



**Onyango v Chief Land Registrar-Kisumu & 5 others (Environment & Land  
Petition E009 of 2021) [2025] KEELC 266 (KLR) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 266 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ENVIRONMENT & LAND PETITION E009 OF 2021**

**SO OKONG'O, J**

**JANUARY 27, 2025**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLES 40 (1), (2) (B) AND (3) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF SECTIONS 25,  
26 AND 30 (2) (A) OF THE LAND REGISTRATION ACT 2012**

**BETWEEN**

**VIOLET SALLY ONYANGO ..... PETITIONER**

**AND**

**CHIEF LAND REGISTRAR-KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**STEPHEN ODUOR ODERO ..... 5<sup>TH</sup> RESPONDENT**

**NISHMA RAMESH KARIA ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. In her petition dated March 22, 2020(sic), the petitioner sought the following reliefs against the Respondents;

1. A declaration that the petitioner's fundamental rights and freedoms as espoused under article 40 (1) of the Constitution have been contravened and grossly violated by the Respondents.



2. A declaration that the Petitioner’s fundamental rights and freedoms as espoused under Articles 47 (1) of the Constitution have been contravened and violated by the Respondents and that the Respondents’ purported transfer, cancellation and/or revocation of the Petitioner’s title for Title No. Kisumu Municipality/ Block 13/92 was unconstitutional, null and void for want of due process.
3. A declaration that the title deed held by the Petitioner in respect to the suit property was conclusive evidence of ownership and that the Petitioner was the absolute and indefeasible owner of all that parcel of land known as Title No. Kisumu Municipality/Block 13/92.
4. An order that the Petitioner’s title be reinstated and that the title held by the 5<sup>th</sup> and 6<sup>th</sup> Respondents and any other subsequent title be revoked and/ or cancelled.
5. General and exemplary damages for violation of the Petitioner’s fundamental rights and freedoms.
6. Such further or other order or orders as the court may deem just and appropriate to grant.
7. An order that the costs of the petition be borne by the Respondents.

### **The Petitioner’s case**

2. The Petitioner averred that she was a lessee from the Government of Kenya of all that parcel of land known as Title No. Kisumu Municipality/Block 13/92 for a term of 99 years with effect from 1<sup>st</sup> January 1999 (hereinafter referred to as “the suit property”). The Petitioner averred that she complied with all the terms and conditions of the lease including the payment of stand premium and annual rent. The Petitioner averred that she was the lawful proprietor of the suit property.
3. The Petitioner averred that at the beginning of 2015, she discovered after carrying out a search on the title of the suit property that another title had been arbitrarily issued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in favour of the 5<sup>th</sup> Respondent in respect of the suit property. The Petitioner averred that she learnt further that the 5<sup>th</sup> Respondent had subsequently purported to transfer the suit property to the 6<sup>th</sup> Respondent on 3<sup>rd</sup> March 2003. The Petitioner averred that the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents’ conduct aforesaid violated the rights of the Petitioner to own property and to have the same protected against arbitrary acquisition.
4. The Petitioner averred that the purported transfer, allocation and/or registration of the 5<sup>th</sup> Respondent as a proprietor of the suit property was done arbitrarily, unlawfully and in blatant violation of the Petitioner’s right to fair administrative action and right to own property. The Petitioner averred that the transaction was a nullity. The Petitioner cited several provisions of the Constitution and the Land Registration Act 2012 which she claimed were violated by the Respondents.
5. The Petition was supported by the affidavit of the petitioner sworn on 18<sup>th</sup> December 2020. In her affidavit, the petitioner reiterated the contents of the petition. The Petitioner annexed to the affidavit; a copy of a Certificate of Lease dated 14<sup>th</sup> March 2008 in her name, a copy of a lease dated 24<sup>th</sup> December 2007 registered on 14<sup>th</sup> March 2008 issued in her favour by the Commissioner of Lands and a Certificate of Official search dated 9<sup>th</sup> February 2015.

### **The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents’ case**

6. The Attorney General entered appearance on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents but failed to file a response to the petition.



The 3<sup>rd</sup> Respondent's case

The 3<sup>rd</sup> Respondent neither entered appearance nor filed a response to the petition.

