



Ogondo (Suing as the administratrices of Salmon Ndolo Obode) v Kenya Railways Corporation; National Land Commission & 3 others (Defendant) (Environment & Land Case 813 of 2015) [2022] KEELC 13367 (KLR) (30 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13367 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 813 OF 2015
A OMBWAYO, J
SEPTEMBER 30, 2022**

BETWEEN

**JULIA KEMUNTO OGONDO AND MARGARET MORARA MAINYA
NDALO PLAINTIFF**

SUING AS THE ADMINISTRATRICES OF SALMON NDOLO OBODE

AND

KENYA RAILWAYS CORPORATION DEFENDANT

AND

NATIONAL LAND COMMISSION DEFENDANT

MASENO UNIVERSITY DEFENDANT

MAYEAIR HOLDINGS LTD DEFENDANT

REGISTERED TRUSTEES - REDEEMED GOSPEL CHURCH DEFENDANT

JUDGMENT

1. This suit was initiated by Salmon Ndalo Obode who later passed on and was substituted by Julia Kemunto Ogondo and Margaret Morara Mainya as the administratrices of the estate of the deceased. The Defendant Kenya Railways Corporation filed a defence but thereafter amended the defence and brought in a counter claim enjoining the Attorney General, Maseno University, Mayfair Holding Ltd, Redeemed Gospel Church as the 1st, 2nd, 3rd and 4th Defendants to the Counter Claim.
2. The Plaintiff claim was that he was the registered proprietor of a parcel of land known as Kisumu/ Municipality/Block 7/384 measuring 0.404 Ha and situate within Kisumu City and bordering the defendant's land amongst others. That in August 2003 the defendant trespassed into the plaintiff land and prevented the plaintiff from developing the land. The plaintiff sought the remedy of a permanent



injunction restraining the defendant by itself, its servants, agents and employees from trespassing onto the plaintiff's land known as Kisumu/Municipality Block 7/384 and from interfering with the plaintiff's development of the same.

3. In a further and further amended statement of Defence and Counter claim, the defendant states that the parcel of land known as Kisumu Municipality/Block 7/384 forms part of what was Kisumu Municipality Block 7/365 formerly IR NO 23354 and Land Reference number 1144/1184 and first registered in the name of East African Railways Corporation, itself the precursor of the present corporation.
4. The defendant asserts that parcel Number Kisumu/ Municipality Block7/ 365 was properly vested in the corporation by the operation of the Kenya Railways Corporation (Vesting of Land) Order, 1986 contained in Legal Notice No 24 of 1986, which revoked the Kenya Vesting of Land Regulations, 1963 (L/N 440/1963). From Plot Kisumu/ Municipality Block7/ 365 there has been created six titles, namely Kisumu Municipality/Block 7/384, Kisumu Municipality/Block 7/385, Kisumu Municipality/Block 7/407, Kisumu Municipality/Block 7/546, Kisumu Municipality/Block 7/547, and Kisumu Municipality/Block 7/548 in circumstances undertaken without the knowledge, consent or participation of the corporation and therefore by fraudulent and illegal means. The titles purportedly created are therefore void and of no legal effect and it is the intention of the corporation to institute against the holders of all these titles with a view to recovering from them possession thereof all of the parts of plot Kisumu/ Municipality Block7/ 365 irregularly and illegally acquired.
5. Whereas the records and maps kept by the National Land Commission at Ardhi House, Nairobi demonstrate unequivocally that the suit property is situate on part of Plot Kisumu/ Municipality Block7/ 365, no records thereat can show the genesis of the aforementioned plots from plot Kisumu/ Municipality Block7/ 365 with the knowledge, consent and participation of the corporation. In view of the foregoing the plaintiff has not acquired proper title to the suit parcel.
6. The defendant states that the plaintiff is constructing on the suit property commercial premises comprising several small rental units apparently for the purposes of leasing out the same to members of the public and it is likely that the plaintiff shall continue with construction and development thereon and may in the purported exercise of proprietary rights subdivide, lease or mortgage the suit property all of which will further alienates the same from the defendant. The defendant contends that the plaintiff's action being predicated upon its purported rights acquired over the suit lands renders its claim untenable and bad in law.
7. The actions of the plaintiff amount to a trespass upon the defendant's land for which the defendant seeks against it damages for trespass and for the loss of mesne profits.
8. The defendant laments that sometimes between the years 1983 and 1998 and in circumstances undertaken without the knowledge, consent or participation of the defendant and therefore by fraudulent and illegal means the 1st defendant to the counterclaim created from plot Kisumu/ Municipality Block7/ 365 by excising therefrom six portions of land.
9. The portions became the subjects of letters of allotment issued by the 1st defendant to the counterclaim either directly to the Late Salmon Ndalo Obede plaintiff and to the 2nd, 3rd and 4th defendants to the counterclaim and to two other persons yet unknown who shall be joined to the counterclaim upon revelation of their identities by the process of discovery (the two other unidentified persons) or to unknown third parties who thereafter assigned their interests to the plaintiff and to the 2nd, 3rd and 4th defendants to the counterclaim respectively and the two other unidentified persons and in respect of which the titles namely Kisumu Municipality/Block 7/384, Kisumu Municipality/Block 7/385,



