



Muvokanza Limited v Nedmart Falls Kenya Limited & 4 others (Environment & Land Case 1180 of 2015) [2022] KEELC 3928 (KLR) (21 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1180 OF 2015
LC KOMINGOI, J
JULY 21, 2022**

BETWEEN

MUVOKANZA LIMITED PLAINTIFF

AND

NEDMART FALLS KENYA LIMITED 1ST DEFENDANT

SYLVESTOR KYALLO MUTUA 2ND DEFENDANT

JAMII BORA BANK 3RD DEFENDANT

MUGANDA WASULA T/A KEYSIAN AUCTIONEERS 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

JUDGMENT

1. By the plaint dated 16th November 2015; the Plaintiff prays for judgement against the first, second, third, fourth and 5th Defendants jointly and severally for:-
 - a. A permanent injunction against the first, second, third and fourth Defendants jointly and severally restraining them by themselves, their servants, agents and or any other persons authorized by them from carrying out any developments on the land, subdivision, sale, lease, auctions, transfer or any other dealing whatsoever concerning Land Reference No.13788 (L.R No.48079/1) and or any part of the suit parcel herein.
 - b. A permanent injunction against the 5th Defendant restraining them from approving or registering any subdivisions schemes, leases, assignments or any other dealings by the first,second and third /or fourth Defendants jointly or severally relating to parcel Land Reference No.13788(L.R No.48079/1) and or any part of the suit parcel herein.



- c. An order directing to the 5th Defendant to revoke and or annul of all entries illegally made on the land register and all illegally acquired titles to the suit property.
 - d. Punitive damages.
 - e. Costs of the suit.
 - f. Interest on (d) and (e) above at court rate.
 - g. Any other relief which the court shall deem fit and appropriate to grant in the circumstances.
2. The Plaintiff avers that it was and still is the lawfully registered legal proprietor of the parcel of land known as L.R No.13788 situated in Nairobi containing by measurement 1.903 hectares or thereabouts registered as I.R 48079/1 since 1989 to date and has never disposed off, sold and or transferred its proprietary interest in the suit parcel to any Third Party. It is its case that that the 5th Defendant misplaced the original deed file for the suit parcel resulting in Plaintiff applying for its reconstruction through a Deed of Indemnity dated 14th July 2015. It added that the said reconstruction has been duly published in the Kenya Gazette vide Gazette Notice No.6694 in Vol.CXVII No.96 of 11th September 2015.
 3. It stated that it placed a “*caveat emptor*” notice on the Daily Nation and The Standard newspapers on 20th July 2015 warning the public not to enter into any dealings in the suit land but unknown to it, the first and second Defendants had already illegally obtained titles to themselves by the fifth Defendant. It stated that the first Defendant holds an illegal title issued on 17th June 2014 being Land Reference No.13788/3 containing by measurement 0.200 hectares or thereabouts registered as I.R 155676. It further stated that it has learnt that the second Defendant has used the illegal title to Land Reference No.13788/3 to secure a loan of Kshs.10 million with the third Defendant and has since defaulted in repaying. It is its case that the third Defendant has initiated foreclosure proceedings over the said parcel of land which is a portion of L.R No.13788 and the third Defendant has instructed the fourth Defendant to proceed to sell the suit property by public auction in exercise of its statutory power of sale.
 4. It contended that the entire ownership by the first and second Defendants is shrouded with irregularity and illegality and it has learnt that the second Defendant used to and or works with the third Defendant and may have colluded with its officers to secure the loan facility with an illegal title. He pleaded particulars of illegality against the first and second Defendants in paragraph 14 of the plaint

The First Defendant’s case

5. The first Defendant filed the defence and counterclaim dated second September 2016. It contended that the Commissioner of lands allocated L.R Number 13788 situate in Nairobi to the first Defendant’s predecessor in title, Mr. James Ashiachi Albert Kusimba by a letter of allotment dated 7th June, 1985 with the authorization of the president of the Republic of Kenya. It further contended that the land was subsequently surveyed by the Director of Surveys and allocated a new number, being L.R Number 13788 (survey plan number F/R No.189/100). It is its case that Mr. Kusimba started paying land rates and rent following his allocation until when he requested the Commissioner of Lands to issue the certificate of title in favour of the first Defendant’s director. It added that the Commissioner of Lands acceded to the request on 10th February 1999 but the first Defendant’s director also made a request that title be registered in the first Defendant’s name. It stated that a certificate of title was eventually issued in favour of the first Defendant.



6. The first Defendant avers that part of the property known as L.R No.13788(I.R155676) was charged to secure a loan facility with the third Defendant and that it was done using the title for a subdivided plot comprised of the suit property that is lawfully vested in the first Defendant honestly and without mischief. It denied that the Plaintiff is entitled to ownership of the suit parcel and in its counterclaim seeks for;
- a. A declaration that the property known as L.R No.13788(Grant No.I.R 48079/1) was lawfully allocated to the first Defendant's predecessor in title on 7th June,1985 and was therefore not available for allocation to any other person.
 - b. A mandatory injunction be and is hereby issued compelling the Registrar of Titles to annul or cancel the purported registration of the property known as L.R No.13788(grant No.48079/1) in the name of the Plaintiff company.
 - c. A permanent injunction be and is hereby issued restraining the Plaintiff by itself, its agents or servants from interfering with the first Defendant's ownership and possession of the property known as Land Reference No.13788(I.R No.48079/1.)
 - d. Costs of the suit.
 - e. Any other relief that the court may deem fit and just to grant in the circumstances.

The Second Defendant's case

7. The second Defendant filed the statement of defence dated 28th February, 2020.He contended that he acquired a lawful title from the first Defendant by way of sale and upon payment of Kshs.10 million as consideration then the suit property was transferred to him. He also stated that he holds a clean title in respect of the suit property having relied entirely on the records supplied to him by the lands office .