The 5<sup>th</sup> Respondent's case

7. The 5<sup>th</sup> Respondent entered appearance and filed a replying affidavit in response to the petition on 28<sup>th</sup> April 2021. The 5<sup>th</sup> Respondent averred that the suit property was allocated to him and after the lease was processed in his name, he was issued with a Certificate of Lease on 3<sup>rd</sup> March 2003. The 5<sup>th</sup> Respondent averred that in 2008, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents unilaterally purported to cancel leases that had been issued to individuals in respect of Title Nos. Kisumu Municipality/Block 13/92-106 which included the lease for the suit property in favour of the 5<sup>th</sup> Respondent. The 5<sup>th</sup> Respondent averred that those who were affected by the said unilateral cancellation of titles filed a suit at Winam Law Court namely, Winam SRMCC No. 109 of 2008, M & L Gateway (K) Ltd. vs. The District Land Officer and Kisumu Land Registrar seeking to restrain the purported cancellation of the said titles which order was duly given on 23<sup>rd</sup> April 2008. The 5<sup>th</sup> Respondent averred that the said parties thereafter moved to the High Court at Kisumu in Kisumu HC. Judicial Review Application No. 10 of 2010(sic) and obtained an order on 16<sup>th</sup> April 2010 quashing the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to cancel the said titles. The 5<sup>th</sup> Respondent averred that at the time the Petitioner was issued with a title for the suit property, there was an injunction in force restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from issuing such a title which title was in any event quashed by the said High Court order. The 5<sup>th</sup> Respondent urged the court to dismiss the petition. The 5<sup>th</sup> Respondent annexed to his replying affidavit; a Certificate of Lease dated 3<sup>rd</sup> March 2003 in his name, a copy of an extract of the register for the suit property, a copy of a Certificate of Official Search on the title of the suit property dated 10<sup>th</sup> August 2016, a copy of Rates Clearance Certificate, a copy of a court order issued on 15<sup>th</sup> May 2008 in Winam SRMCC No. 109 of 2008 and a copy of an order of judicial review issued on 23<sup>rd</sup> April 2010.

#### **The 6<sup>th</sup> Respondent's case**

8. The 6<sup>th</sup> Respondent opposed the petition through a replying affidavit sworn on 27<sup>th</sup> April 2021. The 6<sup>th</sup> Respondent averred that she was the registered proprietor of the suit property having acquired the same for value from the 5<sup>th</sup> Respondent without notice of any defect in the title that was held by the 5<sup>th</sup> Respondent. The 6<sup>th</sup> Respondent averred that she purchased the suit property from the 5<sup>th</sup> Respondent at Kshs. 3,000,000/- and followed due process in acquiring a Certificate of Lease in respect thereof. The 6<sup>th</sup> Respondent averred that she had been paying land rates and land rent to both the County Government and the National Government respectively ever since she acquired the suit property. The 6<sup>th</sup> Respondent averred that after purchasing the suit property, she developed the same after obtaining development approval from the County Government of Kisumu.

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

9. At the trial, the Petitioner, Violet Sally Onyango told the court that she was a retired accountant. She adopted her affidavit in support of the petition as her evidence in chief and produced the documents attached to the affidavit as P.EXHS. 1,2,3 respectively. She stated that her lease and Certificate of Lease had not been challenged by any person. The Petitioner stated that neither she nor the 5<sup>th</sup> Respondent were parties to Kisumu HC. Misc. Application No. 80 of 2008 through which the 5<sup>th</sup> Respondent's title to the suit property was purportedly reinstated. The Petitioner stated that the suit property was also not one of the parcels of land that was in dispute in the said High Court suit. The Petitioner admitted however that the suit property was one of the parcels of land whose titles were cancelled by