Kisumu Municipality/Block 7/407, Kisumu Municipality/Block 7/546, Kisumu Municipality/Block 7/547, and Kisumu Municipality/Block 7/548 were created. The portions excised and the titles purportedly created (hereinafter collectively “the suit lands” are therefore creatures of fraud and thus void and of no legal effect.

10. The defendant prays that the Plaintiff’s suit against it be dismissed with costs and prays for the entry of judgment on the terms that a permanent injunction be issued to restrain the plaintiff and the 2nd, 3rd and 4th defendants to the counterclaim respectively and the two other unidentified persons registered as the proprietors of Kisumu Municipality/Block 7/546 and Kisumu Municipality/Block 7/548 either by themselves or through their agents or servants from entering onto the suit property and the suit lands, from purporting to collect rent from or destrain for rent against the occupants thereof and from transferring, leasing, charging or otherwise howsoever alienating the suit property and the suit lands.
11. Moreover, a declaration of a constructive trust of the proprietary interest in the suit property and the suit lands in favour of the defendant and an order that a transfer of the titles comprising the same be duly executed and registered in favour of the defendant either by the plaintiff and the 2nd, 3rd and 4th defendants to the counter claim respectively and the two other unidentified persons registered as the proprietors of Kisumu Municipality/Block 7/546 and Kisumu Municipality/Block 7/548 or in their default by the deputy registrar of the High Court of Kenya.
12. Furthermore, against the plaintiff and the 2nd, 3rd and 4th defendants to the counterclaim respectively and the two other unidentified persons registered as the proprietors of Kisumu Municipality/Block 7/546 and Kisumu Municipality/Block 7/548 for damages for trespass and for the loss of mesne profits.
13. Last but not least, for the costs suit and of the counter claim both party and party and at advocate and client together with interest thereon from the date of the institution hereof and until payment thereof in full and any other or further award as the court may deem just and convenient to make.
14. In answer to the counter claim the Plaintiffs states that he is a stranger to allegation that the execution of the land was done without the defendants knowledge, consent or participation but add that such knowledge was not necessary on the basis that the land all along belonged to the East Africa Railways Corporation till 1977 when the East African Corporation collapsed and the said Corporation ceased to exist. By the East African Community Mediation Agreement 1984 the land in question was divided and vested in the government of the Republic of Kenya. In its sole discretion as the sole registered owner of all the land received by the dissolution of the East African community the Government of the Republic of Kenya through the commissioner of lands developed a part development plan number 280 Ref No NBI/9/83/1 which excised the land now comprised in titles numbers Kisumu Municipality/ block 7/407, 7/384, 7/385 and marked as CB & A respectively. The said parcels of land were then respectively allocated to Thabiti Finance Company, Central Bank of Kenya and the Kenya National Assurance Co Ltd for development.
15. The plaintiff contends that the suit parcels of land had thus by the year 1986 been alienated and were thus unavailable for vesting by the vesting order contained in the Legal Notice No 24 dated 22/2/1986. By own design and with arrangement between the commissioner of lands and the central bank of Kenya, the Central bank of Kenya surrendered its interests in the allocation and the plaintiff was thus allocated the said parcel for valuable consideration which was followed regularly with a registration under the [Registered Land Act](#) as a trust registration.
16. The plaintiff further pleads that as drafted and filed the fraud alleged could only be as against the 1st defendant to the counter claim but not the plaintiff and that therefore the counter claim reveals no reasonable cause against the plaintiff.



