



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 31 OF 2015**

**JAMES MUIGAI THUNGU.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF TRANS-NZOIA.....1<sup>ST</sup> DEFENDANT**

**COUNTY EXECUTIVE OFFICER, LAND, HOUSING AND**

**URBAN DEVELOPMENT.....2<sup>ND</sup> DEFENDANT**

**PHYSICAL PLANNER, TRANS-NZOIA COUNTY.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 6/03/2015 filed on the same date, the Plaintiff sought the following orders:

- a. A declaration that the Plaintiff is entitled as the registered owner to the exclusive and unimpeded right of use, possession and occupation of the suit property.
- b. A permanent injunction restraining the defendants, their agents, employees, assigns and/or any other person (s) from trespassing, claiming, accessing, constructing and/or in any other way interfering and/or dealing with the suit property.
- c. Costs of the suit and
- d. Interest on (a) and (b) above court rates.

**THE PLAINT**

2. It was the Plaintiff's claim that he was the registered, legitimate owner of all that parcel of land comprised in **Kitale Municipality Block 4/407** measuring approximately **0. 2731 Ha.** (herein known as the "**suit land**"). His claim was that he acquired the land sometime in the year **1995.**

3. He claimed further that after acquiring it, he took possession of it and was in actual physical possession thereof to the date of the testimony. He averred that sometimes in **February 2015,** without his consent and authority the Defendants through their agents and workers unlawfully and illegally entered and/or trespassed onto the suit land, fenced it off and deposited building stones and other construction materials on it.

4. The Plaintiff pleaded that due to the defendants' unlawful actions, he was denied quiet, peaceful, uninterrupted, exclusive possession and use thereof and suffered loss and damage and continued to do so. He then pleaded further that despite demanding that the defendants to stop the trespass they refused and continued with the acts, thereby necessitating the institution of the instant suit.

**THE DEFENCE**

5. The defendants filed a Joint Statement of Defence and Counterclaim on the **19/5/2015.** It was dated **12/5/2015.** They denied all the averments in the Plaint. Instead, they pleaded that the suit land formed part of a plot owned by the **1<sup>st</sup> Defendant.** They averred further that the suit land was situate along the Makasembo Street, measured **0.37 Ha,** and boarded with lanes developed from Physical Plan **ELD/10/81/1** of **17/3/1981** dated **2/10/1982** of **Ref No. ELD/10/82/4** and that it was planned for Kitale Fire Station.

6. They stated that the Plan was presented to the Commissioner of Lands for approval and was actually approved on **24/2/1993** and given approval No. **117**. Their plea was that although the Plaintiff claimed ownership of the suit land, it was not his and he did not explain the process he followed to obtain the title to it because a title deed is the end product of a process.

7. Their defence was that the suit land was and is still a public utility land earmarked for the construction of a Fire Station. Further, they pleaded that if it was allocated, then the allocation was illegal, null and void *ab initio*. They claimed that since the suit land was public land it was not available for allocation then.

#### **THE DEFENDANTS' COUNTERCLAIM**

8. The Defendants' Counterclaim was that the issuance of a title deed to the Plaintiff in respect of the suit land was illegal, null and void *ab initio*, rather the 1<sup>st</sup> Defendant owned, possessed and controlled the land. In the Counterclaim, the Defendants sought:

**a. A nullification of the sub-division of original plot earmarked for the fire station and cancellation of the certificate of lease to title No. KITALE MUNICIPALITY BLOCK 4/407 issued on 27/9/2002.**

**b. Rectification of the Land Register to reflect that land parcel KITALE MUNICIPALITY BLOCK 4/407 is public utility land.**

**c. Costs of the suit**

**d. Any other or further relief (s) as the honourable court deemed fit to grant.**

#### **THE PLAINTIFF'S EVIDENCE**

9. The Plaintiff, **James Mungai Thungu**, testified as **PW1**. That was on **30/8/2016**. His testimony was that he was the owner of the suit land. To him he purchased it from one **Michael Kimutai Ndiwa**, and before that it was allotted to one **Maina Kamau**. He stated that it was referred to as Unsurveyed Plot Kitale Municipality. He marked the letter of allotment dated **28/01/1994** as **PMFI-1**. He testified that he paid the consideration for it in instalments. But he did not produce any agreement of sale. After completion of the instalments, he together with the seller did a transfer at the law firm of Ms. Kiarie & Co. Advocates. He marked the transfer form as **PMFI-2**. Further, he was later issued with a title in his name. He produced the Certificate of Lease as **P. Exhibit 3**. He stated that he had since been paying land rates to the County Government of Trans-Nzoia.

