



Sunshine Villas Limited v County Government of Kisumu & another; Ethics and Anti Corruption Commission (Interested Party) (Environment and Land Case Civil Suit 23 of 2018) [2023] KEELC 21601 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21601 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 23 OF 2018
SO OKONG'O, J
NOVEMBER 16, 2023**

BETWEEN

SUNSHINE VILLAS LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU 1ST DEFENDANT

CITY MANAGER, COUNTY GOVERNMENT OF KISUMU ... 2ND DEFENDANT

AND

ETHICS AND ANTI CORRUPTION COMMISSION INTERESTED PARTY

JUDGMENT

1. The Plaintiff brought this suit on 30th April 2018 through a plaint of the same date. The Plaintiff filed amended Plaint dated 2nd September 2020 on 7th September 2020. The Plaintiff averred that at all material times it was the registered owner of the all that parcel of land known as Kisumu/Municipality/Block 13/302 (hereinafter referred to as the "suit property"). The Plaintiff averred that on or about February 2017, the Plaintiff commenced construction of up market residential apartments on the suit property after obtaining all requisite approvals.
2. The Plaintiff averred that on or about the 4th April 2018 the Defendants caused to be marked in red paint on the walls of the suit property the words, "X Demolish" indicating that the Defendants intended to move and demolish the suit property at any time notwithstanding that the Plaintiff had obtained all approvals and complied with all statutory and legal requirements in relation to the project it was undertaking on the suit property.
3. The Plaintiff averred further that on 27th April 2018 at 9.30 a.m while at the suit property, the Plaintiff's director was served with a letter dated 23rd April 2018 revoking all previous approvals issued to the



Plaintiff by the Defendants and threatening to demolish the developments on the suit property within 48 hours. The Plaintiff averred that on Sunday 29th April 2018 at 10 p.m., the Defendants agents, servants and/ or employees commenced demolition exercise on the suit property and demolished the boundary wall, balconies, canopies, internal walls, and in the process stole the Plaintiff's tools and equipment including a vibrator, poker, water pumps, electrical and plumbing equipment, site documents among others.

4. The Plaintiff averred that no written notice was issued to it by the Defendants and no hearing was accorded to it prior to the Defendants' placing markings on the walls of the suit property and proceeding to undertake demolition of the structures thereon. The Plaintiff averred further that it was also not given a notice or a hearing prior to the revocation of the approvals it had obtained from the Defendants through the said letter dated 23rd April 2018. The Plaintiff averred that the said actions by the Defendants were undertaken against the rules of natural justice and in violation of the Plaintiff's fundamental rights as enshrined in *the Constitution* of Kenya.
5. The Plaintiff averred that the Defendants intended to further wrongfully, illegally, irregularly and unlawfully demolish the structures on the suit property which demolition had already resulted in and would result in great loss and embarrassment, and would impact on the Plaintiff's reputation. The Plaintiff averred that it had commenced off plan sales of the apartments it was developing on the suit property and due to the marking of the structures on the property for demolition, prospective purchasers had indicated intention to rescind the purchase and demand refund of the deposits they had paid. The Plaintiff averred that the intended demolition had dissuaded other prospective purchasers from purchasing the apartments which had, and would culminate in astronomical loss to the Plaintiff.
6. The Plaintiff averred that it obtained finance from Bank of Baroda Kenya Ltd. for the construction of the apartments on the suit property and would be unable to service the loan if the Defendants continued further with demolition of the developments on the suit property. The Plaintiff averred that the Defendants intended action of further demolishing its structures on the suit property was contrary to the law, oppressive and capricious.
7. The Plaintiff averred that the Defendants' unlawful and wrongful actions and intended demolition of the structures on the suit property would result in the Plaintiff being deprived of its property and the collapse of its business. The Plaintiff averred that the said actions had caused and would further cause to the Plaintiff extreme loss, damage, and embarrassment.
8. The Plaintiff averred that arising from the foregoing unlawful actions of the Defendants it had suffered loss and damage the particulars of which were set out as follows:
 - a. Cost of restoration and repair works in respect of damage occasioned by the Defendants' willful unlawful actions of demolishing the Plaintiff's property: Kshs.40,704,783/-.
 - b. Loss of profits based on the proposed sale of units (scaled down based on loss of goodwill) as a result of disturbance: Kshs. 87,491,652/- .
 - c. Bank interest charged on project finance: Kshs.13,859,042/-.Total Kshs.142,055,447/-.
9. The Plaintiff prayed for judgment against the Defendants for:
 - a. A permanent injunctive order restraining the Defendants, their officers, servants, agents or any other person or entity affiliated or associated with them or acting through or under their instructions from demolishing, alienating or in any other way interfering with or dealing with



the Plaintiff's property, development and construction on all that parcel of land known as Kisumu/Municipality/ Block 13/302(the suit property).

- b. A declaration that its property, development and construction on the suit property do not encroach on the road reserve or interfere in any way with the proposed upgrading of the Impala Park -Dunga Road to bitumen standards.
 - c. Special Damages of Kshs 142,055,447/- arising from and as a consequence of unlawful demolition of its property as set out in Paragraph 17 (B) (a-c) above.
 - d. Costs of this suit and interest on (c) above from date of filing the amended plaint.
 - e. Any other relief that this honorable court may deem fit and just to grant.
10. The Defendants filed a joint amended statement of defence on 8th September 2020. The Defendants averred that the approvals that they granted to the Plaintiff for the development it intended to put up on the suit property were conditional. The Defendants averred that the Plaintiff had admitted that the water pipes belonging to Kisumu Water and Sanitation Company Limited(KIWASCO) were within the suit property. The Defendants averred that the Plaintiff ignored the way leave while planning for the project on the suit property. The Defendants averred that the beacon certificate that the Plaintiff relied on was issued by one, Philip N. Juma who was neither a licensed nor a registered surveyor.
 11. The Defendants denied that they had marked the structures on the suit property for demolition. The Defendants admitted however that they served the Plaintiff with a letter on 27th April 2018 revoking all the approvals that they had granted to the Plaintiff in respect of the project that the Plaintiff was to undertake on the suit property. The Defendants averred that the Plaintiff had not complied with conditions III and IV of the letter of approval.
 12. The Defendants denied further that they entered the suit property on 29th April 2018 and commenced demolition of the Plaintiff's perimeter fence, balconies, internal walls and canopies and in the process stole the Plaintiff's tools and equipment. The Defendants averred that although they did not carry out any demolition on the suit property as claimed by the Plaintiff, they did issue the Plaintiff with notices revoking the approvals they had granted to the Plaintiff and also stopping the construction on the suit property.
 13. The Defendants denied the contents of paragraphs 11, 12, 13, 14, 15, 16 and 17B of the amended plaint. The Defendants averred that the Plaintiff was not entitled to the reliefs sought in the amended plaint.
 14. The Interested Party was added to the suit on 22nd April 2021. The Interested Party filed a defence and a counter-claim on 29th August 2022. The Interested Party averred that the suit property was set aside as an open space for use only for public purposes through Part Development Plan Reference No. N9/87/27 and Approved Development Plan number 741 of 11th August, 1987.The Interested Party averred that under this Part Development Plan(PDP) the suit property bears an inscription 34 and this number on the grid indicates that the subject land parcel was earmarked as an open space.
 15. The Interested Party averred that Open Space as per the said PDP is a public utility plot and was not available for alienation as per the Land Planning Act Chapter 303 Laws of Kenya that was in force then. The Interested Party averred that any PDP that purports to convert land from public to private use is fraudulent. The Interested Party averred that the first allottee of the suit property was Jayantilal Pragji Sedani who acquired the property in 1996. The Interested Party averred that the said Jayantilal Pragji Sedani transferred the suit property to the Plaintiff in 2012. The Interested Party averred that



the Plaintiff had developed the suit property and had in the process severally destroyed the wayleave for KIWASCO.

16. The Interested Party averred that the Plaintiff charged the suit property to Bank of Baroda to secure a loan of Kshs. 180,000,000/-. The Interested Party contended that Bank of Baroda ought to have conducted due diligence before accepting the title for the parcel of land as security for that loan. The Interested Party averred that the Plaintiff ought to have known that the suit property was public land by virtue of the wayleave that was evident when it was carrying out construction on the property. The Interested Party averred that the Plaintiff had on several occasions during the construction works destroyed KIWASCO's water pipes. The Interested Party averred that the PDP at the Ministry of Lands clearly indicated that the land was an open space only to be used for public purposes and that the Plaintiff acquired the suit property from Jayantilal Pragji Sedani without undertaking due diligence.
17. The Interested Party averred that the Land Registrar who issued the lease in respect of the suit property acted fraudulently and overlooked the PDP that indicated that the parcel was public land. The Interested Party averred further that the Land Registrar acted illegally by knowingly and without legal authority alienating public land set aside as an open space to a private person for private use. The Interested Party averred further that the Land Registrar alienated land vested in a public body without following the laid down legal procedures. The Interested Party averred that the Land Registrar acted ultra vires the provisions of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed).
18. The Interested Party averred that since the first owner of the suit property Jayantilal Pragji Sedani's registration as the proprietor of the suit property was fraudulent, illegal, null, and void ab initio, he could not confer any estate, right, or interest in the suit property upon the Plaintiff. The Interested Party contended further that the illegal alienation of the suit property for private purposes was contrary to the intended public use for which the land was set aside as public open space.
19. The Interested Party prayed for judgment against the Plaintiff for;
 - a. A declaration that the issuance of a lease by the Land Registrar to the first owner of the suit property Jayantilal Pragji Sedani was null and void ab initio and ineffectual to confer any right, interest or title upon him.
 - b. A declaration that the registration of the lease and issuance of a Certificate of Lease over the suit property to the Plaintiff was null and void and ineffectual to confer a good title upon the Plaintiff.
 - c. A declaration that the suit property was set aside as open space and hence should be under the custody of the County Government of Kisumu, the 1st Defendant herein.
 - d. An order for rectification of the land register by the cancellation of the lease over the suit property and Certificate of Lease issued to the Plaintiff so as to restore the suit property back to the Government.
 - e. A declaration that the charge created and registered in favour of Bank of Baroda over the suit property on 9th March 2017 was null and void and ineffectual to confer any valid interest upon the said bank and an order of a permanent injunction restraining the said bank from selling, transferring, advertising for sale or from howsoever dealing with the suit property in the exercise of any statutory power by virtue of the charge.
 - f. An order for a permanent injunction against the Plaintiff by itself, its agents, servants or assigns restraining it from leasing, transferring, charging, further charging, entering upon, developing, or in any other manner howsoever from dealing with the suit property.



