Act adding that when he purchased the properties there was no caution lodged against them.
7. He argued that the ownership of the properties by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants being under the Registered *Land Act* was unimpeachable even if fraud occurred and that his ownership was protected by Section 28 of the Registered *Land Act*. He put the Plaintiffs to strict proof of the allegation of fraud and prayed for dismissal of the suit with costs and interest.

### **Evidence of the Plaintiffs**

8. PW1 Bipinchandra Himatlal Vora the 2<sup>nd</sup> Plaintiff's Managing Director testified on 15<sup>th</sup> March 2016, and adopted his witness statement as his evidence in chief and produced his bundle of documents as evidence.
9. He stated that as the proprietor of the suit properties, he was shocked to see the 6<sup>th</sup> Defendant putting up a perimeter wall around it and sought court's injunction. He then appointed a surveyor to confirm the status of the properties. The surveyor's report dated 12<sup>th</sup> September 2012 which was adduced in court as exhibit concluded that the suit properties were the same but bore different title numbers.
10. He stated that they acquired the properties from Yuken Textiles Industry Ltd and the 1<sup>st</sup> Plaintiff which were under receivership through a successful bid following an advertisement put up in 1991. The properties LR No. 4953/73/IX and No. 4953/74/IX registered under Yuken Textiles were transferred to them vide a consent order. However, it was until 2011 when LR No. 4953/72/IX registered under the 1<sup>st</sup> Plaintiff was transferred to them vide a vesting order issued on 1<sup>st</sup> August 2011 in HCCC No. 6320 of 1991. PW1 explained that the company file for the 1<sup>st</sup> Plaintiff had been missing from the Companies registry up until 2006 when it was traced.
11. On Cross Examination he stated that he was appointed Director of the 2<sup>nd</sup> Plaintiff in the early 90s and as of 2016 (during his testimony) his wife and he were still the Directors. However, he did not



produce the certificate of incorporation in court. He re-stated that the properties were acquired from the Industrial Development Bank (IDB), Kenya Commercial Finance Company (KCFC) and Yuken Textiles Industry Ltd who were put under receivership. And the name Yuken Textiles changed to Yuken Mills Ltd when they acquired it. When the sale of the properties was advertised, the 2<sup>nd</sup> Plaintiff put in a bid which was successful. He stated that whereas there is a letter with a letterhead that reads “Hercules Mills Ltd” the content states that “Yuken Mills Ltd would like to buy” those assets. He confirmed that he physically went to see the suit properties which were undeveloped and although they had submitted building plans for approval they never developed the properties because they went out of the textile business. The said plans were not adduced in court. He also stated that they put up a fence and had been paying the annual land rent. The payments were also not produced in court.

12. He confirmed that the vesting order issued on 1<sup>st</sup> August 2011 adduced as evidence was only for one plot LR No. 4953/72/IX which was in the 1<sup>st</sup> Plaintiff's name whom they got to know its whereabouts in 2006. He stated that they did not require a vesting order for the other two plots that were under Yuken Textiles which were transferred vide a consent. He confirmed that the vesting order was issued during the pendency of this suit.
13. He acknowledged that the special conditions stipulated that they had 6 months to submit building plans and 24 months to build failure to which the lease would be terminated. However, they had never received any notice from the Commissioner of Lands on revocation or cancellation of their titles to the properties. He confirmed that they had put up a caution against the suit properties but he was neither aware of the Court proceedings at Thika nor that the caution was lifted. He stated that although the 2<sup>nd</sup> Plaintiff was inactive, it was the lawful proprietor of the properties.
14. On Re- examination he confirmed that they purchased the suit properties from Yuken Textiles Ltd receiver manager and the properties were then registered in their names and they were still in possession of the original titles to the said properties. He also affirmed that LR No. 4953/72/IX and 4953/IX/72/ was one and the same plot only that the numbers had been interchanged. He also confirmed that the other two properties were transferred to the 2<sup>nd</sup> Plaintiff in 1994 from Yuken Textiles.
15. PW2, Charles Gathogo a licensed land surveyor at the Survey Department, Ministry of Lands testified on 12<sup>th</sup> April 2017. He stated that upon being instructed by counsel for the Plaintiffs to get the accurate status of the suit properties, he conducted a search and found out that the properties were issued as a government grant as follows: A survey was conducted in 1950 and the numbers 4953/IX/34-88 and 90 issued. Deed Plans for land number 4953/IX/72 and 4953/IX/74 were issued in November 1974 as 95870 and 95869 respectively and Deed Plan for number 4953/IX/73 issued on 5<sup>th</sup> August 1979 as 105917. Land No. 4953/IX/72 and 4953/IX/74 were then issued with IR 33664 and 4953/IX/73 issued with IR 34527. He went on to state that the Deed Plan number is the only instrument used for registration of Title and that is exactly what happened. He also confirmed that there was a numbering error on the title deed which occurred when it was being prepared.
16. He confirmed that in 1990 there were plans to change the registration regime but that notwithstanding, the Titles under RTA had to be cancelled before other Titles were issued. And that the Registrar of Lands had to inform the Director of Survey in writing about the cancellation of previous Titles. And in this case, that did not happen.
17. He testified that under the Registered [Land Act](#) (Cap 300) one acquired Title by having the survey plan approved, then issued with a sealed Registry Index Map (RIM), an area list, and a letter forwarding it to the Commissioner of Lands. The Commissioner of Lands would then prepare lease documents in triplicate, forward them to the respective district lands registries for registration, upon which a certificate of Title would be issued under Registered [Land Act](#) and the owner would then be