17. The plaintiff admits that upon being allocated and registered as the proprietor of the suit land, it in terms of the conditions of the allotment and lease took possession and has constructed a shopping mall upon the premises at astronomical costs and expenses and has improved the value of the property to a costs of Kshs 80,000,000/= for which it would seek compensation in the event that the government through the 1st defendant would be keen to renege on the plaintiff's title. The plaintiff otherwise denied being in trespass upon the defendant's property and reiterate that he is in possession and occupation of the premises as of right and being the first registered proprietor thereof.
18. The plaintiff, pleads and avers that the equity of trust like all other equitable remedies and claims follow the law and cannot challenge the law and further that at the time of vesting in 1986, the land having been excised and parcelled out was not available to the government to vest to the defendant and that this counter claim is clearly a vexation and an abuse of the process of the court as equity is being called upon to override the provisions of sections 143 Cap 300.
19. The plaintiff therefore denies the particulars of trust and avers that the defendant cannot force the vesting of the title in its name when the suit parcel of land was not available for vesting at material time.
20. The plaintiff prays that the counter claim be dismissed with costs and Judgment entered for the plaintiff against the defendant as prayed in the plaint and in the alternative the plaintiff be compensated by the 1st Defendant in the event of success of counter claim to the full market value of the suit land.
21. The 1st Defendant initially was the Attorney General but the pleadings were amended to substitute the Attorney General with the National Land Commission. The Attorney General denied the allegation in the counter-claim and emphasised that the action taken by the Commissioner of Lands regarding Kisumu Municipality Block 7/365 and other suit parcels was lawful, procedural and free of any irregularities.
22. The Second defendant on his part denies the allegation in the defence and counter claim and states that he is the proprietor of the suit parcel number Kisumu Municipality/Block 7/385 and that the same was acquired by way of purchase without notice of any fraud, illegality or irregularity. He denies any irregularity, wrong doing or fraud. The 2nd Defendant avers that he purchased the land for value from Kenya National Assurance Company Ltd who had been allocated and registered as proprietors of the suit land. The 2nd Defendant avers that the suit is time barred and that the titles have been in existence for over 20 years.
23. The 3rd Defendant to the counter claim states that it is a stranger to the allegations that the excision of the suit land was done without the defendant's knowledge, consent or concurrence and note that such knowledge was never necessary on the basis that the land all along belonged to the East Africa Railways Corporation till 1977 when the East African Corporation collapsed and the said Corporation ceased to exist. By the East African Community Mediation Agreement 1984 the land in question was allocated and vested in the government of the Republic of Kenya upon the collapse of East African Community in the year 1977.
24. In its sole discretion as the sole registered owner of all the land received by the dissolution of the East African Community the Government of the Republic of Kenya through the Commissioner of Lands developed a part development plan number Kisumu Municipality/Block 7/407, 7/384, 7/385 and marked as CB & A respectively. The said parcels of land were then respectively allocated to Thabiti Finance Company, Central Bank of Kenya Ltd and the Kenya National Assurance Co. Ltd for development. The suit parcels of land had thus by the year 1986 been alienated and was thus unavailable for vesting by the vesting order of that year.