The Third Defendant's Case

8. The third Defendant filed the statement of defence dated 20th January 2020. It contended that it advanced loan facilities to the second Defendant of Kshs.9,800,000/= as the principal amount *vide* letters of offer dated 17th October 2014, 23rd, January, 2015 and 3rd July 2019 on the strength of a first legal charge over the property known as Title Number L.R 13788/3 (I.R 155676) which was registered in the name of the first Defendant. It admitted that it has instructed the fourth Defendant to sell the suit property on its behalf in exercise of its statutory power of sale in accordance with the law.

The Fifth Defendant's Case

9. The 5th Defendant filed the statement of defence dated 26th April 2019.It contended that gazemment in respect to the suit land was due to non-availability of the parcel file in the lands office which by statute if any party avers of having any registration of the land lost, will be required to gazette and furnish the ministry of lands with a deed of indemnity for any reconstruction to take effect and upon reliance of the same a parcel file is reconstructed based on the documents provided by the Applicant with a rider to indemnify the government from any loss and action that will arise from such reconstruction. It averred that no ground of fraud and negligence and or mistake is alluded against the 5th Defendant.

The Plaintiff's Evidence

10. PW2, Mumo Mwendwa, a director of the Plaintiff and a director of Academic Services Limited testified on 29th September 2020. His witness statement dated 22nd January 2020 and a further statement



filed on 3rd September 2020 were adopted as part of his evidence in chief. The Plaintiff's bundle of documents dated 18th January 2015 and 3rd September 2020 were produced as exhibits in this case. He told the court that on 22nd March 1982, their company Academic Services Limited applied for land in Karen and on 14th May 1982, they received a response through a letter that they had been allocated five (5) acres. He stated that they were issued with a letter of allotment dated 22nd August 1984 for Unsurveyed plot No. Zone 24 and they requested for a change to the Plaintiff's name.

11. It was PW2's testimony that they also requested for reduction of rates. He added that a new letter of allotment was issued in the name of the Plaintiff on 7th June 1985 with reduced rates. They then they made payments of Kshs.160,000/= rates and Kshs.32,000/= rent. He produced CR.12 of the Plaintiff and Academic Services Limited and stated that the two companies have the same directors. He stated that in 1989, they applied for title to the suit land which was issued on 28th August 1989 and that the Plaintiff has never parted with possession to the suit land.
12. He further stated that in 2010, the deed file was not available at the Lands Registry hence they applied for reconstruction of the file and it was reconstructed. He produced the Gazette Notice confirming reconstruction of the Deed File. He added that the Plaintiff has always paid rates and produced the rates clearance certificate for 31st December 2020.
13. It was PW2's testimony that sometime in 2015, an auctioneer went to auction the suit property on instructions of the third Defendant who was foreclosing on the second Defendant yet the Plaintiff is in occupation of the suit property and it has never subdivided it. He urged that the prayers in the plaint be allowed entirely since the first Defendant is not the owner of the suit property. He stated that the first Defendant's list of documents indicate that James Albert Asiachi Kusimba was allotted the suit land on 7th June 1985 yet by 1985, the Plaintiff had a Letter of Allotment. He added that the first Defendant is not in occupation.
14. When he was cross-examined, he stated that Muvokanza Limited and Academic Services Limited have the same directors and both are duly registered under the *Companies Act*. He admitted that the status of registration of Academic Services Limited as at 12th July 2019 and Muvokanza Limited as at 26th August 2020 do not indicate the said companies directorship as at 1985 but he maintained that the directors were the same at the time. He stated that Academic Services Limited applied for the suit land on 22nd August 1984 but the said letter does not have a stamp from the office of the president confirming receipt.
15. He stated that they received the Letter of Allotment dated second August 1884 but a sketch map is not annexed in their documents. He also stated that the Plaintiff were required to pay Kshs.285,925.30/= within 30 days and admitted that they did not do so. He stated that the letter dated 30th August 1984 accepting the allotment and requesting a reduction of annual rent has no receiving stamp but it was received within 30 days. He stated that the offer was to lapse on third September 1984. He further stated that Academic Services Limited did not pay any money to the Government of Kenya as they requested a transfer to the Plaintiff. He added that the letter dated 2nd November 1984 requesting a transfer to the Plaintiff is authored by Kyale Mwendwa and has no indication that it was drawn by Academic Services Limited.
16. He stated that Academic Services Limited is the one which applied for the suit land. When he was referred to the special conditions in the title, he stated that the suit land has containers and temporary structures and that it has no educational institution and that there is no plan for development. He stated that condition No. 2 states that failure to comply with special conditions will result in cessation of the Grant.