- notified to collect the lease documents. He confirmed that not unless consequent Titles were obtained fraudulently, there was no way the Director of Survey would issue another Title when one was already in existence.
18. On cross examination he confirmed that in early 1990s after conversion of Titles from Registration of Titles Act to Registered [Land Act](#), the registration was done at Thika Land Registry which was opened in 1995. He stated that the process of registration and conversion of Titles was initiated by the Director of Survey and not the owners although the owners had to surrender original Titles under Registration of Titles Act for them to be issued with titles under Registered [Land Act](#). He went on to state that as much as he had not read what the conditions of lease for the suit properties stipulated, he had never encountered a situation where a title was reverted. He confirmed that cancellation of Titles could only be done by the High Court and not even the Commissioner of Lands could cancel any Title on his own motion.
  19. He stated that he was not aware of what happens to a title by a company under receivership because his interest was on finding out how the properties had more than one Title. In that regard he stated that there exists only one survey plan for the properties number 4953/IX/72, 73 and 74 which was created in 1950. If an error occurred it ought to have been rectified before approval by the Director of Surveys. And if conversion was to be undertaken, then a cross reference ought to be made on the original survey plan and a box created to indicate as such. He stated that the survey plan he adduced had no box which meant that no conversion had been undertaken although the technical file produced showed that there was conversion which might have been updated later.
  20. He confirmed that the technical file adduced by the Plaintiffs was a document within the Ministry of Lands which showed conversion of Registration of Titles Act properties to Registered [Land Act](#) although he did not have evidence to prove that the said document was from the Ministry of Lands. He went on to state that Registration of Titles Act titles had deed plans which was evidence that the land had been surveyed and could be issued with a title. He also noted that even if the registration regime changed, the property on ground could not change because it was arrived at by mathematical coordinates and two parcels could not have the same mathematical coordinates and that one property could not be registered both under Registration of Titles Act and Registered [Land Act](#).
  21. He stated that having worked at the Survey of Kenya he was aware that the government had a policy for converting Registration of Titles Act to Registered [Land Act](#). Although he was neither sure whether this information about the change was shared with the owners nor could he confirm whether there was any other parcel of land within the same area that had been converted from Registration of Titles Act to Registered [Land Act](#).
  22. On re-examination he stated conversion did not mean that the property had two titles. He also confirmed that the sealed RIM which is for purpose of registration is usually with the property owner and two copies are made whereby one is given to the Ministry of Lands and the other one to the District Land Registrar where the land is to be registered.

### **Evidence of the Defendants.**

23. The 1<sup>st</sup> Defendant Cecilia Wamaitha Mwangi testifying as DW1 adopted her written witness statement as her evidence in chief and produced her bundle of documents as her exhibits. She noted that the 2<sup>nd</sup> Defendant was her business partner. She stated that this being government land, they applied for its allotment in 2002 and the application was approved. They paid the requisite fees and were thereafter issued with Titles. She acknowledged that the Plaintiffs had put a caution against the suit properties but it was lifted through CMCC No. 10 and 11 of 2010 filed at Thika which was not challenged by the



- Plaintiffs. After the caution was lifted, they then sold the properties to the 6<sup>th</sup> Defendant for valuable consideration.
24. On Cross examination she stated that she conducted a search which showed that the land belonged to the government although the said search was not adduced in court. She went on to state that since the land was vacant, she applied for its allotment in 2000 and once the application was approved she received an allotment letter. She then paid the requisite fees including stamp duty and issued with a letter of allotment. These letters and stamp duty receipts were also not produced in court.
  25. She confirmed that the caution was lifted and the land sold to the 6<sup>th</sup> Defendant on 21<sup>st</sup> January 2011 for a consideration of Kshs. 30,000,000 upon obtaining consent from the 3<sup>rd</sup> Defendant and paying of stamp duty. The transfer was then registered and leases issued in favour of the 6<sup>th</sup> Defendant. She also stated that they were the first proprietors of the suit properties under RLA.
  26. On re-examination she stated that when she applied for allocation to the Commissioner of Lands the properties were vacant and were not registered in the Plaintiffs' names. She also stated that there was nothing to show that the properties were initially under the RTA regime and only learnt about that fact when the Plaintiffs put a caution against the properties which was later lifted vide a court order.
  27. Silas Kiogora Mburugu the Principal Land Administrator Officer with the National Land Commission testifying as DW2 adopted his witness statement as evidence in chief. He testified that the file in respect to parcel 4953/74/IX was missing from their records however, file for parcel 4953/72/IX was available and showed that it belonged to the 1<sup>st</sup> Plaintiff. He confirmed that from the records parcels 4953/IX/72, 73 and 74 were converted to Thika/Municipality/Block/9/283, 284 and 285 but noted that there was no evidence in the records that showed that the properties in question had been surrendered back to the government. He went on to point out that file numbers 173617, 173618 and 173606 which were allegedly used to process lease for LR No. Thika/Municipality/Block/9/283, 284 and 285 were in other people's names for plots in Embu Municipality. As such, the Titles issued in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were fraudulently obtained and should be expunged from Thika Lands Registry.
  28. On Cross examination he stated that he had been a Land Administrator for over thirty years. While acknowledging that there was a land conversion regime from RTA to RLA he stated that no notice was required to be issued to the property owners although the Titles would remain under RTA until the owners visited the lands registry for transaction. He re-stated that the Plaintiffs' Titles were never surrendered and as such the suit properties could not be allocated to anybody else adding that he had also not come across any allotment letter regarding the suit properties. He noted that it was possible for a land owner not to visit the lands registry for a period of over five years if they did not have any transaction to make. Adding that if any of the special conditions stipulated was not complied with, then the Title could be revoked however this information and process would be on record.
  29. He affirmed that although the file numbers relating to the suit properties were missing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had acquired Titles to the suit properties fraudulently based on the assessment made from primary information which was land numbers. He also stated that the card numbers held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were uncertified adding that he had seen the letter from the Ministry of Lands dated 31<sup>st</sup> January 2010 adduced by the 6<sup>th</sup> Defendant for the first time in court. He stated that the 6<sup>th</sup> defendant ought to have conducted due diligence to ascertain the status of the suit properties under RTA regime.
  30. On re-examination he stated that there was no evidence to show that the 6<sup>th</sup> Defendants letter addressed to the Ministry of Lands letter was received by the Ministry adding that no new Title could be issued