25. By a first legal charge the said Thabiti Finance Company Ltd offered the suit property to National Bank of Kenya limited, defaulted on its obligations to pay as a consequence whereof the said bank exercised its statutory power of sale by a publicly conducted auction at which sale the defendant emerged the highest bidder and thus bought the property for very valuable consideration and pleads that it holds the title as a bona fide purchaser for valuable consideration whose title is incapable of defeat on facts alleged by the counter-claimant.
26. She reiterates that by virtue of the assignment of the land for the East African Railways Corporation to the said Government of Kenya the said Government in effect received a surrender of the Lease and by such surrender retained the rights to alienate the same as alienated government land which it did to the said Thabiti and the defendant has no locus standi to question the alienation and denies fraud and further pleads that as drafted and filed the fraud alleged could only be as against the 1st defendant to the counter claim but not the 3rd defendant to the counter claim and that therefore the counter claim reveals no reasonable cause against the 3rd defendant to the counter-claim.
27. She admits that upon purchasing the land and getting registered as the proprietor of the suit land, it, in terms of the conditions of the lease took possession and has had building plans drawn and approved at astronomical costs and expenses and has improved the value of the property for which it would seek compensation in the event that the government through the 1st defendant would be keen to renege on the 3rd defendant to the counter-claim's title. The defendant to the counter-claim otherwise denied being in trespass upon the defendant's property and reiterates that he is in possession and occupation of the premises as of right and being a successor to the first registered proprietor.
28. She pleads that the equity of trust like all other equitable remedies and claims follow the law and cannot challenge the law and further that at the time of vesting in 1986, the land having been excised and parcelled out was not available to the government to vest to the defendant and that this counter claim is clearly a vexation and an abuse of the process of the court as equity is being called upon to override the provisions of sections 143 Cap 300 and therefore denies the particulars of trust pleaded at paragraph 19 of the counter claim and put the defendant to strict proof thereof and avers that the defendant cannot force the vesting of the title in its name when the suit parcel of land was not available for vesting at material time. The 3rd defendant prays for dismissal of counter claim and in the alternative that he be compensated by the 1st Defendant.
29. The 4th Defendant in counter-claim on her part denies the allegation by the defendant in toto and avers that the suit is statute barred. The 4th Defendant avers that the suit property was properly acquired and that there was no fraud, illegality or irregularity. The 4th Defendant purchased the suit land from Wilco Developers Company Ltd and Roca Supplies Ltd who were the registered proprietors. Moreover, that the titles have existed for more than 18 years prior to the transfer and that there is no provision for the suit property for being declared being held in that for the Defendant. She prays that the suit be dismissed with costs.

Evidence on Record

30. When the matter came up for hearing on October 25, 2018, Margaret Morara Many Ndalo testified that Salmon Ndalo Obode was her husband. He died on July 31, 2012 after filing the suit in 2003. Upon the death of her husband, she took out letters of administration in the High Court of Kenya at Nakuru case No 213 of 2012. She took out the letters with her co-wife Julia Kemunto Ogondo. Later, Julia gave her a written authority to testify. However, she acknowledge that George Opande was the one in charge of the property that had more than 800 tenants. George Opande,



31. PW2, George Opande testified that he was a Lecturer at Maseno University and also a research scientist at the said Institute. PW1 was his auntie and widow of the deceased plaintiff. According to PW2, the deceased owned Kisumu/Municipality/Block 7/384. He produced a copy of the certificate of lease. He had applied for allocation of the plot on the June 22, 1992 in writing to the Commissioner of lands and the application was approved then by the President Moi on June 30, 1992. A letter of allotment was issued to the deceased on July 15, 1992 at Kshs 282,220 was paid as the acceptance fees and a certificate of lease was issued. The deceased developed the plot by constructing shops and offices and had let them out to business people.
32. On cross-examination by Mr Mweisigwa learned counsel for the Defendant, he states that he does not know the mother parcel of land from which the suit land was excised. He however, agreed that the land initially belonged to East African Railways Corporation after the collapse of the East African Community. He agreed that by the time the PDP was approved, the land had not vested in the Government of Kenya.
33. PW3, Robert Simiyu , a land administration officer Minister of lands stated that the deceased plaintiff duly applied for allocation, he was issued with allotment letter after approval by the President. He accepted the offer in the allotment letter and paid the allotment fee. A lease was prepared after the RIM was received. A Physical Development Plan had been prepared as required by law. On cross-examination he states that he did not have the Physical Development Plan for Kisumu/Municipality/Block 7/365 that was owned by the Government of Kenya and not Kenya Railways. He confirms that Kisumu/Municipality/Block 7/365 was registered in the names of East African Railway Corporation as of 1970. He does not know how the plot moved from East African Railway to the Government of Kenya.
34. The Defendant called Geoffrey Wekesa Nyongesa a Senior Cartographer and the author of the statement filed on March 9, 2020, which was adopted as evidence in chief. He also produced a list of documents that were marked as DEX 1-DEX5. On cross-examination of counsel for plaintiff and defendants to counter claim, he states that the East African Community was dissolved in 1977. The land was vested in the Government of Kenya on behalf of the Kenya Railways Corporation until on February 22, 1986 vide the Kenya Railways Corporation (Vesting of Land) Order , 1986 contained in Legal notice no 24 of 1986 which revoked the Kenya Vesting of Land Regulations, 1963(L/N 440/1963). The land was vested in Kenya Railways. He does not know how the plaintiff and defendant in the counter-claim got registered as proprietors.
35. The 3rd Defendant to the Counter Claim called Francis Mbanda who states that he is a Finance Manager of the 3rd Defendant to the Counter claim and conversant with the facts of the case. That there was a newspaper advertisement in the Daily nation of May 19, 2003 by Garam Investments for the sale of public auction scheduled for June 5, 2003 of various parcels of land within Kisumu Municipality then. That the 3rd Defendant to the counter claim attended and bided and was declared the highest bidder at Kenya Shillings Three Million Four Hundred and Fifty Thousand (Kshs 3,450,000/=).
36. The said amount was paid and memorandum of sale together with the certificate of sale was issued to the 3rd Defendant to the counter claim by the auctioneer.
37. He then organised for the payments of all statutory payments required for the transfer of the same into the name of the 3rd Defendant to the counter claim as evidenced in the documents annexed in the list of documents filed on August 18, 2010. He followed payments of land rents and land rates before transfer of the same into the name of the 3rd Defendant to the counter claim.