- the Chief Land Registrar through a letter dated 16<sup>th</sup> October 2007. She stated however that as of the date of the said letter, she had not been issued with a lease. She stated that the lease in her favour was not signed until 24<sup>th</sup> December 2007. She stated that the said letter dated 16<sup>th</sup> October 2007 could not have referred to her lease which had not yet been issued and registered at the Kisumu District Land Registry. The Petitioner stated that she had no title to be cancelled. She stated that she was not a party to Winam SRMCC No. 109 of 2008 and was issued with a Certificate of Lease in respect of the suit property on 14<sup>th</sup> March 2008 before the order in that case was issued on 15<sup>th</sup> May 2008.
10. On cross-examination, the Petitioner admitted that the 5<sup>th</sup> Respondent was the first to be registered as the owner of the suit property on 3<sup>rd</sup> March 2003. She reiterated that the lease in her favour was issued on 24<sup>th</sup> December 2007 and registered on 14<sup>th</sup> March 2008. She admitted that the suit property was already in the name of the 5<sup>th</sup> Respondent when she was issued with a lease and a Certificate of Lease in respect thereof. The Petitioner stated that she only came to know that the suit property was in the name of a third party when she went to pay land rates. She stated that she had come to court to challenge the order that purportedly cancelled her title.
  11. On examination by the court, the Petitioner stated that she was 70 years old. The Petitioner stated that before she retired, she was working for Kenya Vehicle Manufacturers in Thika. She stated that she was appointed to the Kisumu County Service Board when she was in her last year at Kenya Vehicle of Manufacturers. She stated that after coming to Kisumu, she applied to the Municipal Council of Kisumu to be allocated the suit property. The Petitioner stated that she could not remember when she made the application. She stated that after her application, she was issued with a letter of allotment on 4<sup>th</sup> January 1999. She stated that she was allocated unsurveyed residential plot "A" Kisumu Municipality. She stated that she could not remember when she accepted the allotment since it was her deceased husband who was following up on the matter.
  12. The 5<sup>th</sup> Defendant, Stephen Oduor Odero adopted his witness statement filed on 26<sup>th</sup> January 2023 as his evidence in chief. He produced the documents attached to his list of documents dated 24<sup>th</sup> January 2023 also filed on 26<sup>th</sup> January 2023 as a bundle as D.EXH.1. He stated that he was the one who sold the suit property to the 6<sup>th</sup> Respondent and was duly paid the purchase price by the 6<sup>th</sup> Respondent.
  13. On cross-examination by the Petitioner's advocate, the 5<sup>th</sup> Respondent when shown a copy of the white card at page 35 of D.EXH. 1 stated that in the card, the lessor of the suit property was indicated as the Government of Kenya and the lessor as the Petitioner. The 5<sup>th</sup> Respondent stated that he noted that his name was handwritten on the documents with a pen. The 5<sup>th</sup> Respondent stated further that the title of the suit property was leasehold and not freehold. The 5<sup>th</sup> Respondent stated further that he was not a party to Winam SRMCC No. 109 of 2008 and that the order issued in that case on 15<sup>th</sup> May 2008 did not reinstate his title. The 5<sup>th</sup> Respondent stated further that the suit property was not mentioned in the court order that was issued in Kisumu HC. Misc. No. 80 of 2008 on 23<sup>rd</sup> April 2010 and that he did not challenge the letter by the Commissioner of Lands dated 16<sup>th</sup> October 2007 which cancelled the title for the suit property. On examination by the court, the 5<sup>th</sup> Respondent stated that he sold the suit property to the 6<sup>th</sup> Respondent at Kshs. 3,000,000/- and that he did not know where the sum of Kshs. 1,000,000/- indicated in the transfer as the consideration came from.
  14. The 6<sup>th</sup> Respondent gave evidence as DW2. The 6<sup>th</sup> Respondent adopted her witness statement dated 24<sup>th</sup> January 2022 as her evidence in chief and relied on D.EXH.1 which was produced in evidence by DW1 in support of her defence against the claim. On cross-examination, the 6<sup>th</sup> Respondent stated that as part of due diligence, she did a search on the suit property before purchasing it. She stated that although she had not produced the search certificate in evidence, the same was available. The 6<sup>th</sup>



Respondent stated that she could not recall if the 5<sup>th</sup> Respondent supplied her with a copy of his letter of allotment of the suit property. The 6<sup>th</sup> Respondent told the court that she was aware that the suit property was a leasehold and that the 5<sup>th</sup> Respondent was a lessee from the Government of Kenya. She stated that she was not aware that a lease document was required. She stated that she was not aware that a lease in respect of the suit property was issued to someone else. She told the court that she had a Certificate of Lease but did not have a lease agreement.