- g. General damages for fraud.
 - h. Costs of and incidental to the suit.
 - i. Any other or further relief that the Court may deem fit and just to grant.
20. The Plaintiff filed a reply to the Interested Party's Statement of Defence and Defence to the Counterclaim. The Plaintiff denied that the suit property was public land. The Plaintiff averred that it was the registered owner of the suit property and that its title had never been challenged by the 1st Defendant or the Land Registrar. The Plaintiff averred that the Plaintiff was a bona fide purchaser of the suit property for value from Jayantilal Pragji Sedani without notice of any defect in his title.
 21. The Plaintiff averred that prior to the commencement of construction on the suit property, the Plaintiff engaged KIWASCO and sought reticulation layout of its scheme so as to avoid encroachment. The Plaintiff submitted that it ceded 3 meters of the suit property so that the water pipes could run outside the property a fact that was confirmed through a court-ordered survey. The Plaintiff averred that it had availed survey plans for the suit property which confirmed the beacons and co-ordinates and the measurement of the road abutting the suit property. The Plaintiff averred that the said survey plans confirmed that the suit property was outside the 18-meter width required by Kenya Urban Roads Authority for roads. The Plaintiff denied that it acquired the suit property fraudulently and illegally. The Plaintiff prayed that the Interested Party's counter-claim be struck out or dismissed with costs.
 22. At the trial, the Plaintiff's first witness was its director, Suresh M. Patel(PW1). PW1 adopted his witness statement filed on 30th April 2018 as his evidence in chief and produced the Plaintiff's bundle of documents also filed 30th April 2018 as P.EXH.1. In his witness statement, PW1 reiterated the contents of the amended plaint that I have referred to earlier in the judgment. It is not necessary to reproduce the same here. PW1 stated that the Plaintiff was claiming from the Defendants a sum of Kshs. 142,0055,447/= plus interest and costs of the suit.
 23. The Plaintiff's second witness was Samuel Ratemo (PW2). PW2 told the court that he was an audit manager with John Cumming & Co. Certified Public Accountants. He stated that he prepared a report dated 11th May 2020 based on the instructions from the Plaintiff. He stated that they examined reports that had been prepared by other experts namely, Cyntarch Consultants Ltd., Chrisca Real Estates, and a quantity surveyor. He stated that they also looked at a court order that allowed the Plaintiff to continue with the development, the Plaintiff's writings on the proposed sale of the units on completion, the Plaintiff's loan statements from Bank of Baroda, and the construction contract. He stated that based on the said documents they assessed restoration costs at Kshs. 40,704,783/-, loss of profits at Kshs. 87,491,652/- and interest charged at Kshs. 13,859,042/- making a total claim of Kshs. 142,055,447. He produced their report as P.EXH. 2.
 24. The Plaintiff's next witness was Nobert Kisanya(PW3). PW3 told the court that he was a property valuer and that he prepared a valuation report dated 6th July 2018. He stated that he worked with Chrisca Real Estates. He stated that he inspected the suit property on 3rd July 2018 and found a structure that was still under construction damaged. He stated that they were instructed to assess the damage which they did. He stated that the portion of the building that was damaged was 16,706.59 square feet. He stated that they assessed the damage at Kshs. 50,118,000/- at the rate of Kshs. 5000/- per square feet. PW3 stated that the building was 60% complete and that the value that they gave was for 60% of the building. He stated that the boundary wall measured 6400 feet and using a rate of Kshs. 1000 per square feet, they assessed the damage at Kshs. 6,400,000/-. He stated that they assessed the total loss at Kshs. 56,518,000/-.



25. After the close of the Plaintiff's case, the Interested Party's first witness Timothy Waiya Mwangi(DW1) gave evidence. He told the court that he was the Deputy Director of Physical Planning in the Ministry of Lands. He stated that he had worked in the docket of Physical Planning for 35 years. He stated that prior to 2010, the Physical Development Plan(PDP) would originate from the office of the Commissioner of Lands. He stated that the Commissioner of Lands would receive an application for allocation and would grant authority to plan to the Director of Physical Planning. He stated that the Director of Physical Planning would visit the site and prepare a base map showing the location of the land, the surrounding uses, the accesses, the rivers, and any other features. He stated that the plan would ensure that there is access, sustainability, comparability, and harmony. He stated that the document marked "CK4" in the Interested Party's bundle of documents was an approved Physical Development Plan (PDP) No. 741 for the proposed land use for land Block No. 13.
26. He stated that the PDP was certified by the Director of Physical Planning and forwarded to the Commissioner of Lands for approval. He stated that the Commissioner of Lands approved the PDP on 1st September 1987. He stated that the PDP met all the standards. He stated that there was a register of approved plans. He stated that 741 was the number that was given to the subject PDP in the register of approved plans. He stated that they did not have any other approved Physical Development Plan(PDP) for Block 13.
27. DW1 stated that on the said PDP, the suit property was in the area zoned as 34 which is open space. He stated that the dispute before the court concerned a building and a perimeter wall that sit on a public open space. He stated that the Commissioner of Lands could only allocate plots that were not reserved for public purposes. He stated that the open space in question was not available for alienation. He stated that no PDP could be prepared in respect of public-purpose plots. He stated that an enforcement notice was being issued under Section 38 of the Physical Planning Act and that it was issued when someone built without approval or in breach of certain special conditions on which the approval was given.
28. He stated that the enforcement notice notified the recipient of his rights to appeal to the relevant Liaison Committee. He stated that at the material time, there was a Liaison Committee for Kisumu. He stated that the Plaintiff did not appeal against the notice that was served upon him. DW1 stated that the deferment notice dated 31st January 2018 that was given to the Plaintiff was not a revocation of the enforcement notice. He stated that the deferment notice dated 31st January 2018 merely put the enforcement notice on hold. DW1 stated that if the Plaintiff had obtained a PDP for the area where the suit property is situated, it would have noted that the suit property was an open space. He stated that a title search was not sufficient for due diligence. He stated that planning authorities are bound by Physical Development Plans and the special conditions on the leases where the subject property is leasehold. He stated that development approvals are subject to Physical Development Plans. He stated that the plan marked "CK3" in the Interested Party's bundle of documents was Kisumu Short Term Development Plan prepared in 1969 and the same was in their records.
29. He stated that in the said short term development plan for Kisumu, the suit property was at the far top left hand corner of the plan. He stated that the place marked 6 was the water treatment plant. He stated that that was where KIWASCO water treatment plant was situated as was planned in 1969. He stated that the open space was left for the purposes of public use. He stated that it would probably be used by the public for recreation. He stated that it could also have been left as a wayleave or for ancillary use connected with the water treatment plant. He stated that water pipes should pass through public land and where they pass through private land, there must be a registered wayleave. DW1 produced the Physical Development Plan No. 741 as D.EXH.1, Kisumu Short Term Development Plan No.



- 9/69/41 as D.EXH.2, and the letter dated 15th June 2022 as DEXH. 3. DW1 adopted his statement dated 26th June 2022 as part of his evidence in chief.
30. The Interested Party's next witness was Michael Abala Wanga (DW2). DW2 told the court that he was the acting City Manager, Kisumu City. He adopted his witness statement dated 30th September 2022 as his evidence in chief. Much of what is stated in his witness statement is similar to the evidence that was given by DW1. He stated that the suit property was an open space according to the PDP No. 741 reference N9/89/27. He stated that the suit property being an open space, the same was vested upon the 1st Defendant. He stated that adjacent to the suit property was KIWASCO's water treatment plant. He stated that KIWASCO had laid water pipes in the said open space which were destroyed by the Plaintiff.
 31. DW2 stated that the 1st Defendant attempted to stop the construction on the suit property. He stated that through a letter dated 22nd January 2018, the 1st Defendant informed the Plaintiff that the construction that the Plaintiff was carrying out on the suit property was unlawful and that the same had interfered with the wayleave for KIWASCO. He stated that the Plaintiff was asked to stop the construction immediately. He stated that instead of stopping the construction, the Plaintiff filed this suit. DW2 stated that the suit property was intended for a walk way, wayleave for KIWASCO, a drainage water collection point and a sewer for the benefit of the public.
 32. The Interested Party's next witness was Eng. Moses Odhiambo Jura(DW3). DW3 told the court that he worked at KIWASCO as the Chief Engineer Technical services. He stated that he joined KIWASCO in June 2008. He stated that he was a registered Civil Engineer by profession. He stated that there was an existing water infrastructure that was affected by the suit property. He stated that water line from Dunga intake water works to Dunga Water Treatment Plant passes through a wayleave on the suit property. He stated that the water pipes passed through the suit property. DW3 adopted his witness statement dated 25th August 2022 as part of his evidence in chief.
 33. He stated that the water treatment plant served about 85% of the Kisumu City residents and that they learnt of the encroachment on the water supply infrastructure when construction of a wall started on the suit property and the contractor damaged the water pipe which affected the water supply. DW3 stated that they wrote letters of complaint to the Kisumu City Manager on 3rd May 2016 and 26th May 2016 but the construction did not stop. He stated that the need for expansion of the water facilities had come up since the City was expanding. He stated that there was an ongoing project known as Lake Victoria Water and Sanitation Project (LVWASA) which was funded by the Kenya and French Governments. He stated that the project was intended to expand the water services.
 34. DW3 stated that the project was impeded because they would now be required to acquire a wayleave to lay additional pipes. He stated that they would also need to install dry sludge beds to manage the sludge to avoid pollution of Lake Victoria. He stated that during water treatment, they use chemicals that produce sludge which they had to dispose of. He stated that the same had to be directed to dry sludge beds so that it did not find its way to Lake Victoria. He stated that some of the water pipes passing through the suit property were laid in the 1950s and the latest pipes were laid in 2014. He stated that the pipes were laid on a wayleave and public land. He stated that water pipes could not be laid on private land unless approval was given by the owner. He stated that in this case, permission was not needed because the water pipes were on a wayleave and public land. He stated that they also needed space to maintain the pipes.
 35. He stated that the maintenance of the pipes involved heavy machinery and equipment that required adequate space. He stated that in case the maintenance of the said water pipes became necessary, they would have to demolish the Plaintiff's perimeter wall to undertake the maintenance. He stated that the