38. The parcel of land was duly sold by public auction on June 5, 2003 by the chargee and legally transferred to the 3rd Defendant to the counter claim with no notice of any defect whatsoever and a clean title handed to the Mayfair Holding Ltd.
39. The claim by the Defendant to the main suit is thus frivolous and has no basis whatsoever and ought to be dismissed with costs. He relied on the documents filed on August 18, 2010 in support of the 3rd Defendant to the Counter-claim herein. He produced a list of documents that were admitted as exhibits. The 1st Defendant did not call any evidence. The 3rd Defendant relied on the evidence on record.
40. The 2nd Defendant called Joy Akoth Akinyi the legal officer at Maseno University who states that the 2nd Defendant to the counterclaim is the proprietor of land parcel number Kisumu/Municipality/Block 7/385.
41. That the 2nd Defendant to the counter claim is a purchaser for value and had purchased the above land parcels from Kenya National Assurance Company Limited who had been allocated and registered as the proprietors of the suit land parcel and who had taken up the lease in terms of the conditions of the allotment and lease.
42. That the 2nd Defendant to the counter claim was dully allocated parcel number Kisumu/Municipality/Block 7/385 and complied with all the conditions set for purposes of acquiring the lease certificate.
43. That the lease certificate was issued after due process and the 2nd defendant became the duly registered proprietor of land parcel number Kisumu/Municipality/Block 7/385.
44. On cross-examination she states that Block 7/385, had a building with 10 storeys High. The Maseno University pays land rent to the County Government to the County Government.
45. The 4th Defendant to the counter claim called Bishop Jackton Mark Kegohi who states that the church wanted to buy some property where it could put up a church building for its members in town.
46. That towards the end of the year 2006, they found a company with land parcel number Kisumu/Municipality/Block 7/547 measuring 0.1033 hectares and after conducting diligent search and verification of the documents the church decided to purchase the said land parcel at Kshs. 1,850,000/-. That at the time of purchase, the said land was in the name of Wilco Developers Company Limited and it had original grant from the government.

He states that after the purchase of the said land parcel, they paid all the relevant monies required and the property was transferred into the name of the registered trustees of the church and they are still having a valid title to-date.
47. That they are innocent purchasers for value without any notice about third party claim on the said land parcel. That the church has been brought in this case without any basis since the property was purchased from someone who had been allotted the same by the government and there has been no objection ever since concerning the change of ownership.
48. That they have tried several times to work on the said land but there has been harassment from the agents of the Defendant. That again in the year 2007, the church bought another land parcel from Roca Suppliers Limited that is land parcel number Kisumu/Municipality/Block 7/546 at Kshs 1,220,000/- which was meant to put up structure for the church.



49. That before the purchase of the said land parcel, a search was conducted and it was confirmed that the land belong to the vendor. That in all these transactions, the church participated innocently as a purchaser for value without any notice of claim by a third party.
50. That they have paid a lot of money for the said parcels of land and the church stand to suffer great loss in the event that the Defendant claim is allowed.

He prayed that the defendant claim be dismissed with cost as the land parcels were legally and procedurally sold and transferred to the church.