### **The Petitioner's submissions**

15. After the close of evidence, the parties made closing submissions in writing. The Petitioner filed submission dated 21<sup>st</sup> June 2024. The Petitioner framed the following issues for determination by the court: Had the 5<sup>th</sup> Respondent ever held a registered lease or even a lease between himself and the Government of Kenya in respect of the suit property and therefore capable of transferring his interest in the property to the 6<sup>th</sup> Respondent? Did the 6<sup>th</sup> Respondent perform due diligence before purchasing the suit property to be considered a purchaser for value without notice? Have the Petitioner's rights been violated?
16. The Petitioner cited *Nancy Wanjiru Kunyihya v. Samuel Njoroge Kamau* [2018] eKLR and submitted that the 5<sup>th</sup> Respondent's Certificate of Lease was not backed by any lease agreement between the 5<sup>th</sup> Respondent and the Government of Kenya and as such, the said Certificate of Lease was a mere piece of paper obtained fraudulently. The Petitioner submitted that the Commissioner of Lands disowned the Certificate of Lease in a letter dated 16<sup>th</sup> October 2007 when he cancelled the purported leases issued in respect of Kisumu Municipality Block 13/92-106. The Petitioner submitted that the 5<sup>th</sup> Respondent never challenged the said cancellation. The Petitioner submitted that the 5<sup>th</sup> Respondent had no valid title or interest in the suit property to pass any title to the 6<sup>th</sup> Respondent.
17. On the issue of due diligence, the Petitioner cited *Antony Ted Andrew Hoareau v. Mary Muthoni Wanjogi* [2018] eKLR and submitted that the 6<sup>th</sup> Respondent could not raise the defence of a bona fide purchaser for value without notice as she did not provide any evidence of having conducted any due diligence as to the validity of the title that was held by the 5<sup>th</sup> Respondent.
18. On whether the Petitioner's right had been violated, the Petitioner cited the *Chief Lands Registrar and 4 Others v. Natha Tirop and 4 Others* [2018] eKLR and submitted that by registering the 5<sup>th</sup> Respondent and subsequently, the 6<sup>th</sup> Respondent as the proprietors of the suit property, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents violated the Petitioner's right to own property under Article 40 of the [Constitution](#). The Petitioner urged the court to allow the petition as prayed.

### **The 5<sup>th</sup> and 6<sup>th</sup> Respondents' submissions**

19. The 5<sup>th</sup> and 6<sup>th</sup> Respondents filed submissions dated 3<sup>rd</sup> June 2024. The 5<sup>th</sup> and 6<sup>th</sup> Respondents submitted that the suit property had been the subject of litigation in 2008 when the land registrar unilaterally cancelled the titles to Kisumu Municipality/ Block 13/ 92-106 and issued new titles to new parties. The 5<sup>th</sup> and 6<sup>th</sup> Respondents submitted that that action by the land registrar necessitated the filing of Winam SRMCC No. 109 of 2008 where an injunctive order was issued against the land registrar restraining him from cancelling and /or expunging titles for the said parcels of land from the record. The 5<sup>th</sup> and 6<sup>th</sup> Respondents submitted that other parties moved to the High Court through Kisumu HC. Misc. App No. 80 of 2008 to quash the said decision of the land registrar.
20. The 5<sup>th</sup> and 6<sup>th</sup> Respondents submitted that the 5<sup>th</sup> Respondent lawfully and procedurally sold the suit property to the 6<sup>th</sup> Respondent who held a lawful title in respect of the suit property. The 5<sup>th</sup> and 6<sup>th</sup>



Respondents cited section 26 of the [Land Registration Act](#) 2012 and submitted that from the evidence on record, the Petitioner did not establish grounds provided in law that would warrant the cancellation of the title of the suit property held by the 6<sup>th</sup> Respondent. The 5<sup>th</sup> and 6<sup>th</sup> Respondents submitted that there was no evidence of fraud, misrepresentation, illegality, procedural impropriety or corrupt scheme in the acquisition of the suit property by the 5<sup>th</sup> and 6<sup>th</sup> Respondents.

21. The 5<sup>th</sup> and 6<sup>th</sup> Respondents submitted further that there were two competing titles in respect of the suit property. The Respondents submitted that the Petitioner's title was issued on 14<sup>th</sup> March 2008 for a term of 99 years with effect from 1<sup>st</sup> January 1999 while the 5<sup>th</sup> Respondent's title was issued on 3<sup>rd</sup> March 2003 for a term of 99 years with effect from 1<sup>st</sup> October 1998. The 5<sup>th</sup> and 6<sup>th</sup> Respondents submitted that when there are two competing titles, the first in time will prevail. In support of this submission, the 5<sup>th</sup> and 6<sup>th</sup> Respondents relied on *Wreck Motors Enterprises v. The Commissioner of Lands and Others*, Civil Appeal No. 71 of 1997 and *Gitwany Investments Ltd. v. Tajmal Ltd. & 3 Others* [2006]eKLR. The 5<sup>th</sup> and 6<sup>th</sup> Respondents submitted that the 5<sup>th</sup> Respondent's title being the first in time must prevail against that of the Petitioner. The 5<sup>th</sup> and 6<sup>th</sup> Respondents submitted that the petitioner failed to prove her case against the Respondent and the violation of the alleged rights she was said to have in the suit property. The 5<sup>th</sup> and 6<sup>th</sup> Respondents urged the court to dismiss the petition with costs.