10. He stated that in the year **2015**, he received a demand of payment from the 1<sup>st</sup> Defendant, requiring him to pay land rates amounting to **Kshs. 78,620/=**. He paid for them and a Certificate of Clearance a sum of **Kshs. 2000/=**. He produced the documents as **Exhibits 4 (a) - (d)** respectively. He stated that he bought the land almost **20** years before the material date and had been paying rates all through.

11. His claim was that in February **2015** or thereabouts, people went to his premises, pulled down the fence thereon and erected theirs. When he asked them why they did so, they told him that it was their property. His evidence was that the people were agents of the County Government of Trans-Nzoia, the 1<sup>st</sup> Defendant. They did not show him any documents of ownership at the time. As a result, he sought the services of an advocate whom he instructed to file the instant suit.

12. His testimony was that despite filing the suit, in **February (sic) 2015**, 1<sup>st</sup> Defendant still demanded that he pays land rates. He denied claims that the land was reserved for a Fire Station. To him, on the contrary, there was another land that was meant for use for the station.

13. According to him, he obtained the title in a lawful manner since he paid the purchase price for it. He denied that the land was a public utility. He prayed that the reliefs in the Plaint be allowed.

14. On cross-examination, he admitted that he had many parcels of land in Trans-Nzoia. He admitted the suit land was government land. He stated that he did not know whether Maina Kamau, the said allottee, had paid the demanded allotment sum of **Kshs. 115,120/=** within **thirty (30)** days from the date of offer and given an acceptance within the said period **30 days**. He indicated that he paid stamp duty though he could not remember when he did so.

15. He clarified that Mr. Maina showed him an allotment letter. However, he did not have a transfer from Mr. Maina to one Kimutai Ndiwa. His evidence was that, that was because Mr. Maina did not have a title deed. He confirmed that he was issued with the Certificate of Lease on **3/3/1995** as the first registered owner.

16. He admitted that he was not allocated the suit land by the government. He also stated that he paid for the money shown in the allotment letter but acknowledged that he did it outside the stipulated time of **thirty (30)** days. He stated that he knew his land and that he bought some land for his brother from the parcels of land Mr. Kimutai had sold him. According to him, payment of rates was evidence of ownership, and did so from the year **1995** to **2015**. When he was shown the physical Plan Map, that is, Part Development Plan (**P.D.P.**) he indicated that his advocate did not show it to him.

17. Upon re-examination, he clarified that the P.D.P. had a signature of the person who drew it but had none by the one who approved it. He stated that it bore the name of one J. Njenga but was neither signed by him nor stamped. In relation to **P. Exhibit 4 (d)**, the Certificate of Clearance, he stated that he owed no money to the County Government of Trans Nzoia.

18. In reference to the document made on **1/1/1996**, he clarified that it was in relation to completion of sales. His testimony was that he could

not pay the sums of consideration for the properties in full before being shown title deeds registered in his name. His evidence was that the transfer was from **Maina Kamau** to him.

19. About payment of stamp duty, he stated that it was done but he did not know when and how much, and if the conditions of the allotment were fulfilled. He was particular that he obtained the title deed out of a process emanating from the allotment. He denied being conned of the land. He also denied being attached to Eldoret Express Company Limited. His evidence was that the Eldoret Express Company was separate and different from him.

20. At the end of his testimony it was agreed, by consent of the parties, that **ELC No. 30 of 2015** be the lead file and the evidence of **PW2** and **PW3** as well as that of **DW1** in it being common to both claims applies to the instant case. However, the Court prepare separate judgments. The said evidence is summarized below.