Submissions

51. The gravamen of the plaintiff's submissions is that he has demonstrated that he was allocated an un-surveyed land within Kisumu Municipality. He submits that it is from the exhibit produced by PW2 that the land originally belonged to East African Railways and Harbours and in 1977 was vested in the Government of Kenya through the Mediation Agreement produced as Exhibit P-9 produced by PW2. The PDP produced as Exhibit P-10 was done amending the previous PDP of 1908 when the land still belonged to the Government of Kenya and not the defendant. The certificate of lease was then issued in the names of the plaintiff after following due process as per Chapter 280 Laws of Kenya. The plaintiff submits that the defence has alleged fraud and breach of trust on the part of the plaintiff and the 1st Defendant to the counter Claim (the Ministry of Lands) but have offered no evidence to support such allegations as required in law. The courts have held this position in many cases on standard to be applied when one alleges fraud.
52. The law is clear on standard of proof required when one pleads fraud in civil pleadings. It must be above a balance of probabilities but below beyond reasonable doubt.
53. The plaintiff submits that the legal effects of Legal Notices 440 dated July 12, 1963 by Governor Malcom Mac Donald and Legal Notice No 24 of February 22, 1986 by AK Magugu Minister for Transport and Communication vested alienated crown land or Trust land to East African Railways and Harbours for in the properties used for the administration and control of the services provided by the Administration (of East African Railways and Harbours), Railway lines (including marshalling yards and sidings), Railway station, Workshops and training schools, The operation of ports and harbours including the berths, wharves, piers, jetties, and other installations comprised therein, The navigation of vessels and aids thereto in respect of any port or harbour. That the legal Notice 24 of February 12, 1986 repealed the said The Kenya (Vesting of Land) Order, 1986. The Kenya Railways Corporation (Vesting of Land) Order, 1986 vested the following of land:-
 - a. Premises used for the administration and control of the services provided by the Administration (of Kenya railways Corporation).
 - b. Railway lines (including marshalling yards and sidings).
 - c. Railway station
 - d. Workshops and training schools.
54. That the import of this is that prior to 1963 Crown Land and Trust Lands were vested on the East African Railways and Harbours and when the East African Community collapsed the member states forming the entity executed a legal document referred to as East African Community Mediation



Agreement in 1984 which was reduced into various laws in the respective countries with Kenya enacting the [East African Community Mediation Agreement Act 1987](#), provided at Section 4 that:-

“ 4. (1) All the assets which, immediately before the commencement of this Act, were vested in the former Community by the Treaty and which were allocated to Kenya under the Agreement are hereby vested in the Government of Kenya.

55. In this case the lands owned by East African Community reverted back to the government and hence became public land to be dealt with accordance with the laws of the particular country. It is in 1986 that the government made regulations to transfer parcels of land back to Kenya Railways Corporation. It is thus clear that from 1977 to February 12, 1986 those lands became public land and were available for allocation. As regards the 3rd defendant to the Counter Claim, the land belonged to Thabiti Finance Co Ltd which charged the same and was sold by National Bank Ltd and it never belonged to the defendant as alleged.
56. According to the plaintiff, this clearly shows that the respondent did not own the land from 1932 as alleged in their statement and the outdated map they tried showing court. The Kisumu/Municipality Block 7/365 was by Part Development Plan Excised Reference No NRB/9/83/1 and survey plan done on and approved in 1983 by J n Gichohi.
57. The PDP No 280 was approved and signed by Mr Ohias the Chief Director of Survey on August 18, 1983 and signed by Mr J R Njenga Commissioner of Lands acting on delegated power as per Chapter 280 on August 19, 1983 (before the vesting order).
58. Having established that Kisumu/Municipality Block 7/365 was vested in Government of Kenya in 1977 upto 1984 through the East African Community Mediation Agreement 1987. The said parcel of land belonged to the Government of Land to be allocated as government public land.
59. The Commissioner of Lands did allocate the suit parcels of land by a letter dated reference no 11875/65 dated July 15, 1992 to the plaintiff with the only condition being that the plaintiff pay the statutory payments which he did pay.
60. That the suit parcels of land were excised from Kisumu/Municipal/Block 7/365 when the same was belonging to the Government of Kenya in 1983 and no permission was required from the defendant to create Kisumu/Municipality Block 7/384, 547, 548, 546, and 407.
61. That the National Lands Commission, pursuant to Article 65 of the [Constitution of Kenya, 2010](#), have never carried out investigations as to the acquisition of the suit parcels of land to state that the same were acquired irregularly and the defendant lacks such mandate.
62. On whether the Defendant was entitled to move into the suit properties and destroy buildings and fence the same off while the plaintiff held a title deed issued by the Government, the plaintiff submits that having showed the process how the suit parcels of land were acquired and the National Land Commission not having carrying out investigations to state that the suit parcels of land were irregularly acquired, the plaintiff is entitled to protection under Article 40 of the [Constitution](#).
63. The plaintiff relies on the dictum in [Funzi Island Development Ltd & 2 Others vs County Government of Kwale & 2 Others](#) (2014) eKLR that a registered owner of land enjoys absolute and indefeasible title if the allocation was legal, proper and regular. Article 40 and article 47 guarantees rights to own property and the right to have such right if one is to be limited in enjoyment of such right to have the same done in accordance with the law.