17. When put to task on how Companies make decisions, he told the court that there is no resolution from Academic Services Limited to transfer the allocation to the Plaintiff and that there is no resolution from Academic Services Limited that he represents them. When referred to the Plaintiff, he stated that it does not state how the Plaintiff acquired the suit property. When put to task on the Plaintiff's list of documents filed much later and dated third September 2020, he stated that they always had the records but the file in the land registry had gone missing. When referred to the particulars of fraud alleged against the second Defendant, he stated that he recorded a statement with the Criminal Investigations Department.
18. When referred to Parcel Number L.R. 11641-Karen, Nairobi, he stated that he is not aware if it exists and that he does not have documents from survey of Kenya to confirm if it is a portion of the unsurveyed plot the Plaintiff was allocated. He stated that he is not aware that the first Defendant objected to the reconstruction of the Deed file. He also stated that the Plaintiff did not need to ask for the sketch as it is issued with the title.
19. He also stated that he graduated in 1982, came back and worked with Menezes Architects in May that year. He added that he was a director of Academic Services Limited at the age of eighteen and that the Plaintiff which is a real estate company and Academic Services Limited were managed by Kyale Mwendwa who is his father.
20. It was his testimony that they were seeking twenty (20) hectares on L.R No.11641 but he cannot tell the exact acreage of L.R No.11641. He stated that they have no evidence to show that they identified the plot and that beacons were set and no evidence that Academic Services Limited accepted to transfer the land to the Plaintiff.
21. When he was re-examined, he stated that allocation to Academic Services Limited was approved and that it was acknowledged in the letter dated 3rd May 1982. He added that Academic Services Limited accepted the allotment on 30th August 1984 but they did not receive a plan. He added that they appealed that annual rent be reconsidered. He further stated that Academic Services Limited did not change its name to Muvokanza Limited. He also stated that he has a search dated 30th April 2020 and a copy of the original title issued on 28th August 1989. He stated that they applied for allocation of L.R 11641 Karen but they were given another plot. He stated that the title has a condition that the suit land would be developed within six (6) months and they intended to put up a school but there were no developments in the area as there were no homes nearby. He added that conditions Numbers 3 to 8 were complied with and that condition No 6 prohibited subdivision of the land. He further stated that condition No.7 was complied with and that the title has never been cancelled or surrendered. He also stated that they were not asked for a resolution in order to transfer the land from Academic Services Limited.
22. PW1, Gildine Gatwiri Karani, is a land registrar in the office of the Chief Land Registrar. She had testified on 11th March 2021 but was stood down due to objections raised by counsel for the fifth Defendant. On 15th April 2021, this court directed that she should testify. She told the court that Title No. L.R 13788 (IR No.48079) is a reconstructed file in respect of IR 48079 L.R No.13788 and the Plaintiff is the registered proprietor. She further stated that the title was issued on 5th September 1989 and produced a copy of the grant. She also produced a search dated 29th September 2020 showing that the Plaintiff is the registered owner.
23. It was her testimony that the first entry in the title reads; Deed of Indemnity dated 16th March 2016 and the second entry reads; registration of a court order 11th October 2018 in ELC 1180 of 2015 restricting dealings in the suit land registered on 19th February 2019. She also stated that the online search indicates



that the Plaintiff is the registered owner of L.R No 13788 (IR No.48079/1) measuring 1.9300 hectares as at 13th April 2020. She also stated that the online search reads Transfer but from the manual search it reads a new Grant.

24. When she was cross-examined, she stated that she cannot confirm the authenticity of the online search unless she checks. She admitted that it shows that the property was transferred to the Plaintiff which is different from the manual search produced. He stated that the file was reconstructed on 16th March 2016 and until then, the records were not with the Lands Registry. She stated that the Plaintiff applied for reconstruction and supplied the documents and vouched for their authenticity. She added that She cannot vouch for their authenticity.
25. She told the court that the Gazette Notice published on 11th September 2015 was to invite objections which meant that objections could be made by 15th November 2015. She stated that the Deed file was reconstructed despite an objection dated 7th October 2015 which was irregular. She admitted that once there is an objection to reconstruction, an investigation ought to be conducted. She admitted that the suit was filed in 2015, the Deed file reconstructed in 2016 yet there was a court order for parties to maintain the status quo. She stated that the Plaintiff acquired the suit property by way of new grant. When referred to the title, she stated that it is signed by Wilson Gachanja, Commissioner of Lands. She also stated that a land Registrar ought to have drawn and witnessed the grant but there is no drawer in the title.
26. When re-examined and referred to the Plaintiff's title, she stated that that there is a signature by the Land Registrar. She further stated that the manual search issued by the Ministry of Lands is what she got from the records. She also stated that the objector's title is L.R No.13788 (I.R 151512) while the Plaintiff's title is L.R No.13788 (I.R 48079). She also stated that there is no objection in the reconstructed Deed file and there was an order to maintain *status quo*. The same was registered on 19th December 2018 which restrained the Defendants from interfering.

The First Defendant's Evidence

27. DW1, Joel Ashiachi Kusimba, a director of the first Defendant testified on 19th July 2021. His witness statement dated third June 2019 was adopted as part of his evidence in chief. The first Defendant's bundle of documents dated 3rd June 2019 and a further list of documents dated 16th September 2020 were produced as exhibits in this case.
28. He stated that he is the son of the late James Albert Asiachi Kusimba who died on 12th January 2005. He further stated that he is aware that by a letter dated 29th April 1982, his late father applied to the President to be allocated a residential plot in Karen and his request was approved and communicated to the Commissioner of Lands through the President's private secretary's letter dated 2nd June 1982. The then Commissioner of Lands notified his late father of the approval through his letter dated first August 1984.
29. He further stated that his late father received the Letter of Allotment dated 7th June 1985 which obligated him to communicate his acceptance and settle the sum of Kshs.338,580/= to cater for the stand premium, rent, conveyancing fees and stamp duty within 30 days. He added that on 25th June 1985, his late father communicated his acceptance and forwarded a bank slip of the required amount to the Commissioner of Lands and he was issued with a receipt.
30. He also stated that through a letter dated 28th September 1988, the Director of Surveys notified his late father that the unsurveyed plot allocated to him had been surveyed, assigned reference number L.R No.13788 and was represented on the survey plan number F/R No.189/100 and after payment



of survey fees in the sum of Kshs.1,650/=, the Director of Surveys released Deed plan number 139842 for the property known as L.R 13788 to the Commissioner of Lands.