21. The second witness, **PW2**, one **Peter Kiarie Ndarwa**, an Advocate of the High Court of Kenya testified on **9/7/2019**. He adopted his statement dated **16/1/2018** as his evidence-in-chief. His evidence was that he drew an agreement between **Michael Ndiwa** and **James Mungai** the two being **vendor** and **purchaser** respectively. The document was an acknowledgment of sale and transfer of **eight (8)** plots to the purchaser. Among them were plots No. **IR 60395** which had been sold for **Kshs. 700,000/=** and plot No. **Kitale Municipality Block 4/407** which had been sold for **Kshs. 1,200,000/=**. The other properties were not the subject of the instant suit. He produced the acknowledgment of sales as **P. Exhibit 7**. He stated further that the land ought to be available for allocation.

22. Upon cross-examination, in reference to **PMFI-3**, he confirmed that the land was government land. He stated that upon a party being given an offer by way of allotment, he or she should accept it within **30 days** otherwise it would lapse. He confirmed that the acknowledgment of sales (**P. Exhibit 7**) was in respect of properties that had already been sold and transferred. He admitted that one sells what he owned. His testimony then was that the agreement acknowledged that Michael Kimutai was the owner of the properties sold but he did not bother to establish if Kimutai was indeed the owner because the properties had already been sold. He confirmed that he did not know what had transpired before in respect of the parcels of land which were the subject of the acknowledgment agreement.

23. On **4/3/2020**, **PW3**, one **Nelson Odhiambo** testified. The relevant evidence to this suit was that he was the Land Registrar of Trans-Nzoia County. He stated that he had the records of **Kitale Municipality Block 4/407**. He stated that he had with him the green card as well as the white card for the land. He said that the record in his custody showed that the Lease and the Certificate of Lease were issued to **James Mungai Thungu** on **3/3/1995**. He produced the green card as well as the white card as **P. Exhibit 10** and **11** respectively.

24. His evidence was that in practice, leases were issued from public land. He stated that they are not from private land. He also stated that the government could allocate land to specific individuals and give them ownership for **99 years** through a Certificate of Lease. His evidence was that both James (the Plaintiff) and Simon were the first to be issued with Certificates of Lease hence the land was now private.

25. On cross examination, he confirmed that still the land was public land. He denied being a Land officer. He also denied having knowledge of procedure of allocation of land generally. He confirmed that the land was governed by the Registered Land Act (**RLA**) regime and that it might have been governed under the Registration of Titles Act (**RTA**) before allocation. He denied having seen any letter of allotment in relation to the suit land. He stated that the original file was in Nairobi. In relation to **PMFI-1**, he confirmed that it had the name of **Maina Kamau**. He stated that his office dealt with registration documents only. He confirmed that the name appearing on the letter of allotment was not similar to that in the Certificate of Lease. When he was shown **Clause 2** of the allotment letter, he stated that it was dated **28/1/1994** and that it showed the offer in it would lapse after **thirty (30)** days if it was not accepted. His further testimony was that he had not seen the allotment letter or the application for land or the Part Development Plan (**P.D.P.**) by office of Physical Planning before coming to court. His explanation was that it was not his concern. He clarified that he did not know how the registered owners in respect to the land parcels acquired titles to them. He acknowledged that there would be no protection for public land acquired irregularly. He then testified that the land was acquired regularly but he did not know if fresh application was made by the allottee after the lapse of letters of allotment. He testified that there was a difference between a Lease and a Certificate of Lease.

26. He clarified that if there was any irregularity in obtaining the title, then the claimants should not retain the land. He stated that he was not aware that the land was reserved for a fire station. His testimony was that he had not seen the pleadings and did not know the Plaintiff and Simon, the plaintiff in **ELC Case No. 30 of 2015**. He stated that he only attended Court to produce the documents in his possession in respect to the cases, in obedience to witness summons. He denied being negligent but stated that he would not defend the acquisition of the parcels if it was illegal. He confirmed further that a Certificate of Lease is an end of the process and that the process is open to scrutiny. This marked the close of the plaintiff's case.