to any other person other than the initial RTA holder pointing out that there were neither timelines nor consequence if the RTA Title was not surrendered by the owner.

31. He went on to re-affirm that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not follow the due process in acquiring the properties. He outlined the process as follows: A person applies for allocation of land; inquiry is made on whether the land is available for allocation; Director of Physical Planning then prepares a Deed Plan; once the application is approved a valuation of standard premium is conducted; a letter of allotment with conditions is issued to the applicant; the applicant pays legal fees; if the same is accepted then survey is conducted; a lease is then prepared and executed by the Commissioner of Lands; it is then forwarded to the Land Registrar for registration through a covering letter.
32. The 6<sup>th</sup> Defendant was represented by Peter Otieno (DW3) who had a power of attorney donated to him for purposes of this suit. He adopted his witness statement as evidence in chief and adduced his bundle of documents as Exhibit.
33. He testified that sometime in November 2009 the 6<sup>th</sup> Defendant was approached by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to purchase the properties in issue. Following this, he was instructed to conduct a search at the Thika Lands Registry office which he did. The results of the search dated 30<sup>th</sup> November 2010 showed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the registered proprietors of the suit properties. He stated that they also wrote to the Ministry of Lands to inquire on the status of the suit properties who also confirmed the same position. The 6<sup>th</sup> Defendant then entered into a sale agreement dated 21<sup>st</sup> January 2011 for Kshs. 30,000,000. They then paid the purchase price, received a consent letter to transfer property, land rent clearance certificate, paid for the stamp duty and were subsequently issued with Certificates of Lease for the properties. Since then, the 6<sup>th</sup> Defendant took possession, put up a perimeter wall and has been paying lane rates and rents.
34. On cross examination he confirmed that they were approached by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to purchase the suit properties and he consequently did a search which confirmed ownership of the suit properties and that there was no caution against the properties. However, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants disclosed that there was a matter in court between them and the Plaintiffs but the 6<sup>th</sup> Defendant was not shown the Court order that lifted the caution. He also confirmed that he was not aware how the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired the properties because they did not inquire about the history of the parcels. There was also no evidence to show that the letter had been delivered to the Ministry of Lands neither was there a stamp to acknowledge receipt.
35. On re-examination he stated that by 31<sup>st</sup> January 2011 the 6<sup>th</sup> Defendant had paid a deposit of Kshs. 3,000,000 although there was no stamp to show acknowledgement of the letter to the Ministry of Lands.
36. At the close of the oral testimonies, parties tendered final written submissions.

### **The Plaintiffs' Submissions.**

37. Counsel for the Plaintiffs in their submissions rehashed their pleadings and outlined five issues for determination as summarised hereunder.
38. On whether the Plaintiffs are the registered proprietors of the suit properties counsel submitted that the change of the registration system and applicable law did not render the Plaintiffs Titles invalid to warrant the properties to be allotted to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stating that the Plaintiffs still held the original certificates of Title and were never asked to surrender them for conversion and as such the said conversion was unprocedural and invalid.



39. On whether the Title documents issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were valid, counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants ought to show the root and process of their ownership which they failed to do. To support this counsel cited Hubert L. Martin & 2 others vs Margaret J. Kamar & 5 others [2016] eKLR, Kenya Anti-Corruption Commission vs Online Enterprises Limited & 4 others [2019] eKLR and Munyu Maina vs Hiram Gathiha Maina [2013] eKLR.
40. On whether the Defendants negligently, fraudulently and illegally conspired to defeat the Plaintiffs interests in the suit properties, counsel submitted that the Plaintiffs had demonstrated that the conversion of the Titles from RTA to RLA was done without their knowledge or consent and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had failed to prove or demonstrate how they acquired the said properties. Adding that DW2 had also testified that the files for titles for Thika Municipality Block 9/283, 284 and 285 were opened in favour of other individuals in a different location and not in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and as such were fraudulently and unprocedurally obtained and should be expunged from records.
41. On whether the 6<sup>th</sup> Defendant obtained valid title from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold the properties to the 6<sup>th</sup> Defendant in contrary to injunctive orders set by court. Counsel submitted that the 6<sup>th</sup> defendant could not acquire good Title over property acquired illegally relying on Joyce Muthoni Waciuma vs Cabinet Secretary for Lands & 3 others [2015] eKLR which held that once it is shown that a person unlawfully acquired land it does not matter that he was the first registered owner of the same. Adding that the Plaintiffs being the original title holders were legally protected by law from being denied their property noting that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' titles were void and could not pass good title to the 6<sup>th</sup> Defendant even if he was a bonafide purchaser for value citing Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & another [2013] eKLR.
42. Whether the orders sought should be granted, counsel submitted that the Plaintiffs had proved their case on a balance of probability and that the Plaintiffs should not be deprived of their properties unprocedurally noting that this court had powers as per Section 80 of the [Land Registration Act](#) to grant the prayers sought. Counsel concluded by submitting that costs follow the cause.