- space left for them to access the 3 pipes passing through the suit property was not adequate. He stated that if one of the pipes got damaged, Kisumu City would suffer a water shortage. He stated that it was not in the public interest for a public open space to be allocated for private use. He produced letters dated 3rd May 2016 and 26th May 2016 as D.EXH. 4 and 5 respectively.
36. The Interested Party's last witness was Francis Wafula (DW4). He stated as follows in his evidence in chief: He was a forensic investigator with the Interested Party. He was based in Kisumu. It was reported to them that public land, Kisumu Municipality Block 13/302 (suit property) had been illegally acquired. He started his investigations by finding out the location of the suit property. He located the suit property along Harambee Road next to KIWASCO water treatment plant and Yacht Club.
37. When he visited the site, he found a storey building on the suit property. On both sides of the suit property, there were exposed big water pipes. The pipes were made of plastic and concrete. He established that the water pipes belonged to KIWASCO. KIWASCO told them that it was against the development that was being carried out on the suit property. KIWASCO gave them correspondence through which it had protested against the same. He recorded a statement from one of the Engineers at KIWASCO. He obtained documents from the land offices in Nairobi and Kisumu. He also got documents from the Department of Physical Planning. Most of the documents had already been produced in evidence. He obtained a survey plan No. 248/191 through which the suit property was created. He produced the survey plan as D.EXH.7. He was unable to get the correspondence file and the parcel file for the suit property. That was an indication of fraud. The intention was to conceal evidence.
38. He had difficulty getting documents from the Land Registry in Kisumu. He was later supplied with a certificate of lease and an extract of the register from a file that had been reconstructed. They opened a criminal case file and were pursuing a criminal angle in the matter. The first owner of the suit property, Jayantilal Pragji Sedani did not have a valid title to the property and as such he had nothing to transfer to the Plaintiff. The suit property was charged to I & M Bank Ltd. and subsequently to Bank of Baroda. The said banks did not carry out due diligence. They placed a restriction on the title to preserve the property. This was to warn prospective buyers. The apartments being put up on the suit property had been advertised for sale and there was a risk of the public buying public land. The suit property was reserved as an open space and as such the same was not available for allocation. He produced the certificate of lease as D.EXH.8, the extract of the register as D.EXH. 9, and the letter dated 1st April 2022 as D.EXH.10.
39. The Defendants called one witness, Oscar Richard Ochieng Adede(DW5). DW5 stated that he worked with the 1st Defendant as the County Director of Physical Planning and that he recorded a witness statement on 27th January 2022 which he wished to adopt as his evidence in chief. He produced the report dated 20th December 2019 that was prepared by the Land Registrar and County Director of Surveys as D.EXH.11. He also produced the enforcement notice dated 22nd January 2018 that was issued by Ag. Chief Officer Lands, Housing and Physical Planning as D.EXH.12. He produced other correspondence exchanged between the Plaintiff and the 1st Defendant as D.EXH. 13, 14 and 15. He stated that there was no evidence that the construction of the Plaintiff's perimeter wall was approved by the 1st Defendant. He stated that he was not aware that it was the Defendant who demolished the Plaintiff's buildings. He stated that he did not send anyone to demolish the plaintiff's structures on the suit property. He stated that they could not carry out demolition without notice and a court order.



The Plaintiff's submissions

40. The Plaintiff framed seven issues for determination namely;
- i. Whether the Court has jurisdiction to grant the reliefs sought.
 - ii. Whether the development on Kisumu Municipality/Block 13/302(the suit property) was on a wayleave.
 - iii. Whether or not the Plaintiff has a good title to the suit property.
 - iv. Whether the Defendants demolished the Plaintiff's building.
 - v. Whether the demolition was undertaken in accordance with the law.
 - vi. Whether the Plaintiff suffered loss and damage occasioned by the acts of the Defendants.
 - vii. Whether the Plaintiff is entitled to the reliefs sought against the Defendants.
41. On the first issue, the Plaintiff relied on the provisions of Section 13 of the *Environment and Land Court Act*, 2011, Article 162 (2) (b) of *the Constitution* of Kenya as well as Section 93 of the *Physical and Land Use Planning Act* and submitted that this court has exclusive jurisdiction to determine disputes relating to environment and land. The Plaintiff submitted that the court has jurisdiction to determine its claim against the Defendants.
42. The Plaintiff submitted that the Defendants issued an Enforcement Notice dated 23rd April 2018 which resulted in the demolition of the Plaintiff's developments on the suit property. The Plaintiff submitted that there was no evidence that the Kisumu County Physical and Land Use Planning Liaison Committee had been set up and was operational at the material time a fact that was not denied or rebutted by the Defendants. The Plaintiff submitted that the Enforcement Notice dated 23rd April 2018 aforesaid gave the Plaintiff the option of seeking redress from this court. The Plaintiff submitted that this court was vested with jurisdiction to hear and determine the Plaintiff's suit. The Plaintiff submitted that the purported alternative forum for redress namely, the Liaison Committee provided for under Section 93 of the *Physical and Land Use Planning Act*, 2019 could not provide it with an effective remedy or at all.
43. On the second and third issues, the Plaintiff submitted that it was the registered owner of the suit property. The Plaintiff submitted that it held a leasehold interest in the suit property. The Plaintiff submitted that it applied for development permission in respect of the suit property to the 1st Defendant which gave its approval on 13th January 2017. The Plaintiff submitted that it also secured approvals from the National Construction Authority (NCA) as well as the National Environmental Management Authority (NEMA). The Plaintiff submitted that NCA and NEMA could not issue approvals if the Plaintiff's development was likely to interfere with the main raw water intake pipes belonging to Kisumu Water & Sewerage Company Limited (KIWASCO).
44. The Plaintiff submitted that the Enforcement Notice dated 22nd January 2018 issued by the 1st Defendant, purported to stop the development which had already been approved on the grounds of alleged interference with a wayleave for KIWASCO and encroachment on a public utility/wayleave. The Plaintiff submitted that the said Enforcement Notice was issued on behalf of the 1st Defendant by one, S.K Mwongo, the then acting Chief officer, Lands, Housing, Physical Planning & Urban Development. The Plaintiff submitted that the said S.K Mwongo subsequently issued a Deferment Notice dated 31st January 2018. The Plaintiff submitted that on 23rd April 2018, the 2nd Defendant acting on behalf of the 1st Defendant issued another Enforcement Notice that revoked the approval



- that had been granted to the Plaintiff for the construction of the walls and the building on the grounds that the developments aforesaid were being undertaken on a road reserve and/or disputed parcel. The Plaintiff submitted that it was required to pull down the development and revert the land to its initial state within 48 hours failure to which the Defendants would demolish the building at the Plaintiff's cost.
45. The Plaintiff submitted that in support of its contention that the suit property was public land and comprised of a wayleave for KIWASCO, that the Interested Party relied heavily on the Part Development Plan (PDP) Reference No. N9/87/27, Approved Development Plan No. 741 (DEXH. 2) whose legend/grid shows that the suit property occupies Zone 34 marked as "Open Space". The Plaintiff submitted that according to the Interested Party, under Regulation 11(3) of the Development and Use of Land (Planning) Regulations, 1961 made under the Land Planning Act Chapter 303 Laws of Kenya which was the law in force when the PDP was prepared, "public purpose" included public open spaces. The Plaintiff submitted that the Interested Party contended that KIWASCO had a wayleave for raw water intake from Lake Victoria on the suit property and that its water pipes from Dunga Water Intake Plant pass through the property.
 46. The Plaintiff submitted that in the Part Development Plan (PDP) Reference No. N9/87/27, Approved Development Plan No.741, Zone 34 is marked as "Open Space" and Zoning on the entire PDP was specifically done in the following manner; (a) 0-Residential (b) 2-Educational (c) 3-Recreational (d) 4-Public Purpose (e) 6-Public Utilities, and (f) 7-Transportation. The Plaintiff submitted that neither the Defendants nor the Interested Party provided evidence of a wayleave on the PDP, and neither was evidence tendered to demonstrate that Zone 34 was alienated for a public purpose. The Plaintiff submitted that the PDP does not show anywhere that there was a wayleave reserved for KIWASCO. The Plaintiff submitted further that there was no evidence that the initial lease registered in the name of Jayantilal Pragji Sedani in respect of the suit property had a wayleave registered as an encumbrance against the title of the property.
 47. The Plaintiff submitted that the law does not operate retrospectively hence the Interested Party's assertion that the meaning assigned to "open space" by the Land Planning Act Chapter 303 Laws of Kenya should be applied to the suit property was misleading since the said Act had successively been repealed through the Physical Planning Act No. 6 of 1996 and *Physical and Land Use Planning Act* of 2019. The Plaintiff submitted that it could not have disobeyed a law that was not in existence in 2018. The Plaintiff relied on section 28 of the *Land Registration Act*, Sections 138(3), and 143 (2), (3) and (4) of the *Land Act*, 2012, and the case of Ruth Wamuchi Kamau v. Monica Mirae Kamau [1984] eKLR on the meaning, creation and effect of wayleaves.
 48. The Plaintiff submitted that it was a bona fide purchaser of the suit property for value from Jayantilal Pragji Sedani and that no evidence had been tendered by the Defendants or the Interested Party to the contrary. The Plaintiff submitted that no illegality, procedural impropriety or corrupt scheme was proved against the Plaintiff. The Plaintiff submitted that the particulars of fraud, illegality and knowledge attributed to the Plaintiff/Defendant in the counterclaim remained unproven. The Plaintiff submitted that the Chief Land Registrar should have been joined as a party to the suit to explain the circumstances under which the alleged wayleave for KIWASCO was registered in the name of Jayantilal Pragji Sedani from whom the Plaintiff purchased the suit property. The Plaintiff reiterated that it was a bona fide purchaser of the suit property for value from Jayantilal Pragji Sedani in terms of Sections 25 and 26 of the *Land Registration Act*, 2012.
 49. The Plaintiff submitted that no tangible evidence had been placed before the Court why the Plaintiff should be deprived of its proprietary rights over the suit property ostensibly because of a wayleave. The Plaintiff submitted that the Interested Party did not avail to the Court the Wayleave report, and/