#### **THE DEFENCE CASE**

27. The matter came for defence hearing on **8/12/2021**. Before the defence adduced evidence, upon an oral application and by consent of the parties, it was again agreed that the evidence in this lead file would apply to **ELC No. 31 of 2015**.

28. **DW1**, one **Pius Munialo** the County Chief Officer then testified on **8/12/2021**. He stated that previously he was the Assistant County Secretary. He adopted his written witness statement dated **19/5/2015** as his evidence in-chief. He stated that he was conversant with the issues on the suit land. He admitted he knew both James Mungai Thungu and Simion Mbugua - the Plaintiff in this suit and in **ELC No. 30 of 2015** respectively. He clarified that his witness statement in this case was identical to that in **ELC No. 30 of 2015**.

29. His testimony was that the two plots in issue, that is, **Kitale Municipality Block 4/487** and **Kitale Municipality Block 4/407** were meant for the County Fire Station. He testified that to date, the fire station had not been established because the Plaintiffs were in occupation of the parcels. His evidence was that the plots were owned by the County Government, the 1<sup>st</sup> Defendant. He questioned the manner in which the plots were acquired, stating that the plaintiffs acquired them unprocedurally. He pointed out that according to the **P.D.P.** approved on **24/2/1983**, the suit land was set aside for a fire station which was a public utility and therefore was not available for private allocation. He produced the **P.D.P** as **D. Exhibit 1**. He stated that the total approximate size of the plots was indicated **0.37 Ha**. And that the location was

highlighted on the map and the plots bordered Makasembo Street. On the map, the suit land was named as “proposed site for Municipal Council of Kitale Fire Station.” His evidence was that the two parcels of land fell within the highlighted or marked area on the Map. He urged the court to allow the prayers in the counterclaim.

30. On cross-examination the witness stated, in reference to **D. Exhibit 1**, that the reference number of the plots was not indicated on the Map and that the P.D.P. showed that there was another Plan of **1981**. His evidence was that the current one indicated that it superseded Plan No. **ELD/10/81/1 of 17/3/1981**. He confirmed that there was another plan before but was not aware if there was another Plan after the one produced as **D. Exhibit 1**. But he also confirmed that there could be another one after the one of **1983**. He clarified that there was no other title document issued to the then Municipal Council of Kitale apart from the **P.D.P.** He confirmed that the P.D.P. was signed, the 1<sup>st</sup> signature was placed after the words “Prepared By” and that on the part of the Director of Lands it bore the name “J.M. Ohas” but did not sign it, and on the part of the County for Lands, it only bore the name “J.R. Njenga” but he did not sign it.

31. Agreeing that there was land for the Kitale Fire Station measuring approximately **1 acre**, he stated that the fire station could have larger land allocated for it than that but not less than half an acre. He also confirmed that the P.D.P. should have been followed by title documents of transfer of land to the Kitale Municipality. However, the transfer and registration had not been done. His evidence was that after the proposal, the Municipal did not process the title documents because it knew that the land was set aside for public utility. He confirmed that the current fire station might not be in the Plan but could not tell if it was there or not.

32. On re-examination, he confirmed that he knew the facts of the cases before Court in respect to the suit lands. He also confirmed that he knew the conditions for conversion of public land to private land. He stated that the suit land was earmarked for the fire station and the procedure for its allocation was not followed up. He pointed out that one of the conditions for public land to be converted to private land was that there must be a confirmation from the government agency initially allocated to it that the land was not required for that purpose. He confirmed that the land belonged to the County Government of Trans-Nzoia and was set aside for a fire station.

33. Upon a question being asked by the Court, the witness stated that he was not aware of any time limit for a government agency to complete the process of land allocated to it. And that marked the close of the defence case.

#### **SUBMISSIONS**

34. The Court directed the parties to file their submissions. They did. The Defendants filed theirs on the **31/1/2022** and the Plaintiff on **1/2/2022**.