#### **The 1<sup>st</sup> & 2<sup>nd</sup> Defendant's Submissions.**

43. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their submissions outlined five issues for determination as summarised below.
44. On the legitimacy of the Titles issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, counsel submitted that the Plaintiffs had not proved how the 1<sup>st</sup> and 2<sup>nd</sup> Defendant fraudulently acquired said properties and as such they were the lawful owners prior to transferring the same to the 6<sup>th</sup> Defendant adding that the register could only be rectified if fraud had been proved citing George Cheyne & another vs Robin Munyua Kimotho (Civil Appeal No. 272 of 1998), Mutsonga vs Nyati [1984] KLR 425, Kampalla Bottlers Ltd vs Damanico (U) Ltd [1990-1994] EA 141 CU. Counsel went on to question authenticity of documents produced by Mr. S.K. Mburugu (DW2) saying that they had no indication of source nor letterhead and should be expunged from record adding that the said witness also testified that loss of the file containing the titles in question was not attributable to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and therefore the issue of fraud was not proved making reference to Hellen Wangari Wangeci vs Carumera Muthini Gathua [2005] eKLR.
45. On the issue of breach of special conditions in the Titles, Counsel submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had the right to reclaim the properties leased out to the Plaintiffs if the Plaintiffs failed to adhere to set out conditions which stipulated that the land would unconditionally revert



- to the government if the proprietor does not utilise it according to the purpose granted citing Theresa Constabir vs Jeremiah M. Maroro & 3 others [2013] eKLR. Counsel also noted that PW1 acknowledged that they neither put up any construction on the suit property save for a perimeter fence nor did they adduce evidence of the rates/ rents they claimed to have been paying.
46. Counsel went on to submit that the vesting order was irregular arguing that by then, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were the registered proprietors of the suit property which was in the Plaintiffs' knowledge did not participate in the said proceedings and the Plaintiffs did not disclose this information to the court. As such the said vesting order should be set aside or ignored.
  47. On the issue of transfer of the properties to the 6<sup>th</sup> Defendant, counsel submitted that the root of the Title could be traced and the 6<sup>th</sup> Defendant had evidenced the due diligence conducted including correspondence with the 3<sup>rd</sup> Defendant who confirmed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were allocated the properties in question. Thus the 6<sup>th</sup> Defendant held good title which could neither be impeached nor revoked. Reference was made to David Peterson Kiengo & 2 others vs Kariuki Thuo [2012] eKLR, Charles Karathe Kiarie & 2 others vs Administrators of Estate of John Wallace Muthare (deceased) & 5 others [2013] eKLR and Katende vs Haridar & Company Ltd [2008] 2 EA 173.
  48. Counsel while praying for dismissal of the suit submitted that in the event the Court held that the 6<sup>th</sup> Defendant did not hold good title over the suit properties, then the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants ought to indemnify him for the loss on account that they represented to him that the vendors held good title since the State ought to guarantee accuracy of records in the register.

### **The 3<sup>rd</sup> – 5<sup>th</sup> Defendant's Submissions.**

49. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants in the Submissions outlined the following three issues for determination.
50. On whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants procedurally, legally and regularly obtained title to the suit properties, Counsel while making reference to DW2 and DW3's testimony submitted that the said allocation was neither procedural, legal or regular because there was no conversion of the registration regime from RTA to RLA and if such a conversion was to take place it ought to have been initiated by the Director of Survey and the owners of the property should have surrendered the old titles under RTA and issued with new Titles under RLA. As such it was not possible to have issued new Titles to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants since they were not the initial Title holders under the old regime also highlighting that the Plaintiffs had not surrendered their old regime Titles. Counsel also submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not conform to the procedure of land allocation as outlined by DW2 and neither did they produce application/ correspondence for allocation of the properties which only meant that the said properties were illegally acquired citing Munyu Maina vs Hiram Gathiha and Hubert L. Martin & 2 others vs Margaret J. Kamar & 5 others (supra).
51. On whether the 6<sup>th</sup> Defendant was a bona fide purchaser for value, Counsel while citing Elijah Kimutai Biwott v Patrick Lumumba Ombura [2019] eKLR submitted that the 6<sup>th</sup> Defendant could not have acquired a valid title to the suit property since the 1<sup>st</sup> and 2<sup>nd</sup> Defendant had not acquired a valid title to the land citing Lawrence Mukiri Mungai vs Attorney General & 6 others [2019] eKLR. Counsel while making reference to Esther Ndegi Njiru & another vs Leonard Gatei [2014] eKLR which held: "... Section 26(1)(a) and (b) of the Land Registration Act in my view places a responsibility to purchasers of titles properties to ascertain the status of a property beyond carrying out an official search..." went on to submit that the 6<sup>th</sup> Defendant did not carry out due diligence before purchasing the suit properties having testified that he was aware that the properties were previously registered under RTA but did not go an extra mile in finding out who the registered owners were and that the 6<sup>th</sup> Defendant was also



aware that a caution had been placed over the properties but removed through a court but did not also question that aspect.