or certificate showing its exact width and the neighborhood plots it passes through right from the KIWASCO raw water intake point to the end destination. The Plaintiff submitted further that no evidence was tendered before the court showing that the suit property as the servient land could not co-exist with the dominant tenement that KIWASCO is occupying and that the Plaintiff being acutely aware that its property rights could be defeated by operation of law provided evidence in the form of a court ordered ground report by County Land Registrar and County Surveyor dated 20th December 2019 showing that it ceded 3 metres of its land to accommodate and safeguard the wayleave that KIWASCO claimed to enjoy. The Plaintiff submitted that neither KIWASCO nor the Defendants as well as the Interested Party provided evidence that KIWASCO applied for and was granted a public right of way or wayleave that was to pass over the area marked as Zone 34 (Open Space) on the PDP referred to earlier before the Plaintiff acquired the suit property.

50. The Plaintiff submitted that even if the court finds that KIWASCO had a public right of way or wayleave on the suit property, KIWASCO's right of enjoyment of the public way could not(sic) be compensated by an award of damages as any infringement affected the general public and the Interested Party's counterclaim was in the public interest(sic).
51. On the fourth and fifth issues, the Plaintiff reiterated that it had sought and obtained all the necessary approvals for development on the suit property which approvals were acquired legally. The Plaintiff cited Sections 38 of the Physical Planning Act, Chapter 286 Laws of Kenya (now repealed) and Section 72 of the *Physical and Land Use Planning Act*, 2019 on unauthorised developments and enforcement notices. The Plaintiff submitted that it was on 27th April 2018 served with an Enforcement Notice dated 23rd April 2018 signed by the 2nd Defendant which revoked all approvals that had been issued to the Plaintiff by the 1st Defendant and on 29th April 2018 at 10.00pm, the Defendants commenced demolition of the Plaintiff's properties by bringing down the perimeter wall, balconies, canopies and internal walls. The Plaintiff submitted that the Enforcement Notice issued on the 23rd April 2018 did not conform to the prescribed statutory Form P.P.A7 in schedule to the Physical Planning (Enforcement Notices) Regulations, 1998. The Plaintiff submitted that there was no valid Enforcement Notice contemplated under Section 38 (1) of the Physical Planning Act (now repealed). The Plaintiff submitted that the Defendant's letter dated 23rd April 2018 to the Plaintiff was not an Enforcement Notice as contemplated under the Physical Planning Act (now repealed).
52. The Plaintiff submitted that for a person to avail himself or herself of the appellate process under Section 38 (4) of the Physical Planning Act, Chapter 286 Laws of Kenya (now repealed), the enforcement notice must have been given pursuant to Section 38(1) of the said Act. The Plaintiff submitted that since there was no notice pursuant to Section 38 (1) of the Physical Planning Act (now repealed), it could not fall back to or/initiate the appellate procedure stipulated under Section 38 (4) of the Act.
53. The Plaintiff submitted that it was not accorded an opportunity to be heard by the 2nd Defendant prior to the issuance of the purported "Enforcement Notice" and was not even given an opportunity to appeal the decision. The Plaintiff submitted that the demolition of the developments on the suit property was done without giving it a fair administrative action which constituted a breach of its constitutional rights under Article 47 of *the Constitution* and Section 4 of the Fair Administrative Actions Act thereby prejudicing it to its detriment. In support of this submission, the Plaintiff relied on *Onyango Oloo-v-Attorney General* [1989] EA 456.
54. The Plaintiff submitted that although the Defendants alleged that the Plaintiff had damaged the water pipes on the suit property, the extent of the alleged damage was not quantified by any expert and none was called to testify either by the Defendants or the Interested Party. The Plaintiff submitted that the



- Defendants and the Interested Party did not prove that there was in existence a beacon demarcating the boundary line between the suit property and the KIWASCO's water pipes. The Plaintiff submitted that KIWASCO did not point out if the water pipes and the wayleave route were marked out.
55. The Plaintiff submitted that the Defendants acted in haste and forcefully trespassed into the suit property without following due process by taking the law into their own hands and demolishing the Plaintiff's developments in the name of enforcing wayleave rights.
 56. On the sixth and seventh issues, the Plaintiff submitted the demolition of its properties was undertaken under the direction of and/or by the staff of the Defendants. The Plaintiff submitted that it received the "Enforcement Notice" dated 23rd April 2018 from the 2nd Defendant and no other individual or entity had ever threatened demolition of its development on the property hence it was misleading and a blatant falsehood for the Defendants to claim that they were not responsible for the demolition. The Plaintiff submitted that in the report on remedial costs associated with demolitions on the suit property dated 11th May 2020 (PEXH.2), PW2 assessed the total costs at Kshs 142,055,447/-. In support of its claim for damages, the Plaintiff relied on Samuel Kariuki Nyagito v. Johaan Distelberger [2017]eKLR.
 57. The Plaintiff submitted that it had proved its case on a balance of probabilities and should be awarded the reliefs sought against the Defendants. The Plaintiff submitted further that the Interested Party's counterclaim against the Plaintiff was not proved and the court was urged to dismiss the same.
 58. The Plaintiff filed supplementary submissions dated 30th May 2023 in response to the Defendants' and the Interested Party's submissions. The Plaintiff submitted that the initial complaint by the 1st and 2nd Defendants against the Plaintiff was that the Plaintiff was putting up a structure that was encroaching on a road reserve. The Plaintiff submitted that based on this complaint, the 1st and 2nd Defendants issued a notice to the Plaintiff to stop construction but after an objection was raised by the Plaintiff, the notice was deferred. The Plaintiff submitted that it was not disputed that the 1st and 2nd Defendants offices issued all the approvals for construction that they were complaining about and thereafter purported to unilaterally revoke the same without according the Plaintiff a hearing. The Plaintiff submitted that the Defendants thereafter purported to issue the Plaintiff with a 48-hour notice that was served on Friday morning before the demolition was carried out on Sunday night.
 59. The Plaintiff submitted that the issue of a wayleave was subsequently brought up by the Interested Party who pursuant to an application to be joined in the suit dated 8th April 2021 and in its evidence in Court, relied on a letter of complaint by Kisumu Water & Sewerage Company Limited (KIWASCO) dated 26th May 2016 (Annexure CK-9 to the Interested Party's bundle). The letter was not copied to the Plaintiff although it was based on what KIWASCO referred to as public interest in the approval for the construction of a wall that would compromise the wayleave for its existing raw water main pipes from Dunga water intake plant to Dunga water treatment plant.
 60. The Plaintiff submitted that a wayleave under the Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021 means: "a contract between the owner and occupier of the land (grantor) and a third party (grantee) permitting the grantee to access privately-owned land to carry out works in return for some form of compensation". The Plaintiff submitted that it was instructive that no wayleave report was exhibited by the Interested Party on behalf of KIWASCO, although KIWASCO took the court on a site visit to see the general layout of the water pipes, including the one that ran outside the perimeter wall of the suit property which the Plaintiff contended was no longer being used to carry water.
 61. The Plaintiff submitted that according to Regulation 12(4) of the Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021, a wayleave or easement shall