### **Analysis and determination**

22. I have considered the pleadings, the evidence and the submissions by the parties. I am of the view that the issues arising for determination are as follows;
  1. Whether the Petitioner is the owner of the suit property.
  2. Whether the Respondents violated the Petitioner's right to property guaranteed under Article 40 of the [Constitution](#) concerning the suit property.
  3. Whether the Petitioner is entitled to the reliefs sought in the petition.
  4. Who is liable to pay the costs of this suit

### **Whether the Petitioner is the lawful owner of the suit property.**

23. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed), and Sections 24, 25 and 26 of the [Land Registration Act](#) 2012 which repealed the Registered [Land Act](#), Chapter 300 Laws of Kenya, and Article 40 of the [Constitution](#) protect a registered proprietor of land.

Sections 27 and 28 of the Registered [Land Act](#)(now repealed) provide as follows:

27. 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;
  - (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 and expressed agreements, liabilities and incidents of the lease.



28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:
- Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

24. Sections 24, 25, and 26 of the *Land Registration Act*, 2012 provide 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.

25. 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.

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

“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 recognizes 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.”

27. In Munyu Maina v. Hiram Gatbiha Maina Civil Appeal No. 239 of 2009[2013] eKLR the court stated that:

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

28. In Daudi Kiptugen v. Commissioner of Lands & 4 Others [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

29. 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”.

30. In Henry Muthee Kathurima v. Commissioner of Lands & Another [2015] eKLR where the court held as follows:

“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. We hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired.”

31. In Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 Others[2016] eKLR, the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This



investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain...Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

32. I have considered the competing claims to the suit property by the Petitioner on the one hand and the 5<sup>th</sup> and 6<sup>th</sup> Respondents on the other hand. The Petitioner has claimed that she was allocated the suit property by the Commissioner of Lands, issued with a lease and after registration of the lease, she was issued with a Certificate of Lease. The Petitioner produced in evidence a copy of the lease dated 24<sup>th</sup> December 2007 between the Petitioner and the Government of Kenya and registered on 14<sup>th</sup> March 2008(P.EXH.1). According to the lease, the lease was for 99 years with effect from 1<sup>st</sup> January 1999 at a revisable annual rent of Kshs. 2000/-. The Petitioner also produced in evidence a copy of a Certificate of Lease dated 14<sup>th</sup> March 2008(P.EXH.2). According to the Certificate of Lease, the Petitioner held a 99-year lease from the Government of Kenya with effect from 1<sup>st</sup> January 1999 at an annual rent of Kshs. 2000/-. The Petitioner also produced in evidence a Certificate of Official search dated 9<sup>th</sup> February 2015 showing that the suit property was registered in the name of the 6<sup>th</sup> Respondent on 11<sup>th</sup> November 2011.
33. The 5<sup>th</sup> Respondent has claimed that he was also allocated the suit property by the Commissioner of Lands. In proof of his title to the suit property, the 5<sup>th</sup> Respondent produced in evidence; a certified copy of the extract of the register of the suit property (see page 35 of D.EXH.1). It is indicated in the said extract of the register that the same was opened on 3<sup>rd</sup> March 2003 with the 5<sup>th</sup> Respondent as the first registered owner of the suit property having been registered as such on 3<sup>rd</sup> March 2003. It is also indicated that the suit property is leasehold for a term of 99 years with effect from 1<sup>st</sup> September 1999 at a revisable annual rent of Kshs. 2000/-. The lessor is indicated as the Government of the Republic of Kenya and the lessee is Violet Sally Onyango. From this extract of the register, there is no indication that the 5<sup>th</sup> Respondent was ever issued with a Certificate of Lease. It is further indicated that the title to the suit property was “RE-INSTATED VIDE H.C.C MISC. 80/2008”. The extract of the register shows that the suit property was transferred to the 6<sup>th</sup> Respondent on 11<sup>th</sup> November 2011. The 6<sup>th</sup> Respondent was issued with a Certificate of Lease on 14<sup>th</sup> November 2011. The 5<sup>th</sup> Respondent produced also a copy of a letter dated 16<sup>th</sup> October 2007 addressed to the 1<sup>st</sup> Respondent by the Commissioner of Lands in which the Commissioner of Lands claimed that the leases for all those parcels of land known as Kisumu Municipality/Block 13/92-106 which had been registered at the Kisumu Land Registry were fraudulent and directed the 1<sup>st</sup> Respondent to expunge the same from the land registry records. The 5<sup>th</sup> Respondent also produced in evidence orders issued in Winam SRMCC No. 109 of 2008 and Kisumu H.C Misc. Application No. 80 of 2008 on 15<sup>th</sup> May 2008 and 23<sup>rd</sup> April 2008 respectively (see pages 38 and 119 of D.EXH.1) in support of his title.
34. In his replying affidavit, the 5<sup>th</sup> Respondent had annexed among others, what was said to be a copy of the Certificate of Lease that was issued to him on 3<sup>rd</sup> March 2003. According to this Certificate of Lease, the 5<sup>th</sup> Respondent was granted a lease by the Government of Kenya for a term of 99 years with effect from 1<sup>st</sup> October 1998 at a revisable rent of Kshs. 4,750/-. To the said affidavit, the 5<sup>th</sup> Respondent had also annexed what was purported to be an extract of the register of the suit property. According to the extract, the suit property was leasehold for a term of 99 years with effect from 1<sup>st</sup> January 1999 at a revisable rent of Kshs. 2000/-. There is no indication in this extract of the register that the 5<sup>th</sup>