52. On whether the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants should indemnify the 6<sup>th</sup> Defendant counsel submitted that the 6<sup>th</sup> Defendant was not entitled to indemnity citing Section 81(2) of the *Land Registration Act* since he had contributed to the damage through negligence by not carrying out due diligence in the transaction and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had fraudulently acquired the properties. Counsel went on to state that the sale was also made in 2011 during the pendency of this suit and was not entitled to any indemnity from the 3<sup>rd</sup> to 5<sup>th</sup> Defendants. Moreover, the sale agreement had an indemnity clause as 9.2 as such the 1<sup>st</sup> and 2<sup>nd</sup> Defendants ought to indemnify the 6<sup>th</sup> Defendant.

### **The 6<sup>th</sup> Defendant's submissions.**

53. Counsel for the 6<sup>th</sup> Defendant's submissions on whether the 6<sup>th</sup> Defendant was the bonafide purchaser for value of the properties and had an unimpeachable title made reference to *Martha Wangui Thurura & Another vs Henry Gitahi Thurura & 3 others* [2021] eKLR and *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General & 4 others* [2017] eKLR and submitted that the 6<sup>th</sup> Defendant conducted due diligence and established that the properties were registered in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, paid a consideration of Kshs. 30,000,000 and was issued with Certificate of Leases and had no knowledge of any defect or fraud against the titles. As such his title was unimpeachable adding that there was no fraud that was proved against him relying on *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR, *Joseph N.K. Arap Ngok vs Moijo Ole Keiwua & 4 others* [1997] eKLR. Counsel also argued that there was no legal obligation on the 6<sup>th</sup> defendant's part to ascertain who the owners of the properties under Registration of Titles Act were relying on *Elizabeth Wangeci Githinji & 29 others vs Kenya Urban Roads Authority & 4 others* [2019] eKLR.
54. Counsel went on to submit that the 3<sup>rd</sup> and 4<sup>th</sup> represented to the 6<sup>th</sup> defendant that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the lawful owners of the suit property and were thus estopped from going back to claim that the titles were issued fraudulently referencing *John Mburu vs Consolidated Bank of Kenya* (2018) eKLR and *Kenindia Assurance Company Ltd vs New Nyanza Wholesalers Ltd* (2017) eKLR.
55. Counsel went on to question DW2's testimony submitting that if the file with the properties records was unavailable, how did he arrive at the conclusion that the properties were fraudulently and illegally acquired by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants? Counsel urged court to be careful while evaluating testimony of an inconsistent witness citing *Richard Munene v Republic* [2018] eKLR.
56. On the issue of indemnity, counsel submitted that the 6<sup>th</sup> Defendant took steps to ensure he acquired good title and should not be penalised for the shortcomings of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who confirmed the legitimacy of the titles in question making reference to *Njenga & 3 Others vs Ndua & Another* [2021] KECA 253 (KLR) and *David Peterson Kiengo & 2 others v Kariuki Thuo* [2012] eKLR.

### **Analysis and Determination.**

57. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are;
- i. Who is the lawful proprietor of parcels of land LR No. Thika Municipality Block 9/283, LR No. Thika Municipality Block 9/284 and LR No. Thika Municipality Block 9/285 (also registered and known as Title No. LR No.



4953/IX/72, LR No. 4953/IX/73 and LR No. 4953/IX/74 situate within Thika Municipality within the Republic of Kenya);

- ii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants procedurally/legally and regularly obtained title to the suit properties.
- iii. Are the plaintiffs entitled to the reliefs sought?
- iv. Whether the 6<sup>th</sup> defendant is an innocent purchase for value and should be indemnified.
- v. Who should bear costs of this suit?

58. The Plaintiffs indicated that they acquired the suit properties through a successful bid following receivership of the 1<sup>st</sup> Plaintiff and Yuken Textiles Ltd. A consent was then recorded and parcels LR No. 4953/IX/73 and LR No. 4953/IX/74 were then transferred to them. However, No. LR No. 4953/IX/72 which was in the name of the 1<sup>st</sup> Plaintiff was transferred to them in 2011 vide a vesting order issued on 1<sup>st</sup> August 2011.
59. They stated that they discovered the suit properties registration system had changed and the properties converted to LR No. Thika Municipality Block 9/283, LR No. Thika Municipality Block 9/284 and LR No. Thika Municipality Block 9/285 and registered to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants when they conducted a search.
60. There is no doubt that the plaintiffs still hold the original Certificate of Titles registered under the Registration of Title Act (Cap 281) issued by the 3<sup>rd</sup> and 4<sup>th</sup> defendants in respect of the suit properties. The suit properties did not revert back to the Government through any form of transmission to warrant any transfer to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant as alleged.
61. The plaintiffs never surrendered nor requested by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to surrender their certificate of titles to enable the change of registration and to receive new titles over the suit properties. All this was done without the prior knowledge or consent of the plaintiffs.
62. Your Ladyship, the Principal Land Administrator Officer of the National Land Commission, DW2 stated that an owner of land who had title registered under the Registration of Titles Act had to surrender the said title to the land registration for conversion and there was no consequences in failing to do so or strict timeline. The plaintiffs never surrendered their original titles and are still in possession of them, thus the purported conversion was unprocedural and invalid.
63. The 1<sup>st</sup> Defendant testifying as DW1 stated that they applied for allotment of the suit properties which were government land and undeveloped and the approval was granted. They paid the requisite fees and the properties were duly registered in their names. She stated that at the time, the land belonged to the government and they were thus the duly legally registered proprietors. However, they consequently sold them off to the 6<sup>th</sup> Defendant.
64. To determine the legality of the different titles held, this court points out that it has been stated that if a Title to property is in challenge, then the proprietor must go beyond the instrument to show the legality in its acquisition. This was the Court of Appeal's holding in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR:

“...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. It is our considered view that the respondent did not go this extra mile that is required of him...”