64. Even if the Defendant believed that the titles to the suit properties were acquired un-procedurally it had to accord the plaintiff due process of the law. It is only this court that has the power to cancel such title.
65. The plaintiff also relies on the dictum In *Kassim Ahmed Omar & Another vs Awuor Ahmed Abel & Others* Malindi ELC No 18 of 2015 the court held thus:-
- “A certificate of title is an end product of a process, if the process that followed in issuing the title did not comply with the law, then such title can be cancelled by the Court” (emphasis mine).
66. That by the Defendant taking the law unto its own hands and demolishing the plaintiff’s buildings and chasing the plaintiff from its suit parcels of land without due process amounts an infringement to of the petitioners’ right to property contrary to Article 40 and 47 of the constitution.
67. In the case of *Kenya National Highway Authority vs Shalien Masood Mughal & 5 Others* (2017) eKLR, the court of appeal quoted with authority a number of authorities where principle of indefeasibility of title was refused in the face of certificate of titles unlawfully and procedurally achieved where it stated that:
- “41. At the peak of land grabbing, the courts stamped their authority in order to protect the public interest and I may sample some of the decisions:
68. Maraga J (now chief Justice) in *Republic vs Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others* Mombasa HCMCA No 617 of 2003 {2006} 1 KLR (E&L) 563 expressed himself as follows:
- “Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed.. it is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution.”
69. The Plaintiff having proved his case and in relying on the evidence so far on record is entitled to injunction as prayed in the amended plaint. The Plaintiff is entitled to costs and interests.
70. The Defendant on his part submits that no evidence was tendered as to the process of the subdivision of plot number 365. The Defendant argues that at the collapse of the East African Community in 1977, plot number 365 was not only registered in the name of East African Railways Corporation but was also in possession of the EARC. At this time EARC had been formally vested with the property of East African Railways Corporation and Harbours Administration. (EAR&HA). By legal Notice no 440 of 1963.
71. The defendant argues that a subsequent legal notice no 20 of 1961 issued under the EAR Act 1967 on statute of the defunct EAC authored vesting in the EARC o property from General Manager of the EARC.



72. The defendant argues that upon the collapse of the EAC, EARC ceased to exist and parliament passed the K.R.C Act Cap 397 which commenced on January 20, 1978 and therefore the property of the EARC in Kenya vested in the KRC.
73. The defendant argues that the EACMAA vesting of EARC property in the Government of Kenya on the effective date was therefore as against the interests of other partner states and did not constitute a means of creating a new legal interest in the properties as against the defendant, a state parastatal wholly owned by the Government of Kenya. The Defendant argues that the subdivision of plot no 365 without involvement of KRC Board and the Minister responsible for lands was illegal and fraudulent.
74. The defendant further argues that the transitional provision of the KRC Act together with the vesting orders of 1963 placed properties of the EARC in the hands of the defendant under limit. The defendant further argues that he is entitled to the equitable remedy of constructive trust as the plaintiffs and defendants to counter claim obtained title illegally.
75. On *Bonafide* purchaser for value without notice, the defendant argues that the plaintiff and defendants to counter claim had notice that the land belonged to Kenya Railways.
76. The Gravamen of the 3rd defendant to counter claim submissions is that the defendant has not proved fraud against the defendants to counter claim.
77. The 3rd Defendant argues that the land in dispute reverted back to government hence became Government land available for allocation.
- He argues that due process was followed. The 3rd defendant argues that he is entitled to compensations after establishing that the parcel of land was lawfully acquired and developed but the defendant demolished the property unlawfully.
78. The 4th Defendant equally submits that the suit is time barred and that the 4th Defendant is an innocent purchaser without notice and for value. The 4th Defendant submits that there is no evidence of irregularity, illegality, fraud or otherwise. The 4th Defendant further submits that he bought the land in question for value and from a company that held the title to the land. The 4th Defendant submits that constructive trust does not arise as there is no evidence of wrong doing by the defendants.