#### **ANALYSIS, ISSUES AND DETERMINATION**

35. I carefully considered the pleadings, the evidence adduced, the submissions of the parties as well as the authorities cited and the law relied on. I found two issues for determination. These were:

**a. Who between the Plaintiff and the Defendants was the lawful owner of the parcel of land is issue.**

**b. What orders should issue and who to bear the costs of the suit.**

36. I proceeded to analyze them as hereunder:

#### **a. Who between the Plaintiff and the Defendants was the lawful owner of the parcel of land is issue**

37. It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. **Section 107 of the Evidence Act Chapter 80 Laws of Kenya** succinctly states:

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

38. Also, further, **Section 108 of the Act** states thus:

**“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

39. Again **Section 109 of Act** refers to the burden of proof of a particular fact. It states that:

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

40. In the instant case, the burden of proof lay on the Plaintiff. He claimed to be the rightful owner of the Plot No. **Kitale Municipality Block 4/407**. He testified that he purchased it from one **Michael Kimutai Ndiwa**. However, he did not produce any document to prove as much. He only produced a document dated **6/1/1996** which was an acknowledgement of completed sales. A keen perusal of the document showed that indeed the suit land herein was one of the plots that the purported vendor acknowledged having sold to the Plaintiff at a consideration of **Kshs. 700,000/=**.

41. The plaintiff claimed that he obtained the title deed to the suit land in a proper manner. He claimed that it was as a result of an allotment letter allotted to Maina Kamau. However, the Plaintiff elected **NOT** to produce the allotment letter to the said allottee although it was in his possession. To the Court, it was clear that the Plaintiff had something hiding by all means because he did not give any good reason for not producing the document if at all there was truth about it. Additionally, he could have called an officer from the issuing office to authenticate its existence, content and validity. He did not.

42. The letter of allotment, though not produced, was attached to the plaintiff's supplementary list of documents dated **7/6/2016**. The only logical and inescapable conclusion drawn for its non-production was that the evidence would be detrimental to their case hence it was let to 'lie low' or pass to conceal some truth from the Court. To demonstrate it, I note that the allotment was issued on **28/1/1994**. The plaintiff did not tell the court when the stamp duty on the parcel of land was paid. He did not produce any receipt of payment for stamp duty, if at all it was paid. Absent of that and lack of evidence to show it was done within the stipulated time meant that it was not paid and if it was, it was not done in time and the offer on the allotment lapsed automatically as per the condition thereon.

43. The lapse rendered the land unavailable to the allottee and the subsequent buyers from him, but left it available for allocation to another person if it was to be allotted, and if was not, it reverted back to the government. The instant facts are equated and similar to those on **Dickinson v. Dodds Dickinson v Dodds (1876) 2 Ch D 463** where communication of an offer was said to be complete once communicated in any manner howsoever.

44. All the witnesses in the instant case who testified about the offer in the purported allotment letter were in agreement that once the allotment letter making an offer was issued to an allottee, acceptance had to be made within a period of **thirty (30)** days from the date of issue and that failure to which, the allotment would lapse automatically. That acceptance is by way of fulfilling all the conditions of the allotment. There was clear evidence that the payment made in purported compliance with the conditions on the letter of allotment was made way after the expiry of the period stipulated. That being so, the offer had already lapsed. There was nothing to be accepted hence anything that was done after the expiry of the period, absent of an extension, was neither here nor there. The case of **Dickinson v. Dodds Dickinson v Dodds (1876) 2 Ch D 463** gives a clear explanation that once an offer ceases, there is nothing to accept. The case is clear that even when the notification is by a third party that the offer has been withdrawn, that suffices as though the notice was given by the offeror. In the instant case, the condition was express about when the offer could be subsisting. The Offeree needed to do more to revive the offer than to make a payment in purport of acceptance of the non-existent offer. To cement that action as binding on the part of the government which had given the offer that lapsed would amount to forcing a contract or offer into existence.