65. Further, the Court of Appeal in *Richard Kipkemei Limo v Hassan Kipkemboi Ngeny & 4 others* [2019] eKLR went on to affirm:

“... Article 40 (6) of *the Constitution* stipulates that the right to property does not extend to property that has been found to have been unlawfully acquired. In this regard, the appellant had the burden to prove the root of his title and to demonstrate that he procedurally and lawfully acquired title to the suit property. In other words, whereas the legal burden of proof is on he who asserts that a property comes within the provisions of Article 40 (6) of *the Constitution*, the evidential burden is on a registered proprietor to rebut an assertion that his property was unlawfully acquired and demonstrate that the property does not come within the provisions of Article 40 (6) of *the Constitution*.

61. This Court has often times stated that when a certificate of title is under challenge, the root of title must be proved. The lawfulness of the acquisition of title must be demonstrated to oust the provisions of Article 40 (6) of *the Constitution*. In the instant matter, the appellant never led convincing evidence to establish the root of his title. We thus find that the trial court did not err in finding that the certificate of title held by the appellant was null and void...”

66. In this regard, the court has looked through the chronology of events as per evidence adduced to support the parties’ claims as notes that there is an advertisement and a re-advertisement for disposal of the suit properties which read:

Offer for sale of assets of an established company Yuken Textile Industry Ltd (In receivership)

... offers should reach the undersigned on or before March 18, 1991.

Offer for sale of assets of an established company Yuken Textile Industry Ltd (In receivership) (re-advertisement)

... offers should reach the undersigned on or before 30<sup>th</sup> November 1991...

67. There is a letter dated 18<sup>th</sup> March 1991 from Hercules Mills Ltd (PW1 stated during his testimony that Yuken Mills was owned by Hercules Mills) to the receiver manager showing interest to purchase all the assets listed in the advertisement.

68. On 10<sup>th</sup> April 1991 the receiver manager responded to Hercules Mills Ltd managing Director confirming acceptance of their offer to purchase Yuken Textile assets.

Vide a Complaint dated 28<sup>th</sup> November 1991 for HCCC 6320 of 1991 the 2<sup>nd</sup> Plaintiff sought orders for specific performance for transfer of the suit properties.

On 21<sup>st</sup> October 1992 the 2<sup>nd</sup> Plaintiff’s Director wrote to the Receiver Manager of Yuken Textile Industry seeking handing over of possession of the suit properties.

69. On 30<sup>th</sup> October 1992 the receiver manager confirmed to the 2<sup>nd</sup> Plaintiff the handing over of the suit properties and other assets to them.



On 7<sup>th</sup> June 1993 the receiver manager wrote to the 2<sup>nd</sup> Plaintiff's managing director forwarding Transfer Deeds for the suit properties and also stating:

“...You have the original titles in respect to the above plots except for LR No. 4953/IX/72 which we have to transfer from Somerset Africa Ltd to Yuken Textile Industry Ltd so that you can lodge the transfer for that plot. This will involve High Court proceedings and orders and will therefore take time...”

It is on record that LR No. 4953/IX/73 and LR No. 4953/74/ IX registered under Yuken Textile Industry Ltd were both transferred to Yuken Mills Ltd on 18<sup>th</sup> February 1994.

70. Vide a letter dated 7<sup>th</sup> March 1994 the 2<sup>nd</sup> Plaintiff's then Advocates wrote to Industrial & Commercial Development Corporation (ICDC) seeking Title documents regarding L.R. No.4953/72/1X.

On 17<sup>th</sup> March 1994 ICDC responded to Advocates for the 2<sup>nd</sup> Plaintiff advising that the Title documents of the said property were in the possession of the Receiver Manager.

On 28<sup>th</sup> March 1994 the Receiver Manager confirmed that he had the Grant for that property which was in Somerset Africa Ltd name.

On 13<sup>th</sup> November 1998 the 2<sup>nd</sup> Plaintiff's then Advocate wrote to the Registrar of Companies highlighting the need for the Company File relating to Somerset Africa Limited to be traced so as to initiate transfer of LR. No.4953/72/IX.

On 29<sup>th</sup> October 1998 the 2<sup>nd</sup> Plaintiff's Advocates wrote to the Receiver Manager seeking withdrawal of a Caveat lodged against Title to LR. No.4953/72/IX by Industrial Development Bank (IDB). The court has noted that the Caveat lodged on 13<sup>th</sup> November 1991 was withdrawn on 1<sup>st</sup> April 1993.

71. On 30<sup>th</sup> October 1998 the Receiver Manager forwarded the original Grant to the 2<sup>nd</sup> Plaintiff's Advocate and promised the removal of the Caveat lodged against the L.R. No.4953/72/1X.

On 23<sup>rd</sup> November 1999 the Registrar of Companies wrote to the 2<sup>nd</sup> Plaintiff's Advocate confirming the non-availability of the file relating to Somerset Africa Limited.

On 13<sup>th</sup> November 2001 the 2<sup>nd</sup> Plaintiff's Advocates wrote to Industrial & Commercial Development Cooperation (ICDC) seeking execution of the Transfer of property LR. No. 4953/72/1X.