- be registered in accordance with the provisions of the [Land Act](#), 2012 and where they fall under private property, Regulation 12 (5) provides that the planning authority shall apply for creation and registration under the [Land Act](#),2012. The Plaintiff submitted that under Regulation 6, wayleaves and easements shall be depicted in the physical and land use development plans and survey plans. The Plaintiff submitted that none of the plans submitted by the Interested Party demonstrated the existence of any wayleave or easement.
62. The Plaintiff submitted that the issue of a road reserve was resolved by the joint ground report by the County Land Registrar and County Surveyor dated 30th December 2019 and it was incredible that the Interested Party sought again to bring it up by writing to the Principal Secretary through a letter dated 1st April 2022 (Annexure CK-8 to the Interested Party's bundle) requesting that a restriction be placed on the suit property ostensibly because the property encroached on a road reserve and had been illegally acquired. The Plaintiff submitted that no evidence was led by the Interested Party at trial to demonstrate that the suit property was on a road reserve and that the Interested Party throughout its evidence restricted itself to the claim that the suit property was a public open space that was not available for alienation.
63. The Plaintiff submitted that in a desperate bid to give meaning to the word "Open Space", the Interested Party had resorted to relying on the meaning assigned to it by the Open Spaces Act of 1906 of the United Kingdom. The Plaintiff submitted that the Interested Party had not deemed it fit to find meaning of "open space" within the Land Planning Act, Chapter 303 Laws of Kenya, the Physical Planning Act Chapter 286 Laws of Kenya and the [Physical and Land Use Planning Act](#), 2019. The Plaintiff submitted that under Regulation 11(3)(c) of the Development and Use of Land (Planning) Regulations, 1961 under the Land Planning Act (Chapter 303 Laws of Kenya), "public spaces" for a public purpose is defined as "non-profit making purpose" which includes, educational, medical, religious, car parks, public open spaces, and other social amenities. The Plaintiff submitted that there was no mention in the PDP in question that Zone 34-Open Space was a public open space as contended by the Interested Party. The Plaintiff submitted that it would be dangerous to assign a meaning to the term "open space" using foreign laws when the national laws have not been stated or demonstrated to be inadequate. In support of this submission, the Plaintiff relied on Sections 2, 3 and 9 of the Government [Land Act](#), Chapter 280 Laws of Kenya (now repealed). The Plaintiff reiterated that it was a bona fide purchaser of the suit property for value from Jayantilal Pragji Sedani whose title the Interested Party sought to impeach but did not do so to the standard required for proof of fraud and illegality, neither was the said Jayantilal Pragn Sedani joined in the suit by the Interested Party in its counterclaim. In support of this submission, the Plaintiff relied on Ahmed Mohammed Noor v. Abdi Aziz Osman [2019] eKLR, Katende v. Haridar & Company Limited [2008] 2 EA 173 and Black's Law Dictionary, 9th Edition for the standard of proof and the definition of a bona fide purchaser for value.
64. The Plaintiff reiterated that the particulars of fraud, illegality, and knowledge pleaded in the Interested Party's defence and counterclaim were unproven. The Plaintiff submitted further that proof of the allegations of fraud and acting with the knowledge of the suit property being public land pleaded against the Plaintiff did not meet the threshold of beyond reasonable doubt and was in a proper sense directed at the Registrar of lands. The Plaintiff reiterated further that there was no evidence of collusion, misrepresentation or proof of a corrupt scheme on the part of the Plaintiff.

The Defendants' submissions

65. In their submissions the Defendants framed four issues namely;



- a. Whether the Plaintiff has proved his case as required by the law as to who carried out the demolition on the suit property and if so whether the same was done in accordance with the law.
 - b. Whether or not the Plaintiff had a good title to the suit property.
 - c. Whether the Plaintiff suffered loss and damage and if so how much.
 - d. If it is found that the Plaintiff suffered any loss or damage who bears that loss or damage?
66. On the first issue, the Defendants submitted that it was not denied that an enforcement notice was served upon the Plaintiff. The Defendants submitted that there was no clear evidence from the Plaintiff that it was the Defendants or their employees who carried out the demolition of the Plaintiff's structures on the suit property. The Defendants submitted that the burden of proof was upon the Plaintiff to demonstrate that the demolition was carried out by the Defendants and their employees. The Defendants submitted that their witness denied any involvement in the demolition of the Plaintiff's structures. The Defendants submitted that the Plaintiff's witnesses admitted that the incident occurred during the construction of Impala-Dunga Road when several structures were brought down to make way for the construction of the said road.
67. On the second issue, the Defendants submitted that the evidence before the court shows that the suit property was an open space and designated as such in the PDP and the Short-Term Development Plan that were produced in evidence by the Interested Party's witnesses. The Defendants submitted that it was incumbent upon the Plaintiff to show how the suit property which was an open space designated for public use was allocated to it or the person from whom it bought the same. In support of this submission, the Defendants cited *Republic v. Land Registrar, Trans-Nzoia & another Ex parte Mary Odhiambo & another* [2019] eKLR and *Town Council of Awendo v. Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties)* [2019] eKLR.
68. The Defendants submitted that in *Funzi Island Development Ltd & 2 Others v. County Government of Kwale & 2 Others* [2014] eKLR the court stated that a registered owner of land enjoys absolute and indefeasible title if the allocation was legal, proper and regular and that in *Kassim Ahmed Omar & Another v. Awadh Ahmed Abel & Others Malindi ELC No.18 of 2015* the court stated that:
- “A certificate of title is an end product of a process, if the process that followed in issuing the title did not comply with the law, then such title can be cancelled by the Court.”
69. The Defendants submitted that this court should find that the Plaintiff had failed to show how public land was allocated to an individual or the procedure used for the acquisition of the suit property. In support of this submission, the Defendants cited *Kenya National Highway Authority v. Shalien Masood Mughal & 5 others* [2017] eKLR.
70. On the second issue, the Defendants submitted that the Plaintiff sought Kshs.142,055,447/- as special damages for the costs and damage suffered due to the demolition of its structures on the suit property. The Defendants submitted that this being a liquidated claim, the Plaintiff was required to specifically plead and prove each and every item comprised in the claim. In support of this submission, the Defendants relied on *Nyamogo & Nyamogo Advocates v. Barclays Bank of Kenya Ltd.* [2015] eKLR and *Nicholas Angwenyi Siro t/a Riverside Continental Resort v. Finlay Kirui & Anor* [2019] eKLR. The Defendants cited *Jamal Mohamed Bandira v. Owners of Motor Vessel Naisibu* [2020] eKLR and *Great lakes Transport Co. Ltd.(U)Ltd v. KRA*[2019] eKLR and submitted that the Plaintiff's witnesses (PW2 and PW3) based their assessment of loss on the full contract for 32 units while there



was evidence that the Plaintiff had scaled down the development to 8 units only. The Defendants submitted that that showed that the claim for special damages had not been proved.

71. The Defendants submitted that the loss occasioned by interest on bank loan was also not proved. The Defendants submitted that no loan statement, letters of offer or any other documentary evidence was produced to show that there was any loan advanced to the Plaintiff. The Defendants submitted that there was also no evidence that the bank declined to advance to the Plaintiff further loans to force the Plaintiff to scale down the development. The Defendants submitted that the claim must collapse for want of proof.
72. On the last issue, the Defendants submitted that the Plaintiff did not prove that it was the Defendants who carried out the demolition on the suit property. The Defendants reiterated that there was no evidence before the court showing that the Defendants or their employees or agents carried out the demolition. The Defendants submitted that in the circumstances, there was no basis upon which the Defendants could be made liable to the Plaintiff.
73. The Defendants submitted that Plaintiff had failed to prove its claim against the Defendants to the required standard and urged the court to dismiss the claim for lack of proof.

Interested Party's submissions

74. In its submissions, the Interested Party framed the following issues for determination;
 - a. Whether the court has jurisdiction to grant the reliefs sought.
 - b. Whether the development on Kisumu Municipality Block 13/302(the suit property) was on open space and whether open space is public land.
 - c. Whether the procedure for alienation of land was properly followed in the alienation of the suit property.
 - d. Whether the Plaintiff has a good title to the suit property.
 - e. Whether the Plaintiff undertook due diligence before purchasing the suit property.
 - f. Whether it is in the public interest that this suit succeeds.
 - g. Whether the Plaintiff is entitled to any relief against the Defendants.
75. On the first issue, the Interested Party submitted that this Court has jurisdiction to hear and determine all the issues raised in the Plaintiff's plaint and the Interested Party's counterclaim. In support of that submission, the Interested Party relied on Article 162 (2) of *the Constitution* and Section 13 of the *Environment and Land Court Act*.
76. On the second issue, the Interested Party submitted that public spaces are all places publicly owned or for public use, accessible and enjoyable by all for free and without a profit motive. The Interested Party submitted that Public spaces are a key element of individual and social well-being, the places of a community's collective life expressions of the diversity of their common, natural and cultural richness and a foundation of their identity. The Interested Party submitted that the community recognizes itself in its public places and pursues the improvement of their spatial quality. The Interested Party submitted that under Section 3 of the repealed Government Lands Act, Chapter 280 Laws of Kenya, the President may subject to any other law, make grants & dispositions of any estates, interests or rights over unalienated Government land. The Interested Party submitted that the phrase "subject to any other law" includes The Land Planning Act, Chapter 303 Laws of Kenya.