31. DW1 stated that his late father was not able to actively follow up issuance of title as he was shot and injured by unknown gunmen on 17th August 1989 which led to a long period of hospitalization. He further stated that through the letters dated 10th May 1991 and 17th February 1982, the Commissioner of Lands demanded road charges of Kshs.340,000/=. He stated that by a letter dated 12th January 1999, his late father requested the Commissioner of lands to allow him to transfer the Letter of Allotment to DW1 which request was approved vide the letter date 10th February 1999 on condition that he paid the road charges, consent fees at the rate of 2% of the consideration or capital value, payment of outstanding land rent and rates and the government being a party to the transfer. He added that after complying, a formal transfer of the allotment was effected in his favour on 6th December 1999 but ten (10) years later, he was still not able to obtain title as the correspondence file went missing at the Ministry of lands.
32. He stated that vide his letter dated 1fourth February 2011, he requested the Commissioner of Lands to expedite issuance of title and further requested that it be issued to the first Defendant which is a company he formed to bring family members together. He added that the Commissioner of lands approved the request vide the letter dated 18th April 2012 but on condition that he was to provide the registration certificate and CR12 showing its directorship. He complied and the first Defendant was issued with a certificate of Title to the suit property by the Registrar of Titles.
33. He stated that upon issuance of the Certificate of Title, the first Defendant commissioned a private surveyor to prepare a subdivision scheme for the suit property for approval by the Nairobi City County. He added that the subdivision was approved by Nairobi City County and the Director of Survey subsequently issued nine Deed plans of the sub-plots contained in the suit property containing by measurement 0.200 ha, being L.R No.13788/1-9 with deed plan number 368210-218 and survey plan numbers (F/R)564/99. He also stated that on 17th June 2014, the first Defendant surrendered the original title for the suit property to the Registrar of Titles, applied and paid for the registration of the subdivision of the new grant detailing the nine distinct plots.
34. When he was cross-examined, he stated that he was five years old in 1982 when his late father made an application for allotment for residential purpose only. He further stated that the surrounding area has a secondary school, education center for deaf children among others. When referred to the special conditions contained in the title, he stated that condition No.2 states that there should be building plans within six (6) months. He further stated that there are some structures on the suit land, no buildings yet but there are building plans. He further stated that condition No.5 provides that the land shall be used for residential purposes and that condition No.8 provides that there shall be no subdivision without the consent of the Commissioner of Lands in writing. He stated that he has already subdivided the land. He also stated that the allottee was required to complete building within twenty four (24) months but they have not erected any building. He admitted that the allottee was to pay rent and rates and that they have been paying but they do not have receipts. When referred to the letter dated 10th May 1991 demanding payment of Kshs.340,00 within three (3) months, he stated that the said payment was made but he has no receipt. He added that rent and rates were not payable by that time as the first Defendant had not been issued with a grant.
35. He admitted that prior to his father's death in 2005, he had done an informal transfer to him on 11th December 1999 and it was effected. He was put to task on his letter dated 20th June 2019 attaching the first Defendants Certificate of registration and CR12 requesting to the Commissioner of Lands to register a title in the name of the first Defendant. He stated that the said letter was received on 27th June



2012 and the title in the name of the first Defendant was issued on 18th June 2012. He further stated that prior to his letter dated 20th June 2012, the commission did not know about the first Defendant. When referred to Special condition No.2 of the title, he stated that they have drawings but no buildings yet. He also stated that the Plaintiff sold L.R No 13788/3 to the second Defendant though he has not annexed the sale agreement in his bundle. He stated that the first Defendant lawfully transferred the same to the second Defendant. He also stated that they objected to the reconstruction of the Deed file vide the letter dated 7th October 2015. He added that subdivision of the suit land was done in 2014 and Certificates of title issued in between 2013 and 2014.

36. When re-examined, he stated that he has no control of the dates in the grant. He further stated that he complied with special condition No.2 as he submitted proposal within six (6) months together with drawings and has completed erection of sewerage system. He also stated that Nairobi city Council would not have issued them with a certificate of subdivision had they not complied.

The Third Defendant's Evidence

37. DW2, Samuel Macharia Murimi, a debt recovery manager for the third Defendant testified on 4th November 2021. His witness statement dated 21st January 2020 was adopted as part of his evidence in chief. The third Defendant's bundle of documents dated 21st January 2020 was produced as exhibits. He told the court that the second Defendant is a client to the third Defendant and he was a borrower. He added that his security is in the form of a title L.R No.13788/3 (IR No.155676) and a Charge was created over the title. He testified that the bank conducted due diligence before the charge was created by conducting a search. It was his testimony that the second Defendant has not paid off the loan advanced being Kshs.12, 700,000/= and the third Defendant will be prejudiced if the Plaintiff's claim is allowed.
38. When he was cross-examined, he stated that he has been with the third Defendant since July 2018. He added that the second Defendant was an employee of the third Defendant. He was a manager. He also stated that as per the letter of offer dated 31st July 2014 for Kshs..6, 700,000/=, the money was advanced for purchase of land and at the time, the first Defendant was the registered owner of the suit property.
39. When put to task on the conditions on the letter of offer, he stated that the valuation report of the suit land is not in the bundle, thus he cannot confirm its value in the absence of a valuation report. He stated that current rates and rent clearance certificates are not in the bundle and the cheque issued was for Kshs.15 million while the offer was for Kshs.6.7 million. He added that there is no sale agreement in the bundle. He stated that the figure could go higher in anticipation of future borrowing. He further stated that the third Defendant's Advocates are the ones who conducted the search dated 17th June 2014 but a receipt is not attached. He told the court that the suit land was sold by the first Defendant and that the sale agreement was signed by its two directors; being John shiundu and Joel Ashiachi and it was executed on 26th August 2014. He added that a consent was sought before charging the suit property but it is not in the bundle.
40. He stated that the first offer dated 23rd January 2015 was a loan for home improvement of Kshs..1.6 million and a consolidation of existing facilities but conditions of the offer letter were not met. He further stated that he is not aware if the bank instituted any case against the second Defendant directly and that he is not aware if it made a report to the Anti Banking fraud. He also stated that a charge was registered on 8th October 2014 by the lands registry and that a rates clearance certificate must be procured before a charge is registered. When referred to a replying affidavit sworn by Christine Wahome , a spouse of the second Defendant, he stated that a spousal consent was attached. He also



stated that the second Defendant did not pay the loan in full and that in default the bank would exercise its right to sell the suit property.

41. When re-examined, he stated that for an RTA title, a search is stamped on the copy of title while under the RLA, a Certificate of official search is issued. When referred to the conditions contained in the letter of offer, he stated that rates/rent clearance certificates are availed in the replying affidavit of Christine Wahome and so is the spousal consent. He also stated that the valuation was not material to the investigation of title in this court. He stated that the transfer by the first Defendant is properly executed and the bank offers credit facilities to its members of staff. He also stated that the second Defendant does not dispute the amounts disbursed and that the bank issued him with demand notices of the outstanding amount. He stated that the second charge was proper, therefore the bank is entitled to realize its security.

The Fifth Defendant's Evidence.