- Respondent was issued with a Certificate of Lease. The 5<sup>th</sup> Respondent had also annexed a Certificate of Official search dated 10<sup>th</sup> August 2011 which showed that the 5<sup>th</sup> Respondent was the registered proprietor of the leasehold interest in the suit property for a term of 99 years with effect from 1<sup>st</sup> January 1999.
35. The 6<sup>th</sup> Respondent claimed to have acquired her title from the 5<sup>th</sup> Respondent. The 6<sup>th</sup> Respondent produced in evidence among others; a copy of the agreement of sale dated 7<sup>th</sup> November 2011 between the 5<sup>th</sup> Respondent and the 6<sup>th</sup> Respondent, and a transfer of lease dated 7<sup>th</sup> November 2011. In her replying affidavit to the petition, the 6<sup>th</sup> Respondent had annexed a copy of her Certificate of Lease dated 14<sup>th</sup> November 2011 and a copy of a Certificate of Official Search dated 29<sup>th</sup> March 2021. According to the 6<sup>th</sup> Respondent's Certificate of Lease, the lease was for 99 years with effect from 1<sup>st</sup> October 1998 at a revisable rent of Kshs. 4,750/- and the 6<sup>th</sup> Respondent was registered as the owner of the property on 11<sup>th</sup> November 2011 and was issued with a Certificate of Lease on 14<sup>th</sup> November 2011(entries numbers 3 and 4 in the certificate of lease). According to the Certificate of Official Search dated 29<sup>th</sup> March 2021, the 6<sup>th</sup> Respondent was registered as the leasehold proprietor of the suit property on 11<sup>th</sup> November 2011(entry number 2) and the lease was for a term of 99 years with effect from 1<sup>st</sup> January 1999.
36. From the evidence before the court, I am satisfied that the Petitioner was allocated the suit property by the Commissioner of Lands, she was issued with a lease in respect of the property on 24<sup>th</sup> December 2007, the lease was registered on 14<sup>th</sup> March 2008 and she was issued with a Certificate of Lease on 14<sup>th</sup> March 2008. The evidence before the court shows that before the suit property was registered in the name of the Petitioner, the same is said to have earlier been registered in the name of the 5<sup>th</sup> Respondent on 3<sup>rd</sup> March 2003. The said registration among others was declared by the Commissioner of Lands through a letter dated 16<sup>th</sup> October 2007 as fraudulent. As mentioned earlier, the Commissioner of Lands directed the land registrar Kisumu to cancel the registration and expunge from the land registry all the records relating to the purported registration. The parcels of land which were affected by the said cancellation which were 15 in total (Kisumu Municipality/Block 13/92-106) were registered in the names of new allottees. The Petitioner was one of the new allottees. When the suit property was registered in the name of the Petitioner on 14<sup>th</sup> March 2008, the registration of the same property in the name of the 5<sup>th</sup> Respondent had been cancelled and the register and all other records relating to the same had been expunged from the land registry records following the said directive from the Commissioner of Lands. That would explain why the only valid extract of the Land Register for the suit property showed the name of the Petitioner as the lessee of the suit property. The extract of the register also shows only the particulars of the Petitioner's lease. All the searches done including the one done on 10<sup>th</sup> August 2011 before the suit property was sold to the 6<sup>th</sup> Respondent on 7<sup>th</sup> November 2011 shows only the particulars of the Petitioner's lease; a lease of 99 years with effect from 1<sup>st</sup> January 1999 at a revisable rent of Kshs. 2000/-. There is no register in existence for the 5<sup>th</sup> and 6<sup>th</sup> Respondent's lease of 99 years with effect from 1<sup>st</sup> October 1998 with a revisable rent of Kshs. 4,750/-. The court did not also have sight of the lease which appears to have been expunged from the record if it ever existed.
37. It is apparent from the evidence on record that after the Petitioner was registered as the owner of the suit property on 14<sup>th</sup> March 2008, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents purported to cancel her registration as the owner of the suit property pursuant to what they claimed was an order made on 16<sup>th</sup> April 2010 in Kisumu H.C.Misc. Application No.80 of 2008 which they claimed had reinstated the 5<sup>th</sup> Respondent as the owner of the suit property. By way of background, following the cancellation by the Commissioner of Lands and the land registrar of titles and expunging of the records relating to land parcels Kisumu Municipality/Block 13/92-106 from the land registry on 16<sup>th</sup> October 2007 or