77. The Interested Party submitted that Regulation 11(3) of the Development and Use of Land (Planning) Regulations, 1961 under the Land Planning Act, Chapter 303 Laws of Kenya which was the planning law in force before the Physical Planning Act, Chapter 286 Laws of Kenya and was in use during the transaction involving the suit property, “public purpose” is defined as any non-profit-making purpose which may be declared by the Minister to be a public purpose and includes - (a) Educational, medical and religious purposes; (b) Public open spaces and car parks; (c) Government and Local Government purposes. The Interested Party cited the decision of the Court of Appeal in Queens Bench in London Case No.C1/2020/0136 between The Queen on the Application of Peter Day and Shropshire Council and Shrewbury Town Council and CSE Development (Shropshire) Ltd, in which the court referred to the definition of open space under Section 20 of the English Open Spaces Act of 1906 where “open space” is defined as:
- “any land, whether enclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole of the remainder of which is laid out as a garden or is used for the purposes of recreation, or lies waste and unoccupied.”
78. The Interested Party also referred to another English Case R(on application of Day)(Appellant) v. Shropshire Council (Respondent) [2023]UKSC8 where the judges referred to Attorney General v. Sunderland Corpn (1876) 2 Ch D 634 where a local authority wished to use part of a public garden for other public purposes and Bacon VC stated that:
- “It is plain that these lands were vested in this corporation for a public purpose...Now that these lands have been made into a park, which is intended only for the recreation and healthful exercise of the people of Sunderland. It has been argued that these statutes may, by circuitry, be brought round to give to the corporation power of constructing buildings for other purposes, provided such purposes are not inconsistent with public use and benefit. But I am of the opinion that buildings for purposes not connected with public walks or pleasure-grounds are plainly unlawful.” (the quoted portion of the judgment is reproduced from the cited judgment for better understanding of the submissions and not from the submissions by counsel)
79. On the third issue, the Interested Party submitted that the Director of Physical Planning had not prepared a Part Development Plan(PDP) to allocate the suit property to the Plaintiff and that the Plaintiff did not even present any Part Development Plan. The Interested Party submitted that Section 9 of the Government *Land Act* Chapter 280 Laws of Kenya (now repealed) provides that the Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes and such plots may from time to time be disposed of in the prescribed manner. The Interested Party submitted that the open space was planned for a public purpose and therefore could not be sold to a private person to develop residential apartments which is not a public purpose. The Interested Party cited Regulation 11(3) of the Development and Use of Land (Planning) Regulations, 1961 under the Land Planning Act, Chapter 303 Laws of Kenya (now repealed) and submitted that the purpose for which the Plaintiff intended to put the suit property was not (a) Educational, medical and religious purposes; (b) Public open space nor a car park. (c) Government or a Local Government purposes. The Interested Party submitted that the apartments that the Plaintiff intended to put up on the suit property was a non-conforming purpose.
80. The Interested Party submitted that under Article 62(1)(b) of *the Constitution* of Kenya, 2010, public land is defined as land lawfully held, used or occupied by any state organ. The Interested Party



submitted that such land cannot be disposed of or otherwise used except in terms of an Act of Parliament. The Interested Party submitted that there was no evidence that the Commissioner of Lands had allocated the suit property to the Plaintiff which would have been illegal in any event as there was no Part Development Plan prepared, approved, assigned an Approved Part Development Plan Number and entered in the register in favour of the Plaintiff prior to the alleged issuance of a letter of allotment. The Interested Party submitted further that the suit property was not unalienated government land and was therefore not available for alienation and that a Part Development Plan can only be prepared in respect to government land that has not been alienated.

81. The Interested Party submitted that it was trite law that under the repealed Land Planning Act Chapter 303 Laws of Kenya, a Part Development Plan had to be prepared by the Director of Physical Planning on written authority of Commissioner of Lands before any unalienated government land could be allocated. The Interested Party submitted that after the Part Development Plan was prepared by the Director of Physical Planning and approved by the Commissioner of Lands, assigned an approved physical development plan number by the Director of Physical Planning and entered in the register, a letter of allotment based on the approved part development plan was then issued to the allottee by the Commissioner of Lands. The Interested Party submitted that after the issuance of the letter of allotment and the compliance with the terms therein, a cadastral Survey could be conducted for the purpose of issuance of a Certificate of Lease.
82. In support of this submission, the Interested Party relied on *Dina Management Limited v. County Government of Mombasa & 5 Others*, Supreme Court Petition 8 (E010) of 2021 [2023] KESC 30 (KLR) (21st April 2023) (Judgment) where the court upheld the decision of the trial court that the alienation of the property that was in dispute in the suit was unprocedural and unlawful for lack of an approved development plan from the Director of Physical Planning and that the property remained for public utility and was incapable of giving rise to private proprietary interest protectable by law. The Interested Party submitted that the court in that case held further that a title or a lease is an end product of a process and that if the process that was followed prior to the issuance of the lease did not comply with the law, the title was defeasible and that where an allocation is irregularly obtained the same gives rise to no legal interest in land that can be passed to subsequent owners.
83. On the issue whether the Plaintiff undertook due diligence before purchasing the suit property, the Interested Party submitted that the Plaintiff's witness admitted that he visited the suit property before purchasing the same during cross-examination by the Interested Party's advocate. The Interested Party submitted that it was evidence of lack of due diligence that the Plaintiff's director could visit the suit property where it was evident that their neighbour was KIWASCO, a public organization, and still went ahead to purchase the land. The Interested Party submitted that in 2016 after acquiring the suit property and before the construction of apartments commenced, the Plaintiff while excavating the ground to build a perimeter wall came across KIWASCO pipes and destroyed them. The Interested Party submitted that just the existence of these pipes on its land should have raised a red flag and stopped the Plaintiff from continuing with the development, but it did not. The Interested Party submitted that the Plaintiff was served with a complaint letter from KIWASCO which during cross-examination by the Interested Party's Advocate their witness PW1 admitted to receiving and reading, but they nevertheless went ahead with the development.
84. The Interested Party submitted that the 1st Defendant served the Plaintiff with an enforcement notice informing it that there were investigations being carried out by the National Land Commission on whether the suit property was public or private land. The Interested Party submitted that this did not deter the Plaintiff's quest to develop the property and the construction continued. The Interested Party submitted that the deferment notice that was issued by the 1st Defendant to the Plaintiff had the



- effect of suspending the approval of development but the Plaintiff was not deterred. The Interested Party cited Kenya Anti-Corruption Commission v. Wilson Gacanja & 2 others, Milimani ELC NO. 275 OF 2009, where the court relied on Chemey Investments Limited v. AG and 2 others [2018 eKLR in which the Court was of the view that if one is purchasing land where the neighbours are a Provincial Headquarter and a law court, that should hint at something. The Interested Party also relied on Arthi Highway Developers Limited v. West End Butchery Limited & 6 other [2013] eKLR where the Court held that only a foolhardy and a careless or fraudulent investor would purchase land such as the suit property with alacrity of a potato dealer in Wakulima Market.
85. On the issue whether the Plaintiff has a good title to the suit property, the Interested Party submitted that the suit property was already reserved for public institutions or for any other public purpose and could not be said to be unalienated Government land as defined under the repealed Government Lands Act, Chapter 280 Laws of Kenya and Physical Planning Act, Chapter 286 Laws of Kenya as was held in the cases of Nelson Kazungu Chai and 9 others v. Pwani University [2014] eKLR, African line transport Co. Ltd. v. the AG, Mombasa HCCC No. 276 of 2003, H.H. DR. Syedna Mohammed Burhennuddin Saheb & Others v. Benja Properties Ltd, Nairobi HCCC No. 73 of 2000 and James Joram Nyaga & another v. The AG and Others, Nairobi High Court Misc. Civil Application No. 1732 of 2004.
86. On the issue whether it was in the public interest that this suit succeeds, the Interested Party submitted that while discussing the concept of public trust and public interest, Nyamu J. (as he then was) stated as follows in Kenya Guards Allied Workers Union v. Security Guards Services & 38 Others Nairobi HC Misc 1159 of 2003:
- “How for instance are the courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title. Are the courts going to stay away and refuse to rise to the greater call of unraveling the indefeasibility by holding that such a title perhaps issued in order to grab a public plot such as a hospital by an individual violates the public or national interest and therefore a violation of *the constitution*. I venture to suggest that such titles ought to be nullified on this ground and thrown into the dustbins”.
87. The Interested Party submitted that it was important for the court to consider the many residents of Kisumu who would suffer for not having water if the court was to rule in favour of the Plaintiff and that the court should protect the public by not allowing innocent buyers to purchase the Plaintiff’s apartments without the knowledge of the risk of the houses submerging in the event there would be water leakage. The Interested Party submitted further that the court should take note that the apartments were not habitable as they were sitting on pressured pipes carrying huge amounts of water. The Interested Party submitted that it placed a restriction on the title of the suit property warn members of the public against purchasing the apartments of the property.
88. On the last issue, the Interested Party submitted that the Plaintiff failed to prove its case. The Interested Party submitted that the Plaintiff did not furnish the court with evidence of the process that it followed to acquire the title that it produced in Court. The Interested Party submitted that the Plaintiff did not have a PDP nor the application letter to the Commissioner of Lands for allocation of the suit property. The Interested Party submitted that the Plaintiff’s title was acquired unprocedurally. The Interested Party submitted that they had proved that the suit property was public land that was set aside as an open space and that KIWASCO had laid their water pipes on the land. The Interested Party submitted that KIWASCO’s said water pipes which draw water from the water intake plant to the water treatment plant could not be repaired with the Plaintiff’s development on the suit property in place in the event there was a leakage. The Interested Party submitted that it was in the public interest



that the suit property was returned to the 1st Defendant and KIWASCO to be used for the purposes of the expansion of their water infrastructure to serve the over 300,000 residents of Kisumu County with water.

89. With regard to the Plaintiff's special damages claim of Kshs. 142,055,447/-, the Interested Party submitted that the Court should find that the Plaintiff did not exercise any caution despite the glaring red flags that were obvious and that it acted in defiance of the complaints from KIWASCO, the 1st Defendant and the National Land Commission. The Interested Party submitted that the Plaintiff was not entitled to claim either compensation or the land.
90. The Interested Party submitted that it filed a counterclaim against the Plaintiff to protect public property. The Interested Party urged the court to find that it had proved its counterclaim on a balance of probabilities and to grant the reliefs sought therein with costs to be borne by the Plaintiff.