42. DW4, Chacha Maroa, a land registration officer testified on 4th November 2021. He adopted his undated witness statement as part of his evidence in chief. The fourth Defendant's bundle of documents filed on 29th August 2019 were produced as exhibits in this case.
43. DW4 told the court that the parcel file (I.R 48079) L.R 13788 contains reconstructed documents of 21st August, 2015 which are certificate of Title, copy of Deed Plan, Deed of Indemnity for reconstruction of a Deed file, copy of affidavit sworn by Mumo Ikui Mwenda and Vonza Kavila Mwendwa in support of the reconstruction of deed file, *caveat emptor* published in the Daily Nation of 20th July 2015 and another published in The Standard Newspaper of even date, receipt for payment and Kenya Gazette Notice No.6694 of 11th September 2015. He further stated that the Ministry of lands and physical planning issued a 60 day notice for any objection to the reconstruction of the deed file. He added that on 7th October 2015, the first Defendant wrote a letter objecting to the reconstruction of the Deed file claiming that it is the lawful owner.
44. He stated that parcel file I.R 151512 (L.R 13788) contains several correspondences in relation to the suit land to wit that the suit land was first allocated to James Albert Kusimba on 29th April, 1982 and a letter of allotment issued on 7th June 1985. He stated that the acceptance receipt in the record indicates that the Applicant paid vide cheque No.257258 being Kshs..338580 and was issued receipt number 641253 and then the suit land was issued with a number from the survey of Kenya being L.R .13788 on survey plan F/R189/100. He added that from the records, the Commissioner of Lands requested road charges vide the letter dated 10th February 1999.
45. He also stated that vide the letter dated 1fourth February, 2011, Mr. Joel Ashiachi Kusimba requested the Commissioner of Lands to register the suit land in the name of first Defendant and supplied its registration certificate and CR12. An application for registration of the new grant was lodged at the lands registry on 30th April 2013, and a certificate of title issued to the 1st Defendant. He added that there is on record a subdivision of the suit property to nine portions leading to the suit land now having nine portions being L.R 13788/1-9.
46. When he was cross-examined, he stated that he is aware that there are two titles for the same property and that the L.R No's are the same.; being (IR 48079) L.R 13788 in the name Muvokanza Limited which has a reconstructed Deed file and (IR 151512) L.R No.13788 in the name of 1st Defendant. He added that he was able to trace the parcel file for IR 151512 but unable to trace the one for I.R 48079.
47. He stated that in (IR151512), the letter of application for allotment is dated 29th April 1982 and it is addressed to the former President Daniel Arap Moi and not the ministry of lands. He further



- stated that it has a “received” stamp. He stated that the letter dated 27th June 1985 is addressed to the commissioner of lands and it is received by the office of the President and the lands department with a similar stamp.
48. He also stated that there is no plan number indicated on the letter of allotment issued on 7th June 1985 and that a Physical Development Plan is always attached to the Letter of Allotment. He stated that the letter of allotment was transferred to Joel Asiachi Kusimba being an informal transfer as it was a gift. He added that Kshs.410 was paid as stamp duty but there is no receipt. He added that Kshs.100 paid on 11th May 1999 and a further payment of khs.340,000 on even date being additional road charges.
49. He also stated that after the transfer, no subsequent letter of allotment was issued to Joel Kusimba. When referred to the letter dated 14th February 2011 and the letter dated 18th April 2012 addressed by DW1 requesting that the suit land be transferred to a company owned by his family members; the first Defendant company, he stated that the commissioner requested for the first Defendant’s CR12 and its registration certificate and Joel Kusimba attached the said documents in his letter dated 20th June 2012. He added that the certificate of incorporation is No CPR/2011/49904, and that no CR12 is attached therefore he cannot tell how many directors the first Defendant has. He further stated that the letter dated 20th June 2012 was received by the commissioner of lands on 18th June 2012.
50. When referred to the Certificate of title endorsed by the commissioner of lands on 18th June 2012, he stated that a lease was executed and that a reservation letter had been sent earlier, it is dated 6th December 2012, thus by 18th June 2012, the Commissioner of Lands had details of the first Defendant. He also stated that registration is a different department and after endorsement by the commissioner of lands, the lease was forwarded to the registration department for registration. He added that it was booked on 30th April 2013 in their department.
51. When referred to the first Defendant’s Certificate of Lease, Special condition No.9, he stated that the land was subdivided upon consent that was obtained and that at the time of subdivision, no development had been done. When referred to the Plaintiff’s title IR NO 48079 and the first Defendant’s title IR NO151512, he stated that the Plaintiff’s came first and it was not cancelled. He added the Deed file was reconstructed and it was in the Ministry of lands custody. He also stated that the first registration in time prevails. He told the court that a certificate of lease comes after the letter of allotment. He further stated that objection to reconstruction was done in file IR NO 48079 but the objection letter is not among the documents in the file. He further stated that he is not aware if the two parties were summoned but the Deed file was reconstructed on 16th March 2016 after this suit had been filed and that the Registrar has to verify ownership thus he should have heard the objection from the other party claiming IR 151512.
52. When referred to the fifth Defendant’s bundle of documents, he stated that there is nothing to show that the property was allocated to Academic Services Limited or the Plaintiff. In respect of the Plaintiff’s letter of allotment dated second August 1984, he stated that Academic Services Limited was allotted UNS.PLOT No’s Zone 24 and that L.R No.13788 was given after it had been surveyed. He added that there is no attached plan and that acceptance of the Letter of Allotment and payment was to be done within 30 days; thus Academic Services Limited had until third September 1984 to make payments. He further stated that informal transfer of allocation is done when an allottee wants to transfer to another party but before a title is issued. He added that the allottee originates the application, the transferee cannot be the one who originates. He also stated that there is a form to be filed by both parties for purposes of stamp duty.
53. He told the court that he did not get the letter of allotment dated 7th June 1985 issued to the Plaintiff in their records and has not seen the plan either. When referred to the Plaintiff’s grant of 5th September



1989, and the special conditions therein, he stated that the Plaintiff has not complied as there is no school on the ground and no plans have been submitted. He also stated that the letter of allotment to James Kusimba had a Part Development Plan annexed and is identifiable and that there is a duly executed informal transfer and stamp duty was paid. He further stated that the Plaintiff's documents existed after reconstruction and that root of title must be established. He also stated that the suit property was duly subdivided and that the second Defendant acquired plot no.3.