45. It was also the evidence of **PW 3** and **DW1** that a title (lease for that matter) is the end product of a process. The Plaintiff was duty bound to explain how he acquired the title in his name. **PW3**, confirmed that the land was government land. He also confirmed that there was a procedure to be followed for conversion of public land to private and that the procedure ought to be followed to the letter. The witnesses were in agreement that once the allotment letter making an offer was issued to an allottee, acceptance had to be made within a period of **30** days from the date of issue and fulfillment of conditions attached thereto and that failure to do so meant that the allotment would lapse automatically.

46. The Plaintiff alleged that he obtained the title deed in the proper manner. But he neither produced the allotment letter nor called the said allottee, one Maina Kamau to produce it in court. He did not plead that the said Maina Kamu was deceased or could not be found. In the absence of the allotment letter which is the root of the Certificate of Lease, it is not possible for this court to believe in the Plaintiff's testimony rightful and procedural manner of acquisition of the suit land.

47. In the case of **Rukaya Ali Mohamed -vs- David Gikonyo Nambachia & another Kisumu HCCA.9/2004** the Judge held that;

**“once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest”.**

48. This court has found, and it is a fact, that no allotment letter that was produced in evidence to support the Plaintiff's case. Further, that there was no receipt to prove payment of stamp duty. Given these facts and the inconsistencies in the Plaintiff's evidence in total, it leaves no doubt in my mind that the plaintiff's title deed was obtained in an irregular and unprocedural manner thus rendering it null and void for all purposes of the law.

49. Again, this Court considered the evidence of the defendants that the suit land was set aside for a fire station in the **P.D.P.s of 1981** as well as that of **1983**. They contended that at the time the alleged allotment was not proper as the land was not available for allocation. This Court finds that indeed the land was not available for allocation to another party once it was set aside for public use. It is immaterial that the plaintiff paying rates to the County Government. If that happened, it was done in respect of land that was non-existent at that time for allocation or even after and cannot found a proper title thereto.

50. The defendants counterclaimed and stated that they were the rightful owners of the suit land. **DW1** testified that the suit land belonged to the 1<sup>st</sup> defendant herein. The defendants' case was that the plaintiff grabbed the suit land and registered it irregularly in his name. The plaintiff did not prove how he acquired the land from the government and caused it registered in his name. A title is the end product of a process. This court finds that the plaintiff failed to follow the process of acquisition of land from the government. The mere payment of land rates could not confer title or guarantee ownership of land to the Plaintiff. In my view, the Plaintiff, through a well-planned, illegal scheme cleverly processed the title in his name with the intention to defraud the government. Thus, the title in his possession were obtained illegally, unprocedurally and unlawfully without following the due process thus null and void for all purposes required of it in law.

51. Further, the defendant produced a Part Development Plan to support their case. They produced it as **D. Exhibit 1**. The plaintiff challenged it on the ground that it was neither signed nor stamped. I have closely perused the document and noticed that it bears a signature of the surveyor who prepared it. Also, it was approved by J.R Njenga - the Commissioner of Lands. According to the dates appearing on it,

the **P.D.P.** was prepared on 2/10/1982 and approved on 24/2/1983 in Nairobi vide Development Plan **No. 117**. It also contained notes that it superseded Plan No. **ELD/10/81/1 of 17/3/1981**. This court is of the considered opinion that despite the **P.D.P.** lacking a stamp as well as the signature of Commissioner of Lands, it was approved and the approval number issued. Lack of a signature and other evidence to the contrary on authenticity thereof does not negate the intent and purpose of the government to set the plot as a fire station. The Plaintiff did not challenge that intention and purpose or otherwise of the **P.D.P.**

52. On the **P.D.P.** it is shown that the suit land measures approximately **0.37 Ha**. The Plaintiff prayed that the sub-division of the plot be cancelled. A quick perusal shows that indeed the plot was sub-divided into two (2) portions; one measuring **0.1 Ha** which was named as **Kitale Municipality Block 4/487** and another one named as **Kitale Municipality Block 4/407** measuring approximately **0.2731 Ha**. The total acreage would be approximately **0.3731 Ha** which makes it true that the land was indeed subdivided into two portions. More so, the **P.D.P.** was not only in reference to the suit land herein. It entailed **P.D.P.** for other public utilities for instance the Town Hall, Law Court, the Museum, Police Workshop among others which are in place and operational. The only logical conclusion drawn would be that although the land portion had not been indicated in the **P.D.P.** as a fire station, the plaintiff did not adduce evidence to rebut the assertion by the defendants that the suit land was allocated or set aside for public use.