Analysis and Determination

91. I have considered the pleadings, the evidence tendered and the submissions filed by the parties. The parties did not agree on the issues for determination by the court. Each party framed its own issues for determination. From the pleadings, the following in my view are the issues arising for determination in this suit;
- a. Whether the Plaintiff holds a valid title in respect of all that parcel of land known as Kisumu Municipality/Block 13/302 (the suit property).
 - b. Whether the development that was being undertaken by the Plaintiff on the suit property was lawful.
 - c. Whether the Defendants unlawfully entered the suit property on 29th April 2018 and demolished the Plaintiff's boundary wall, balconies, canopies internal walls, and in the process stole the Plaintiff's tools and equipment including vibrator, poker, water pumps, electrical and plumbing equipment and site documents.
 - d. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.
 - e. Whether the Interested Party is entitled to the reliefs sought in its counter-claim.
 - f. Who is liable for the costs of the suit?
92. Whether the Plaintiff holds a valid title in respect of all that parcel of land known as Kisumu Municipality/Block 13/302 (the suit property).
93. In answering this question, I cannot avoid going into the history of the suit property. From the evidence on record, in the Kisumu Town Short Term Development Plan dated 1st April 1969, the area on which the suit property is situated was reserved for public purposes. According to Kisumu Town Part Development Plan Reference No. N9/87/27 Approved Plan No. 741 dated 1st September 1987, the area where the suit property is situated was reserved for open space. The suit property was created sometime in 1993 through Survey Plan Folio No. 248 Register No. 191. There is no evidence that there was a Part Development Plan leading to the creation of the suit property. Neither the Letter of Allotment nor the Part Development Plan that normally accompanies it and on the strength of which a survey referred to above could have been carried out were not produced in evidence.
94. The suit property was registered in the name of Jayantilal Pragji Sedani as the first registered owner on 16th December 1996. The suit property is a leasehold from the Government of Kenya for a term of 99 years with effect from 1st November 1993. The lease in respect of the suit property was not produced



in evidence. The Plaintiff purchased the suit property from Jayantilal Pragji Sedani at a consideration of Kshs. 17,000,000/- through an agreement for sale dated 30th March 2012, an addendum to the said agreement dated 22nd June 2012 and deed of assignment dated 22nd June 2012. The suit property was registered in the name of the Plaintiff on 10th July 2012. On 7th August 2012, the Plaintiff charged the suit property to I & M Bank together with another parcel of land to secure a loan of Kshs. 33,575,000/-. That charge was discharged on 9th March 2017 when the Plaintiff charged the suit property with other parcels of land to Bank of Baroda to secure a loan of Kshs. 180,000,000/-. At the trial, the court was not told whether this latest charge had been discharged or not. It is common ground that the suit property was government land before it was allocated and registered in the name of Jayantilal Pragji Sedani.

95. Section 3(a) of Government Lands Act, Chapter 280 Laws of Kenya (now repealed) provides that:

“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

- (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;”

96. “Unalienated Government land” is defined in section 2 of the Government Lands Act as:

“Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment”.

97. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). At the time the Plaintiff acquired the suit property from Jayantilal Pragji Sedani on 10th July 2012, the Registered [Land Act](#) had been repealed by the [Land Registration Act](#), 2012. Sections 24, 25, and 26 of the [Land Registration Act](#), 2012 provides as follows:

“24. Interest conferred by registration

Subject to this Act—

- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—



- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

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

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



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

99. In the case *Henry Muthee Kathurima v. Commissioner of Lands & Another* [2015] eKLR, the Court of Appeal stated that:

“We have considered the provisions of Section 26 of the *Land Registration Act* in light of the provisions of Article 40(6) of *the Constitution* and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of *the Constitution*. Guided by Article 40 (6) of *the Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that the title to the property was unlawfully acquired.”

100. In *Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

101. In *Adan Abdirahani Hassan & 2 others v. Registrar of Titles & 2 others* [2013] eKLR, the court stated as follows:

“19. Section 75 of the repealed Constitution recognised the doctrine of public trust which applies to land set aside for public purpose. Such parcels of land are



held by the Government in trust for the public and any purported allocation to individuals or legal persons cannot be said to fall under the purview of the protected property pursuant to the provisions of Section 75 of the repealed Constitution. It is true that under section 23 of the Registration of Titles Act cap 281, a title is sacrosanct and indefeasible and can only be challenged on the ground of fraud and misrepresentation. However, any alienation of land contrary to the provisions of section 75 of the repealed Constitution or the provisions of the Government Land Act or any other Act of parliament would be null and void ab initio.

20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that the Constitution protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by the Constitution, he must show that he has followed the due process in acquiring that which he wants to be protected.
24. There has been a long chain of authorities by the High Court which have stated that the Registrar of Titles or the Registrar of Lands, as the case may be, has no authority to cancel a title. My take is that the Commissioner of Lands or his subordinates, while alienating Government land, can only do so over unalienated Government land as defined in the Constitution and under the repealed Government of Lands Act. The Commissioner of Lands or his subordinates cannot purport to alienate land which has already been set aside for public purpose.
25. Any alienation of land reserved for public purpose and issuance of a title for the same, whether under the Registration of Titles Act, cap 281 or the Registered Land Act, cap 300 is null and void ab initio. Such a title does not exist in the first place because the land belonged to the Public and was not available for alienation. The cancellation of such a “title,” which is not a title as known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that was made by the same office.
26. This is the position that was taken by Justices J.G. Nyamu and R. Wendo in Miscellaneous Civil Application No. 1732 of 2004; James Joram Nyaga & Another -Vs- The Hon. Attorney General and two others where they held as follows:-

“The Commissioner of Lands cannot have purported to pass any valid title under the Government Lands Act or the Registration of Titles Act when acting contrary to the express constitutional provisions. The question of fraud under section 23 of the Registration of Titles Act does not therefore arise and there would be no need to prove it in this case...The applicants have



challenged the process by which the land was repossessed from them. From our findings above, the Applicants had no title to the land and the result is that the action of the Respondent was not a compulsory acquisition of that land. The land belonged to the public and the custodians were the Respondents. The notices issued by the Respondent were proper and sufficient time was given for verification for those who ought to have been in doubt of their titles...Due process was followed in the repossession of the suit land.””

102. I am satisfied from the evidence placed before me that the suit property was created from land that was reserved as an open space. Under Kisumu Short Term Development Plan of 1969, the land was reserved for public purposes while under Kisumu Part Development Plan Reference No. N9/87/27 Approved Plan No. 741 of 1987 the land was reserved for an open space. The land use planning legislation that was in force at the time when the Kisumu Short Term Development Plan of 1969 and Kisumu Part Development Plan Reference No. N9/87/27 Approved Plan No. 741 of 1987 were made was Land Planning Act, Chapter 303 Laws of Kenya (now repealed) together with the rules and regulations that were made thereunder. Regulation 11(3) of the Development and Use of Land (planning) Regulations of 1961 under the Land Planning Act Chapter 303 Laws of Kenya (now repealed) provided as follows:

“ 11(3) For the purpose of this regulation "public purpose" means any non-profit-making purpose which may be declared by the Minister to be a public purpose and includes -

- (a) educational, medical and religious purposes;
- (b) public open spaces and car parks;
- (c) Government and local government purposes.”

In Kisumu Part Development Plan Reference No. N9/87/27 Approved Plan No. 741 of 1987, the land from which the suit property was created was reserved as an open space which was in line with the public purpose for which it was reserved under Kisumu Short Term Development Plan of 1969.

103. From the evidence on record, it appears that the suit property was allocated to Jayantilal Pragji Sedani to use for single residential purposes which the Plaintiff changed to multiple residential purposes/ apartments. It is beyond argument that the purpose for which the suit property was allocated to Jayantilal Pragji Sedani was not the purpose for which the land was reserved. The land that was allocated to Jayantilal Pragji Sedani was reserved for an open space for public use. I am in agreement with the Interested Party that the suit property was not unalienated government land. The same was therefore not available for alienation by the Commissioner of Lands for private purposes. The land having been reserved for a public purpose, the same stood alienated. Being a public open space, it was not inconsistent with its use for KIWASCO to lay its water pipes serving Kisumu residents underneath it. The land was allocated to Jayantilal Pragji Sedani with KIWASCO's four (4) huge water pipes measuring between 16 and 20 inches below it. This shows that adequate consultation was done before the purported illegal allocation.
104. The allocation of the suit property to Jayantilal Pragji Sedani having been undertaken illegally, could the Plaintiff acquire a valid title from him? The answer is in the negative. In *Dina Management Limited v. County Government of Mombasa & 5 Others*(supra) the Supreme Court stated as follows:

“



“[100] From the record and submissions, we note that the land was first allocated to H.E. Daniel T. Arap Moi in 1989. The applicable law at the time was the Land Planning Act, Cap 303, which was repealed by the Physical Planning Act Cap 286 which has since been repealed by the *Physical and Land Use Planning Act* No.13 of 2019. The Land Planning Act made provision for open spaces. Regulation 11(3) of the Development and Use of Land (Planning) Regulations, 1961 made under the Land Planning Act defined “public purpose” as any non-profit making purpose declared by the Minister to be a public purpose and includes educational, medical and religious purposes, public open spaces and car parks; and Government and local government purposes. Similarly, under the Physical Planning Act, Section 29 gave the local authorities power to reserve and maintain land planned for open spaces.

[101] The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land as urged by the appellant. It was therefore not available for alienation to H. E. Daniel T Arap Moi or for further alienation.”

The Supreme Court stated further that:

“[107] We are careful to note that this Court has no jurisdiction to revisit the factual findings of the superior courts, and we are limited to the Court’s jurisdiction under Article 163(4)(a) in this case. 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 give its seal of approval to an illegal or irregularly obtained title.”

[109] We note that the suit property was subsequently converted and H.E. Daniel T. Arap Moi registered as owner and obtained a freehold title. Further, the suit property herein is within the then Mombasa municipality. Contrary to the appellant’s averment, Section 10 of



the GLA is applicable. Being a town plot, within the jurisdiction of the 1st respondent and its predecessor, it ought to have been an allocation for a lease for a term not exceeding 100 years.

[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.”