54. When re-examined, He stated that one cannot hold two letters of allotment as the first to be issued supersedes the other one. When referred to special condition No.2 of title granted to the first Defendant, he stated that he has not seen any building plans. He further stated that condition No.4 of the title issued to the Plaintiff provides that the land should be used for educational purposes. He added that in absence of compliance, the land would revert back without formal surrender. He stated that the grant to the Plaintiff was registered on 5th September 1989 and it ought to have complied within 6 months of that date.
55. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Written Submissions.

56. They are dated 2nd February 2022. Counsel for the Plaintiff submitted on the following issues:-
- a. Whether or not the Plaintiff has proved its case to the required standards in law, that is, on balance of probability.
 - b. Whether the Plaintiff is entitled to the prayers sought in the plaint.
 - c. Who bears cost and interest of the suit?
57. It was counsel's submission that the allotment letters dated 2nd August 1984 and 7th June 1985 related to the same plot with just a change in name of allottee which was requested by Kyale Mwendwa. He added that the allottee accepted the offer, complied with all the conditions set out in the letter of offer by making payments on 25th June 1985 and took possession of the suit plot which was surveyed and registered as L.R No.13788 (I.R 38079) in the Plaintiff's company name in 1989. He further submitted the Plaintiff's allotment letter was first in time thus it should prevail. He relied on the case of *Kamau James Njengu v Serah Wanjiru & Another* [2017] eKLR and the case of *Verakiya Investments Limited v Kenya Airports Authority & 2 Others* [2014] eKLR.
58. He submitted that at the point where the Plaintiff was issued with certificate of title dated 28th August 1989, any allotment letter in respect of the said property was extinguished and ceased to have effect. He cited the case of *Shadrack Kuria Kimani v Stephen Nganga & another* [2017] eKLR and the case of *Elisius Muranga v Andrew Mwangi Chui & 2 Others* [2015] eKLR.
59. It was also his submission that in view of Section 26(1)(b) of the *Land Registration Act, 2012*, the first Defendant's title ought to be cancelled as Plaintiff had acquired its certificate of title by the time the first Defendant conveniently got its certificate of title in June 2012. He relied on the case of *Elisius Muranga v Andrew Mwangi Chui & 2 Others* [2015] eKLR. He also submitted that the first defendant's title is not genuine because it was not acquired procedurally he pointed out that DW1 does not show how he got the land for him to transfer to the first defendant. He relied on the case of *Hubert L. Martin & 2 Others v Margaret J.Kamar & 5 Others* [2016] eKLR.
60. Counsel also submitted that the first Defendant did not prove allegations of fraud against the Plaintiff raised in its counterclaim. He added that the onus of proving the alleged fraud rests with the person



alleging as per Section 107,108 and 109 of the Evidence Act. He relied on the case of Gitwany Investment Limited v Tajmal Limited & 3 others [2006] eKLR.

61. He relied on the case of Montext Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani) HCC No.834 of 2002 and Trust bank Limited v Paramount Universal Bank Limited & 2 others [2009] eKLR to submit that the Plaintiff's averments against the second and fourth Defendants have not been denied thus they stand unchallenged since the second Defendant did not testify and the fourth Defendant failed to enter appearance or participate in the matter.
62. Counsel submitted that that the 5th Defendant's allegations that the Plaintiff's title was cancelled and then subsequently issued to the Plaintiff is untrue and if that was the case, then due process was not followed and there was no court order obtained to cancel the Plaintiff's title. He relied on the case of Republic v Registrar of Titles Nairobi & Another Ex parte Mercy Muthoni Mbuba & 2 Others [2012] eKLR and the case of Vekariya Investments Limited v Kenya Airports Authority & 2 others [2014] eKLR. He added that the Plaintiff has proved its case as envisaged under Sections 107,108 and 109 of the Evidence Act and forward the case of Peter Ndungunya Ole Sono & 2 others v Lands Limited & another [2019] eKLR.

The First Defendant's Submissions

63. They are dated 7th March 2022. Counsel for the first Defendant submitted that the issues below fall for determination:-
 - a) Whether Academic Services Limited held a valid interest over L.R No.13788.
 - b) Whether the reconstruction of the land register on 16th March, 2016 at the behest of the Plaintiff was valid.
 - c) Was academic Services Limited and the Plaintiff allocated L.R No.13788?
 - d) Whether the transfer of allocation of the suit property from Academic Services Limited to the Plaintiff was validly effected.
 - e) Is the Plaintiff in breach of special conditions number 2 and 4 of the grant? If so, did the term herein lapse under special condition number 5?
 - f) Has the first Defendant demonstrated that it holds a valid interest over L.R No.13788?
64. It was counsel for the first Defendant's submission that given that no payment by Academic Services Limited within 30 days as provided in the alleged letter of allotment issued on 2nd August, 1984, was made, then the terms, conditions and offer therein contained stood revoked effective 3rd September,1984 thus the purported transfer of its allocation to the Plaintiff in 1985 long after the offer contained in the alleged letter of is void. He relied on the case of Wreck Motors Enterprises v The Commissioner of Lands & 3 others Civil Appeal No.71 of 1997, the case of Joseph Arap Ng'ok v Justice Moiwo Ole Keiwua [1977] eKLR and the case of Mary Mukami Kariithi v Dentonpak Agencies Limited & 2 others [2021] eKLR.
65. It was also his submission that the purported reconstruction of records under Section 33 of the Land Registration Act at the behest of the Plaintiff on 16th March 2016 was illegal given that the first Defendant's objection was never considered. He added that the status quo order issued on 21st December 2015 and extended on 10th February, 2016 froze all manner of transactions including reconstruction of the land register in relation to the suit property and it was in force on 16th March,