53. The Plaintiff only indicated that there was another land that was allocated for a fire station. That may well be true. Even that no one may and should limit the government on decision making such another fire station so as to increase or reduce the number of public utilities it wishes to establish or allocate land to. In any event it would be for the public good to have more fire stations in the County. The Plaintiff could use the excuse of another parcel of land set aside for that purpose to justify his illegal acquisition of land and or sanitize his illegality, committed in obtaining the land to the detriment of the defendant.

54. This Court is of the considered view that the plaintiff cannot and would not be protected and or cushioned by the law in any manner in respect of the suit land as he does not qualify to receive such protection as envisaged by **Article 40** of the **Constitution of Kenya** and **Sections 24, 25, and 26** of the **Land Registration Act**. The parcel of land was obtained irregularly and unlawfully through fraudulent and a corrupt scheme. I find support in the sentiments of the Court in the case of **Republic –vs- Minister for Transport & Communication & 5 Others Ex- Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 (2006) 1KLR (E&L) 563** which was cited with approval in the case of **Kenya National Highway Authority -vs- Shalien Masood Mughal & 5 Others (2017) eKLR** where the court held as follows:

**“Court should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of the title deed....”.**

55. Also, my brother Judge Onyancha J. in the case of **Alberta Mae Gacci -vs- Attorney General & 4 Others [2006] eKLR**, had this to say in respect to land acquired unprocedurally:

**“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come.....”**

56. The Registrar who is the custodian of documents in reference to the land in dispute did not produce any transfer documents in respect to the acquisition of the title in dispute. He only produced green card and white card in respect to the suit land. However, the presence of the green card and the white card did not add any probative value to the plaintiff’s case. It did not salvage it either. It is my considered view that he concealed material evidence that was crucial in this case. Actually, I found him to be an untruthful and unreliable witness in many respects. For instance, he stated that his office only dealt with registration documents but could not inquire into their veracity. Again, he said he is unaware of the procedure of alienation of government land: I find this bizarre of a government officer entrusted with public documents relating to sacrosanct processes and properties to say this. If he does not know this process he should leave office, for how can he protect the sanctity of the procedures entrusted to him? Moreover, the said Land Registrar was in a position to tell whether the land was acquired procedurally or not as they are vested with the responsibility to conduct the business of issuance and registration of documents in relation to land by the government. That is the scheme I have referred to above.

57. For the foregoing reasons, on the one hand I find that the Plaintiff failed to prove his case on a balance of probabilities. His case is hereby dismissed with costs to the Defendants. On the other hand, defendants succeed in their Counterclaim. I therefore enter judgment in favour of the Defendants against the Plaintiff in terms of the Counterclaim and issue the following orders:

**a. An order be and is hereby issued for the nullification of the sub-division of original Plot earmarked for the Fire Station and cancellation of the Certificate of Lease to title No. KITALE MUNICIPALITY BLOCK 4/407 issued on 27/9/2002 in favour of the James Muigai Thungu.**

**b. An order be and is hereby issued for the rectification of the Land Register to reflect that the land comprising in land parcel KITALE MUNICIPALITY BLOCK 4/407 is public utility land.**

**c. An order be and is hereby given requiring the Plaintiff to remove himself and his structures if any at his own cost from the suit land within thirty (30) days from the date of this judgment, failure to which the defendants shall be at liberty to evict him, at his cost.**

58. Costs follow the event. The event herein is that the Plaintiff has lost his case and the Defendants have succeeded. Thus, the Plaintiff is hereby condemned to pay costs of both the suit and Counterclaim.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 31<sup>ST</sup> DAY OF MARCH, 2022**

**DR. *IUR* FRED NYAGAKA**

**JUDGE, ELC, KITALE**