thereabouts, some of those who were affected moved to the High Court at Kisumu in the aforesaid application to challenge the said cancellation. Those who moved to the High Court were those who had been registered as the owners of Kisumu Municipality/Block 13/96, 97, 99, 101, 103, 104 and 109, and whose titles were cancelled and their land parcels allocated to other people. The 5<sup>th</sup> Respondent did not challenge the cancellation of his title to the suit property and the allocation and registration of the same in the name of the Petitioner. The 5<sup>th</sup> Respondent was not a party to Kisumu H.C.Misc. Application No.80 of 2008 neither was the suit property one of the parcels of land the cancellation of whose title was in contest in that suit. The order made in the suit on 16<sup>th</sup> April 2010 did not therefore reinstate the 5<sup>th</sup> Respondent's title to the suit property. The same applies to the order that was made on 23<sup>rd</sup> April 2008 in Winam SRMCC No. 109 of 2008 in which neither the 5<sup>th</sup> Respondent nor the Petitioner were parties. It is therefore my finding that there was no basis for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's cancellation of the name of the Petitioner from the register of the suit property and replacing it with the name of the 5<sup>th</sup> Respondent. I therefore hold that as between the Petitioner and the 5<sup>th</sup> and 6<sup>th</sup> Respondents, the Petitioner is the owner of the suit property. The registration of the 5<sup>th</sup> Respondent as the owner of the suit property having been cancelled, the register relating to his purported lease expunged from the land registry records, and the property registered in the name of the Petitioner under new terms and conditions, the 5<sup>th</sup> Respondent ceased to be the owner of the suit property unless he successfully challenged the cancellation of his title which he never did. For the foregoing reasons, the 5<sup>th</sup> Respondent had no proprietary interest in the suit property which he could transfer to the 6<sup>th</sup> Respondent. Although the 5<sup>th</sup> Respondent purported to transfer to the 6<sup>th</sup> Respondent a 99-year lease with effect from 1<sup>st</sup> October 1998 at a revisable rent of Kshs. 4,750/-, such a lease does not exist in the land register. The purported registration was done in the register for the Petitioner's lease of 99 years with effect from 1<sup>st</sup> January 1999 at a revisable rent of Kshs. 2000/-. I agree with the Petitioner that the 6<sup>th</sup> Respondent did not do adequate due diligence. A search that was conducted on 10<sup>th</sup> August 2011 before the sale of the suit property by the 5<sup>th</sup> Respondent to the 6<sup>th</sup> Respondent was done by the 6<sup>th</sup> Respondent. The application for the search and the search certificate dated 10<sup>th</sup> August 2011 are annexed to the 5<sup>th</sup> Respondent's replying affidavit sworn on 27<sup>th</sup> April 2021 as annexure "SOO1C". The search showed that what was purportedly registered in the name of the 5<sup>th</sup> Respondent was a 99-year lease with effect from 1<sup>st</sup> January 1999 at a revisable rent of Kshs. 2000/-. This no doubt was not the 99-year lease with effect from 1<sup>st</sup> October 1998 at a revisable rent of Kshs. 4,750/- that was indicated in the 5<sup>th</sup> Respondent's Certificate of Lease dated 3<sup>rd</sup> March 2003 and which was being sold to the 6<sup>th</sup> Respondent. The 6<sup>th</sup> Respondent should also have asked questions about the several discrepancies which were apparent on the face of the register of the suit property. There was an entry in the register purporting that the title of the suit property was restored to the name of the 5<sup>th</sup> Respondent pursuant to a court order. The particulars of the case were given. If the 6<sup>th</sup> Respondent was diligent enough, she would have taken the trouble to find out whether the suit property was the subject of the said suit and whether the court order actually reinstated the 5<sup>th</sup> Respondent's title. Having failed to undertake the necessary due diligence, the 6<sup>th</sup> Respondent has only herself to blame. The suit property belongs to the Petitioner and the fact that the 6<sup>th</sup> Respondent purchased the same innocently cannot defeat the Petitioner's title.