- 2016 when the purported reconstruction was done thus it is a nullity. He relied on the case of *Republic v Chief Land Registrar & 2 others ex parte Kihiumwiri Farmers Company Limited* [2015] eKLR.
66. Counsel submitted that no material has been placed to demonstrate that the parcel described in the alleged letters of allotment issued to the Plaintiff and dated 7th June 1985 and Academic Services Limited dated 2nd August 1984 refer to one and the same parcel as L.R No.13788 as they are not accompanied with a Physical Development Plan. He relied on the case of *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR.
67. He further submitted that a company such as Academic Services Limited operates through formal resolutions thus its purported transfer to the Plaintiff is null in the absence of a resolution. He relied on the case of *Stephen Kirimi Ringera v David Mwiraria & 2 others* [2016] eKLR.
68. It was his submission that the Plaintiff is in breach of special conditions 2 and 4 of the grant which envisaged that a school would be established on the suit property within 24 months of registration of the grant and as such, the land would automatically revert back to the government. He relied on the case of *Visa Oshwal Community & Another v Attorney General & 3 others* [2019] eKLR.
69. Counsel cited the case of Richard Kipkemoi Limo v Hassa Kipkemboi & 4 others to submit that the first Defendant had demonstrated that it holds a valid interest over L.R No.13788 and that it did not matter that the purported grant held by the Plaintiff was issued in 1989 since the law does not protect a title that has been issued illegally and unprocedurally. He put forward the case of *Kamau James Njendu v Serah Wanjiru & Another* [2018] eKLR.

The Second Defendant's Submissions

70. They are dated 4th March 2022. Counsel for the second Defendant addressed the following issues:-
- a. Whether the Plaintiff has demonstrated it has valid and or legal interest over the suit property?
 - b. Whether the first Defendant has demonstrated that it acquired and or has valid interest over the suit property?
 - c. Whether the second Defendant acquired valid interest from the Defendants?
 - d. What orders should the courts issue?
71. It was submitted by counsel for the second Defendant that the lack of Physical Development Plan accompanying the alleged allotment letters issued to Academic Services Limited and to the Plaintiff clearly identifying the land allocated makes the alleged interest thereto invalid. He relied on the case of *Nelson Kazungu Chai & 9 others v Pwani University College*(*supra*)

The Third and Fourth Defendant's Submissions.

72. They are dated fourth March 2022. Counsel for the third and fourth Defendants submitted that the following issues fall for determination by this court;
- a. Who is lawfully registered owner of the title Land Reference Number 13788?
 - b. Whether the Plaintiff is entitled to the prayers sought in the plaint?
 - c. Who bears the costs of this suit?
73. Counsel relied on the case of *Munyu Maina v Hiram Gathiba Maina* Civil Appeal No.239 of 2009 and the case of *Hubert L Martin & 2 others v Margaret J Kamar & 5 others* [2016] eKLR to submit that when a court is faced with a case of 2 or more titles issued over the same property, it is obligated



to investigate the root title and processes and procedures that brought forth the two titles and uphold the one that conforms to the procedure. He added that the first Defendant's paper trail evidence is proper while in contrast, the Plaintiff has provided distorted, unclear and /or opaque background of how he acquired his title.

The Fifth Defendant's Submissions.

74. They are dated third March 2022. Counsel for the 5th Defendant submitted that the following issues arise for determination:-
- a. Was the Plaintiff allocated the suit land?
 - b. Was the second Defendant allocated the suit land?
 - c. Costs of the suit.
75. It was counsel's submission that while the Plaintiff produced an allotment letter of 2nd August 1984 in relation to uns.plot No. Zone 24 issued to Academic Services Limited, the said letter did not contain any development plan upon which the allocation was made as it does not explain the relevance with L.R 11641 which the Plaintiff applied to be allocated. He added that a Part Development Plan is the advisory upon which any allocation of land is premised and hence the document that must be prepared to advise allocation thus in its absence, the Plaintiff could not have obtained a genuine and lawful allocation at all. He cited the case of *Moses Okatch Owuor & another v Attorney General & another* [2017] eKLR.
76. Counsel also submitted that in the absence of compliance with terms of the allotment letter, there could be no proper process of obtaining a grant if any. He added that there is no evidence that the Plaintiff accepted allotment and paid requisite stand premium within 30 days of offer. He relied on the case of *Joseph Kamau Muhoro v Attorney General & another* [2021] eKLR.
77. I have considered the pleadings and the evidence on record. I have also considered the written submission and the authorities cited. In my view the issues for determination are:-
- i. Was the right procedure for alienating the suit property to the Plaintiff and to the first Defendant followed?
 - ii. Do the allotment letters issued to Academic Services Limited and to the Plaintiff refer to the suit land?
 - iii. Was re-construction of (I.R 48079) I.R 13788 regular?
 - iv. Who owns the suit land?
 - v. Is the Plaintiff entitled to the reliefs sought?
 - vi. Whether the first Defendant has proved its prayers in the counterclaim.
 - vii. Who should pay costs of this suit?
78. PW2, Mumo Mwendwa told the court that, Academic Services Limited applied for land in Karen on 5th March 1982. It received a response through a letter dated 14th May 1982 in which it was allocated five acres. It was issued with a Letter of Allotment dated 21st August 1984 in which it was allocated unsurveyed plot in Zone 24 in the name of Academic Services Limited. They requested for a change to the Plaintiff's name and a reduction of the rates. A Letter of Allotment dated 7th June 1985 was issued in the name of the Plaintiff and they made payments.