On 18<sup>th</sup> December 2001 ICDC responded to the 2<sup>nd</sup> Plaintiff's Advocates confirming that the 1<sup>st</sup> Plaintiff was a registered company owned by them and it was the registered owner of LR. No. 4953/72/1X.

Produced as exhibit was a search from the Companies Registry dated 5<sup>th</sup> October 2006 confirming that Somerset Africa Ltd was registered on 13<sup>th</sup> August 1972. Also adduced as evidence was a 99 year grant from 1<sup>st</sup> March 1974 for LR No. 4953/72/IX registered in favour of the 1<sup>st</sup> Plaintiff on 14<sup>th</sup> April 1976.

72. Further, vide a letter dated 18<sup>th</sup> October 2006 from Africa Registrars Secretaries to 2<sup>nd</sup> Plaintiff's Advocates (at the time Sharpley Basset & Co.) stated that they were once the Company secretaries for Somerset Africa Ltd (1<sup>st</sup> Plaintiff) but ceased acting as such as of 10<sup>th</sup> January 1984.

A certificate of search dated 16<sup>th</sup> July 2009 was also adduced which showed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as owners of Thika Municipality Block 9/283, 284 and 285 however a Caution had been registered against them by Yuken Mills. The said caution was registered on 15<sup>th</sup> July 2008.

73. Finally, on 17<sup>th</sup> March 2011 a Notice of Motion in HCCC 6320 of 1991 by the 2<sup>nd</sup> Plaintiff sought issuance of vesting orders for LR No. 4953/72/IX. This was on grounds that suit properties LR No.



4953/72/IX, 73 and 74 were sold to them in 1991 and vide a consent order adopted on 23<sup>rd</sup> January 1992 properties LR No. 4953/73/IX and 74 were transferred to them. However, LR No. 4953/72/IX could not be transferred since it was registered in the 1<sup>st</sup> Plaintiff's name whose records were missing. It was only up to 18<sup>th</sup> December 2001 when Industrial & Commercial Development Corporation disclosed that it owned Somerset Africa Ltd.

74. Through an order dated 1<sup>st</sup> August 2011 the Court granted as follows:

It is hereby ordered by consent that:

1. Pursuant to the consent orders made herein on 23<sup>rd</sup> January 1992:
  - a. The ownership of the property known as LR No. 4953/72/IX... is hereby vested unto the Plaintiff Yuken Mills Ltd.
  - b. That the entity known as Somerset Africa Ltd is ... holding the said land or property in trust for the Plaintiff.
  - c. ...

From this chronology, the Plaintiffs have established the legal and evidentiary burden of proof of how they acquired the suit properties.

I am satisfied that all the plaintiffs have explained how they acquired the suit properties.

75. As for the Titles held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, they claimed that they applied and were allotted the said parcels which initially belonged to the government. A perusal of the evidence on record, this court notes that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not produce a search certificate that showed the was un-allocated government land, copies of the application letter to the Commissioner of Lands for allotment of the said property, approval for allocation by the Commissioner and any other relevant documentation as evidence that the allotment was procedural and followed the due process.

76. In light of the missing documentation, the court does not have relevant material that would lead it to conclude on a balance of probability that the suit properties were legally or procedurally acquired by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is also noted that the Surveyor and the Land Administrator who testified as DW2 and DW3 respectively also testified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Title was acquired unprocedurally pointing out that even if the registration system changed from RTA to RLA, the initial Title holders ought to have surrendered the original documents for them to be issued with other Titles.

I am satisfied that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have failed to demonstrate that they followed the detailed procedure laid down by DW3, the Principal Land Administration Officer.

To buttress this, the Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) held:

106. "... certain documents that were required to support the allocation of the suit property to H.E. Daniel T. Arap Moi were missing. These were, "the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land."
107. ... It has not been disputed that indeed there was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was



done. We therefore agree with the trial court and the appellate court that the allocation of the suit property to H.E. Daniel T. Arap Moi was irregular.

108. As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of *Funzi Development Ltd & Others v County Council of Kwale, Mombasa Civil Appeal No.252 of 2005 [2014] eKLR* the Court of Appeal, which decision this Court affirmed, stated that: "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title..."
110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.
111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser..."

77. The court therefore finds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not acquire their Titles to the suit property procedurally but the 2<sup>nd</sup> Plaintiff had proved beyond reasonable doubt how they acquired proprietorship of the suit properties LR No. 4953/IX/72, LR No. 4953/IX/73 and LR No. 4953/IX/74 situate within Thika Municipality.

78. On the second issue for consideration on whether the 6<sup>th</sup> Defendant was a bonafide purchaser for value; the 6<sup>th</sup> Defendant testified that he was approached by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sometime in 2009 to purchase the suit property. Upon undertaking due diligence he was convinced that the suit properties belonged to them and hence went ahead and purchased. He stated that at the time of purchase, there was no caution against them. However, he had been informed of existence of the current suit although he was not shown the pleadings.

The 6<sup>th</sup> Defendant produced the following documents to show that he undertook due diligence:

79. A letter dated 7<sup>th</sup> January 2011 (it is noted that the initial date was 7<sup>th</sup> January 2010 but the 0 was replaced with 1) addressed to the Commissioner of Lands as follows:

RE: LR THIKA MUN BLOCK 9/283, BLOCK 9/284, BLOCK 9/285

I have been approached by one M/s Cecilia Wamaitha and Justus Wainaina Njuguna... in connection with the possible purchase of the above parcels...