**Whether the Respondents violated the Petitioner's right to property guaranteed under Article 40 of the Constitution.**

38. Having held that the Petitioner is the owner of the suit property, I am of the view that the Respondents violated the Petitioner's right to own property guaranteed under Article 40 of the Constitution of Kenya when they unilaterally and arbitrarily cancelled her title and registered the property in the name of



the 5<sup>th</sup> Respondent who subsequently sold it to the 6<sup>th</sup> Respondent. The Petitioner's title to the suit property could not be cancelled unless there was a finding by a competent court that the same was acquired unlawfully.

### **Whether the Petitioner is entitled to the reliefs sought in the petition.**

39. The Petitioner has proved that his constitutional right was violated by the Respondents. The Petitioner is therefore entitled to the declaratory reliefs sought in prayers (a) to (c) of the petition as shall be framed by the court in the final orders. The Petitioner is also entitled to an order for the cancellation of the registration of the 5<sup>th</sup> and 6<sup>th</sup> Respondents as the owners of the suit property. As to the claim for general and exemplary damages, the court is of the view that no basis was laid for the same in the pleadings, evidence and final submissions. I would not grant the same.

### **Who is liable to pay costs of this suit?**

40. Under section 27 of the *Civil Procedure Act*, the costs of and incidental to a suit is at the discretion of the court and as a general rule, costs follow the event. In Halsbury's Laws of England, 4<sup>th</sup> Edition (Re-issue), [2010] Vol. 10, para 16 the authors have stated as follows:

“The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.

41. The Petitioner has succeeded in her claim against the Respondents. No reason has been advanced why the Petitioner should be denied her costs of the petition. The Petitioner shall have the costs of the petition to be paid by the Respondents jointly and severally.

### **Conclusion**

42. In conclusion, I hereby enter judgment for the Petitioner against the Respondents jointly and severally for;
1. A declaration that the Petitioner's fundamental rights and freedoms guaranteed under Article 40 of the *Constitution* have been violated by the Respondents.
  2. A declaration that the Petitioner's fundamental rights and freedoms as espoused under Articles 47 of the *Constitution* have been violated by the Respondents.
  3. A declaration that the Respondents' purported transfer, cancellation and/or revocation of the Petitioner's title for Title No. Kisumu Municipality/ Block 13/92 was unconstitutional, null and void for want of due process.
  4. A declaration that as between the Petitioner, and the 5<sup>th</sup> and 6<sup>th</sup> Respondents and not otherwise, the title deed held by the Petitioner in respect to the suit property is conclusive evidence of ownership.
  5. A declaration that as between the Petitioner, and the 5<sup>th</sup> and 6<sup>th</sup> Respondents and not otherwise, the Petitioner is the absolute and indefeasible owner of all that parcel of land known as Title No. Kisumu Municipality/Block 13/92.



6. An order that the Petitioner's title to all that parcel of land known as Title No. Kisumu Municipality/Block 13/92 be reinstated and that the registration of the 5<sup>th</sup> and 6<sup>th</sup> Respondents as the proprietors of all that parcel of land known as Title No. Kisumu Municipality/Block 13/92 and the titles issued to them are cancelled forthwith.
7. Costs of the petition to be borne by the Respondents.

**DATED AND DELIVERED AT KISUMU ON THIS 27<sup>TH</sup> DAY OF JANUARY 2025.**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;**

Mr. Que for the Petitioner

N/A for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents

N/A for the 3<sup>rd</sup> Respondent

Mr. Yogo for the 5<sup>th</sup> and 6<sup>th</sup> Respondents

Ms. J. Omondi-Court Assistant