79. It is his case that Academic Services Limited applied for twenty (20) hectares of land in L.R 11641 Karen. The Letter of Allotment issued to Academic Services Limited for unsurveyed Plot in zone 24 did not contain a part development plan. PW1 did not produce the part development plan to identify the parcel of land which was allocated on 2nd August 1984.
80. PW2 further stated that its title was issued on 28th August 1989 with effect from 2nd August 1984. He stated that the Plaintiff has never disposed the suit property or parted with possession. He stated that in 2012, the Deed File was not available in the Lands Registry. They applied for reconstruction of the file and the same was reconstructed. It was his case that the Plaintiff has been paying rates for the suit property and that suit property has never been subdivided. It was his case that in the year 2015, the fourth defendant wanted to auction the suit property on instruction of the third Defendant who was foreclosing on the second Defendant.
81. It is not clear how L.R No 11641 became unsurveyed plot No Zone 24. In the absence of a Part Development Plan, the plot allocated to the Plaintiff was not identifiable at that point. PW2 could not confirm if the Plaintiff paid Kshs.285,923/30 within 30 days as stated in the Letter of Allotment dated second August 1984. The Plaintiff filed a letter dated 30th August 1984 addressed to the Commissioner of Lands by Academic Services Limited protesting against the prescribed annual rent, in the said Letter of Allotment and requesting for an additional sixty (60) days to effect payment. Nothing was however produced in evidence to show that the said letter was received by the Commissioner of Lands or that the Commissioner of Lands acceded to the request. It is on record that Academic Services Limited never applied or requested the Commissioner of Lands to effect a change of allocation to the Plaintiff. It is the Plaintiff which requested for the change of the allocation. The Letter of Allotment dated 7th June 1985 issued to the Plaintiff identifies the plot as unsurveyed plot. It refers to an attached plan number 113098/1 but the plan was not filed or produced before this court. The Plaintiff now holds title being L.R No 13788 (IR No 48079) issued on 28th August 1989.
82. The first Defendant on the other hand averred that L.R No 13788 was originally allocated to James A. Kusimba through a Letter of Allotment dated 7th June 1985. He complied with the conditions therein being communication of acceptance and payment of the requisite amount on second July 1985 which was within thirty (30) days as required. Through an informal transfer executed by the original allottee Joel Ashiachi Kusimba and the Commissioner of Lands on 6th December 1999, the suit property was transferred to Joel A. Kusimba now a director of the first Defendant on 17th February 2011, the grant no (IR 151512) L.R No 13788 was issued in the first Defendant's name and registered on 13th April 2013.
83. This was confirmed by DW4 Chacha Maroa, the Chief Land Registration Officer in the office of the Chief Land Registrar. He also confirmed that the suit property has been subdivided into nine (9) parcels being L.R NO 13788/1 to L.R NO 73788/9. It was his evidence that from there, there are no records held at the Land Registry to show that the suit property was allocated to Academic Services Limited and subsequently to the Plaintiff.
84. From the foregoing, the evidence of DW1, was not controverted and it was confirmed by the 5th Defendant's witness (DW4). PW1 Gildine Gatwiri Karani, Land Registrar from the Chief Land Registrar's Office, admitted on cross examination that the Plaintiff applied for reconstruction and supplied the documents. She stated that she could not vouch for the authenticity of the said documents. She also admitted that the Deed File was reconstructed despite the objection by the first Defendant dated 7th October 2015. The reconstruction of the Deed File was therefore irregular. She also stated that the title acquired by the Plaintiff was by way of New Grant.



85. DW4, told the court there was a reconstruction of the Deed File in respect of (IR No 48079) L.R No 13788. He brought to court the Deed File for (IR No 151512) L.R No. 13788.

86. From the foregoing, I find that the title to the first Defendant is traceable to the Letter of Allotment issued to James Albert A Kusimba. I find that the title issued to the first Defendant on the 18th June 2012 was lawful. In the case of *Hurbert L. Martin & 2 Others vs Margaret J Kamar & 5 Others* [2016] eKLR it was held:-

“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. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

87. The title issued to the first Defendant seems to have followed the proper process before it was issued. In the case of *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR the Court of Appeal that:

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

I am guided by the above authorities in finding that the first Defendant's title was acquired procedurally. I find it is the owner of the suit property.

88. Having stated the reasons why in my view the Plaintiff is not the owner of the suit property, it is not entitled to the reliefs sought in the Plaint. In the case of *Wreck Motors Enterprises vs the Commissioner of Lands & 3 Others* Civil Appeal No 71 of 1997, the Court of Appeal held as follows:-

“Title to landed property normally comes into existence after issuance of letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held”.

The letter dated 30th August 1984 by the Plaintiff seeking extension to comply with conditions in the Letter of Allotment confirms that it knew the effect of non compliance with the conditions in the Letter of Allotment.

89. I find that the Plaintiff has failed to prove its case against the Defendants on a balance of probabilities. In conclusion, the Plaintiff's suit is dismissed as it was unable to prove that the title held by the first Defendant was acquired unprocedurally.

90. The first Defendant's title was acquired procedurally. The Chief Land Registrar tendered the documents to demonstrate that the first Defendant complied with all due processes and the historical



record in support of the said title. I find that the first Defendant had a good title to pass to the second Defendant. Section 26(1) of the Land Registration Act, 2012 provides that:-

- “(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.”

91. Accordingly, the Plaintiff suit is hereby dismissed. The first Defendant’s counterclaim succeeds. I enter Judgment on its favour as follows:-

- a. That a declaration be and is hereby issued that the property known as L.R No.13788(Grant No.I.R 48079/1) was lawfully allocated to the 1st Defendant’s predecessor in title on 7th June,1985 and was therefore not available for allocation to any other person.
- b. That a mandatory injunction be and is hereby issued compelling the Registrar of Titles to annul or cancel the purported registration of the property known as L.R No.13788(grant No.48079/1) in the name of the Plaintiff company.
- c. A permanent injunction be and is hereby issued restraining the Plaintiff by itself, its agents or servants from interfering with the second Defendant’s ownership and possession of the property known as Land Reference No.13788(I.R No.48079/1.)
- d. Costs of the suit and interest.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 21ST DAY OF JULY 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Omondi advocate for the Plaintiff

Mr. Rapando advocate for the 1st Defendant

Mr. Awuor advocate for the 2nd Defendant

Mr. W. Akello advocate for the 3rd and 4th Defendants

No appearance for the 5th Defendant

Steve - Court Assistant