105. Like in the case before this court Dina Management Limited Case that the Supreme Court dealt with concerned allocation of an open space. The Supreme Court upheld the finding by the Court of Appeal that the allocation was illegal. The Supreme Court held further that a title that emanated from the illegal allocation was defeasible and that the allocation having been illegally obtained, the allottee had no valid title that he could pass to a purchaser and which the purchaser could, in turn, pass to a second purchaser. In line with that authority from the Supreme Court, it is my finding that Jayantital Pragji Sedani had no lawful title in the suit property that he could pass to the Plaintiff.

106. The Plaintiff had contended that he purchased the suit property in good faith and that he was an innocent purchaser without notice. I wish to say that however innocent the Plaintiff may have been which I do not accept it was, such innocence could not pass a valid interest in the suit property to the Plaintiff. The interest that was to be passed to the Plaintiff was that which was being held by Jayantital Pragji Sedani. Jayantital Pragji Sedani held an illegal, null and void title in the property. That is what he passed to the Plaintiff. Nullity can only beget nullity. In the Dina Management Limited v. County Government of Mombasa & 5 Others(supra), the Supreme Court stated as follows on due diligence:

“(92) On the same issue, the Court of Appeal in Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No. 28 of 2005 [2015] eKLR stated as follows:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

107. I am in agreement with the Interested Party that all the signs were there that the suit property was created from land that was reserved for public purposes and that the Plaintiff ignored the same. The court visited the suit property on 19th April 2023 in the company of the parties. KIWASCO’s water treatment plant is situated next to the suit property and its huge water pipes that are laid inside the suit property can be seen with the naked eye. It was obvious that if any damage to the said pipes would occur, KIWASCO would require space to carry out the repairs and such space could only come from the suit property. The court noted that even after the Plaintiff claimed to have moved its boundary 3 meters inside to leave some room for the pipes, some of the pipes were still inside the Plaintiff’s perimeter wall.



108. In *Godfrey Githinji Kamiri v Attorney General & 4 others* [2019] eKLR the court cited *Chemey Investment Ltd. v A.G & 2 Others* [2018] eKLR where the Court of Appeal stated as follows:

“We have noted that the Ekima Junior Academy never took possession of the suit property. It therefore means that when the appellant purported to purchase the same, the suit property was in the same condition it was when it was initially allocated, namely in use for public purposes. We ask ourselves, which innocent purchaser, without notice, would accept to purchase a property that is being used for public purposes, just next to the provincial headquarters and the law courts, without any form of inquiry”. As this court stated in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* (Supra), only a foolhardy, and we may add, a careless or fraudulent investor would purchase land such as the suit property “with the alacrity of a potato dealer in Wakulima Market”. And further in *Flemish Investments Ltd vs Town council of Mariakani*. CA No. 30 of 2015, in an appeal where the appellant who had fraudulently obtained registration of public property in his name but claimed to be an innocent purchaser for value without notice, this court stated:-

A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, person, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that plot no. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells”.

109. Due to the foregoing, it is my finding that the Plaintiff did not acquire a valid title in the suit property. Having acquired a null and void title, the title held by the Plaintiff was equally a nullity.

Whether the development that was being undertaken by the Plaintiff on the suit property was lawful.

110. I have held that the Plaintiff did not have a valid title to the suit property. The property was reserved for use by the public as an open space. The apartments that the Plaintiff was constructing on the suit property were illegal structures as the same were not in furtherance of the public purposes for which the land was reserved. The developments that the Plaintiff was undertaking on the suit property were illegal despite the approvals that the Plaintiff obtained from the 1st Defendant and other regulatory bodies. The 1st Defendant and the said regulatory bodies had no power to approve private development on illegally acquired public land. The purported approvals were equally null and void and could not give the Plaintiff's development any validity. The 1st Defendant's attempts to revoke the purported approvals were superfluous as there was in law nothing to revoke.

Whether the Defendants unlawfully entered the suit property on 29th April 2018 and demolished the Plaintiff's boundary wall, balconies, canopies internal walls, and in the process stole the Plaintiff's tools and equipment including vibrator, poker, water pumps, electrical and plumbing equipment and site documents.

111. I am in agreement with the Plaintiff that the Defendants had served it with an enforcement notice in which the Defendants had called upon it to stop development and had threatened that if it continued with development, the 1st Defendant would enter the suit property and demolish the illegal structures thereon. I am also in agreement with the Plaintiff that the Defendants did put markings on its perimeter wall with the words “X DEMOLISH”. The Plaintiff led evidence that the demolition of the structures



on the suit property took place on Sunday 29th April 2018 after the Defendants had served it with a letter dated 23rd April 2018 revoking all the approvals that it had granted to it for the development.

112. The Defendants denied in their defence and at the trial that they were involved in the demolition of the Plaintiff's structures on the suit property. The burden was on the Plaintiff to prove that it was the Defendants who carried out the demolition. The only witness who gave direct evidence regarding the demolition was the Plaintiff's director, Suresh Patel (PW1). According to his witness statement that he adopted, the demolition was carried out at 10.00pm on Sunday 29th April 2018 by the Defendant's agents, servants and/or employees. PW1 did not tell the court whether he was present at the site during the demolition and how he knew that those who were engaged in the demolition exercise were employees or agents of the Defendant. It is my finding that the Plaintiff failed to prove to the required standard that it was the Defendants who demolished its structures on the suit property and also engaged in the theft of its properties. I would be basing my decision on conjecture if I was to say that since it was the Defendants who had served the Plaintiff with an enforcement notice, they must be the ones who carried out the demolition and theft complained of.

Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.

113. From my findings above, it is clear that the Plaintiff has failed to prove its case against the Defendants to the required standard. The Plaintiff has failed to prove that it is the lawful owner of the suit property and that its activities on the property were lawful. The Plaintiff is therefore not entitled to the injunctive and declaratory reliefs sought. The Plaintiff having failed to prove its title to the suit property and the participation of the Defendants in the demolition of its structures, the Plaintiff is not entitled to the special damages sought. I wish to add that I did not also find part of the special damages relating to loss of profits and bank interest proved. No basis was laid for the two heads of damages. There was no explanation why the Defendants would be liable to pay the interest that accrued between 3rd July 2017 and 30th April 2020 on the loan advanced to the Plaintiff by Bank of Baroda even if the court had found that they were involved in the demolition of the Plaintiff's structures on the suit property. The same applies to the loss of profits for the entire project. From the evidence of PW1, the Plaintiff completed the project in 2021 and the total apartments constructed were eight (8). The computation of loss of profit is however based on a 9-floor building comprising of thirty-six (36) 3 bedroom and 4 bedroom apartments. I find the basis for this claim and the computation thereof not well explained.

Whether the Interested Party is entitled to the reliefs sought in its counter-claim.

114. I find the Interested Party's claim against the Plaintiff proved. The Interested Party has proved that the land that was allocated to Jayantilal Pragji Sedani was a public open space that was not available for allocation by the Commissioner of Lands. The Interested Party has proved that Jayantilal Pragji Sedani did not acquire a valid title in the suit property that he could pass to the Plaintiff and that both Jayantilal Pragji Sedani and the Plaintiff held null and void titles in respect of the suit property. The Interested Party is entitled to all the reliefs sought in its counter-claim save for general damages that was not proved, and the reliefs sought against a party that appears to have an existing interest in the suit but was not made a party thereto.

Who is liable for the costs of the suit?

115. On the issue of costs, as a general rule costs follow the event unless the court for good reason orders otherwise. In this case, the Plaintiff has failed in its claim against the Defendants while the Interested Party has succeeded in its counter-claim. I will award the Interested Party the costs of the suit. I will



however deny the Defendants their costs for defending the suit because the court has noted that they issued development approval in this case without adequate consultation and circumspection.

Conclusion

11. In conclusion, I hereby make the following orders in the matter;
 - a. The Plaintiff's suit is dismissed.
 - b. A declaration is issued that the issuance of a lease over Title No. Kisumu Municipality/Block 13/302, the registration of the said lease and the issuance of a certificate of lease in respect thereof by the Registrar in favour of the first owner of the property, Jayantil Pragji Sedani was null and void ab initio and ineffectual to confer any right, interest or title upon the said Jayantil Pragji Sedani.
 - c. A declaration is issued that the transfer of lease over Title No. Kisumu Municipality/Block 13/302 by the said Jayantil Pragji Sedani to the Plaintiff, the registration of the said transfer of lease and the issuance of a certificate of lease to the Plaintiff was null and void and ineffectual to confer a good title upon the Plaintiff.
 - d. A declaration is issued that Title No. Kisumu Municipality/Block 13/302 is land set aside as an open space and should be under the custody of the 1st Defendant, County Government of Kisumu.
 - e. The register of Title No. Kisumu Municipality/Block 13/302 is hereby rectified by the cancellation of the registration of the property in the names of Jayantil Pragji Sedani and the Plaintiff and the certificates of leases that were issued to them.
 - f. The ownership of Title Kisumu Municipality/Block 13/302 is restored to the Government of Kenya who shall hold the same in trust for the residents of Kisumu for the public purpose for which the land was reserved.
 - g. A declaration is issued that since the Plaintiff had no valid proprietary interest in Title No. Kisumu Municipality/Block 13/302, the Plaintiff could not create any lawful charge over the same to secure a debt.
 - h. An order of a permanent injunction is issued restraining the Plaintiff by itself, its agents, servants or assigns from leasing, transferring, charging, further charging, entering upon, developing, or in any other manner howsoever dealing with Title No. Kisumu Municipality/Block 13/302.
 - i. The Interested Party shall have the costs of the suit and the counter-claim to be paid by the Plaintiff.
 - j. The Defendants shall bear their own costs of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 16TH DAY OF NOVEMBER 2023.

S. OKONG'O

JUDGE