However, although the searches presented to me from your lands office in Thika show registered ownership as Cecilia Wamaitha and Justus W. Njuguna. I still wish in good faith to establish the presence and details of records that may be in your possession in connection with the above parcels.

I also have gathered information that the above three parcels were previously registered as LR 4953/IX/72, LR 4953/IX/73, LR 4953/IX/74...

80. The Commissioner of Lands in a letter dated 31<sup>st</sup> January 2010 (sic) responded as follows:

RE: THIKA MUNICIPALITY BLOCK 9/283, 284, 285

Your letter dated 7<sup>th</sup> January 2011 refers.

As per our records, the above plots were allocated to Cecilia Wamaitha Mwangi and Justus Wainaina respectively and jointly.

To ascertain the collect ownership as per today's records, please visit our Thika Land Registry Office...

81. A Certificate of Search dated 30<sup>th</sup> November 2010 showed the suit properties were registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

82. Agreement for sale dated 21<sup>st</sup> January 2011 (it is noted that the initial date was 21<sup>st</sup> January 2010 but the 0 was replaced with 1).

Dated 25<sup>th</sup> February 2011 is an application for registration of transfer of the suit properties and certificate of stamp duty payment. The Stamp duty payment cheque was dated 8<sup>th</sup> February 2011.

A Certificate of Lease in the 6<sup>th</sup> Defendant's name was issued on 14<sup>th</sup> February 2011 (was the Certificate of Lease issued before the application for transfer?)

The 6<sup>th</sup> Defendant also produced Land rent payment receipts for the years 2012 and 2013 and proof of payment of the Kshs. 30,000,000

83. The 1<sup>st</sup> Defendant in her testimony stated that the said caution was lifted through a court decree issued on 21<sup>st</sup> September 2010 in CMCC 10 of 2010 Thika. The Plaintiffs contested having been served or informed of that suit adding that the order was issued *ex parte*. On what grounds were they approaching possible buyers for the suit property in 2009 in full consciousness that other persons were claiming same property? Were they in a rush to dispose it off so as to rely on the doctrine of bonafide purchaser for value to christen the Title? It is also noted that the sale was undertaken during the pendency of this suit! The Court of Appeal in *Anne Jepkemboi Ngeny v Joseph Tireito & another* [2021]eKLR stated as follows on the doctrine of *lis pendens*:

“... In Civil Appeal Number 44 of 2014, *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR, the Court address the issue of *lis pendens* as follows;

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

The actions of the appellant and the 2<sup>nd</sup> respondent of proceeding to alienate the property and having it registered in their names during the pendency of the litigation process, ran afoul of the doctrine of *lis pendens* and was also tantamount to contempt of court... Under the circumstances, the learned Judge cannot be faulted for cancelling the Title deeds and ordering the retransfer of the properties to the 1<sup>st</sup> respondent...”

84. I find that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants could not pass any valid title to the 6<sup>th</sup> Defendant.



85. Since the evidence shows that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were well aware of the illegality being orchestrated in the disposal of the suit properties, will indemnify the 6<sup>th</sup> Defendant of the loss. This is also duly captured under Clause 9.2 of the sale agreement between the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants which reads:

The vendors hereby warrants that the suit property is not ... under any challenge whatsoever and shall indemnify the purchaser any loss suffered as a result of breach of this warranty...

86. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were aware they did not have good title to pass to the 6<sup>th</sup> Defendant, will have to indemnify the 6<sup>th</sup> defendant for the loss.

87. Having stated that the plaintiffs have established their case against the defendants on a balance of probabilities I find that they are entitled to the reliefs sought.

88. Accordingly judgement is entered in favour of the plaintiffs as against the defendants as follows:

- a. That a declaration is hereby issued that parcels of land known as Thika Municipality Block 9/284 and Thika Municipality/Block 9/285 within Thika Municipality in the Republic of Kenya (also known as LR 4953/IX/72, LR 4953/IX/73, and LR 4953/IX/74) absolutely vests in the 2<sup>nd</sup> Plaintiff.
- b. The Chief Land Registrar is hereby ordered to cancel and rectify the register to reflect the 2<sup>nd</sup> Plaintiff as the lawfully registered proprietor of Thika Municipality Block 9/284, Thika Municipality Block 9/285 (also known as LR 4953/IX/72, LR 4953/IX/73, and LR 4953/IX/74).
- c. That an Order of permanent injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their agents, assigns and/or successors, or any other person from selling, offering for sale, charging and/or in any other manner interfering and /or dealing with the parcels of land known as Thika Municipality Block 9/284 and Thika Municipality Block 9/285 (also registered and known as LR 4953/IX/72, LR 4953/IX/73, and LR 4953/IX/74) situated within Thika Municipality within the Republic of Kenya.
- d. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are hereby ordered to indemnify the 6<sup>th</sup> Defendant by refunding to the 6<sup>th</sup> Defendant KShs. 30,000,0000 which was the purchase price of the suit properties with interest a Court's rate from 21<sup>st</sup> January 2011 until payment in full.
- e. That costs of the suit be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Dated, Signed and Delivered virtually at Kajiado this 28<sup>th</sup> day of September 2023.

**L. KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Kioko for Mr. Mumia for the Plaintiffs present.

Ms. Natalie Obago for John Mbaluto for the 6<sup>th</sup> Defendant.

Mr. Karani for the 1<sup>st</sup>, 2<sup>nd</sup> Defendants.

N/A for the 3<sup>rd</sup> – 5<sup>th</sup> Defendants.

Court Assistant – Mutisya.