Issues for Determination

79. The following issues can be discerned from the pleadings, evidence and submissions for determination.
1. Whether the suit is time barred.
 2. Whether the parcels of land were available for allocation.
 3. Whether due process was followed in allocation, allotment and registration.
 4. Whether the Defendants in the counter-claim were innocent purchasers for value without notice.
 5. Whether the Defendant proved fraud against the plaintiff and Defendants.
 6. Whether the principle of constructive trust can be invoked.
 7. Whether remedies should the court grant.



Whether the Suit (Counter Claim) is Time Barred

80. The counter-claim is hinged on fraud and illegality and nullities. The Salient facts of the case are that after Kenya attained its independence, the suit parcel of land was vested in the East African Railway and Harbour (EAR & HA) by legal Notice no 440 of 1963. Until the collapse of the East African Community, plot number 365 was registered in the names of East African Railway Corporation and was in possession of the East African Railway Corporation.
81. In 1969 vide legal notice no. 20 of 1967 issued under the East African Railway Corporation Act 1967 the property was vested in East African Railway Corporation. Plot number 365 was property of East African Railway Corporation until 1977 when it was purportedly subdivided and 384, 547, 548, 546, 407 were created. It is alleged by the Defendant that the subdivisions and allocation was a nullity, illegal and fraudulent.
82. I do find that the defendants to the counter-claim have not demonstrated that the counter claim is time barred. Moreover, there is no time limit for nullities as they are forever nullities and can be quashed any time a party goes to court.

Whether the Parcels of Land were available for Allocation

83. On this issue, I do find that parcel of land number 365 was always public land from 1963 and remained so to the date of sub-division. The same vested in the East African Railway Corporation until the whole processes of subdivision, alienation, transfer, and sale were illegal as the land was not available for alienation. This court finds that until the collapse of the East African Community in 1977, the property was registered in the names of the East African Railways Corporation and was in its possession having previously vested in the East African Railways and Harbours Administration by Legal Notice no 440 of 1963 that published the Kenya (Vesting of Land) Regulations 1963. The property passed on to the Kenya Railways Corporation in 1978 upon the enactment of the Kenya Railways Corporations Act Cap 397 whose commencement date was on January 20, 1978. I do agree with the defendant that she was entrusted with suit properties because the same was public land which was vested in the Government for public purposes or for the purposes of the Kenya Railways Corporation and previously vested in its predecessors in title. This court further agrees with the defendant that the trust subsisted upto February 22, 1986 when Legal notice no 24 of 1986 was issued revoking legal notice no 440 of 1963 and therefore formally vesting the property into the Kenya Railways corporation. The commissioner of Lands had no authority to allocate public land vested in public institutions because the vesting order is evidence of alienation, moreover, it is trite law that the commissioner of lands has no power to alienate land already alienated and in this case to the public institution..
84. On the import of the *East African Community Mediation Agreement Act*, this court finds that the same was meant to vest the property in the Governments of East African Community against each other to hold the same on behalf of the Railways Corporations of the government and was not meant to belong to the Government for purposes of alienation as the properties had been alienate to the East African Railways Corporation.
85. In NBI, HC Misc Appl 1732 of 2004, *James Joram Nyaga & Another v Attorney General & Another* [2007] eKLR the court referring to section 3 and 7 of the GLA observed thus:

"The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants



as he purported to do vide the letter of December 18, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registrarion of Titles Act Cap 281 of the Laws of Kenya.”

86. In the same case the court having found that the land in dispute was government land over which the Commissioner of Lands had no power to pass any title, the court dismissed the Applicant’s Originating summons in which they were seeking, inter alia, a declaration that they were the lawful owners of the property in dispute.
87. Further in the case of Milankumarn Shar & Two others vs City Council of Nairobi & Others, Nairobi HCCC No 1024 of 2005 the Court found that the Commissioner of Lands did not have authority under Section 3 of the Government Lands Act to make any grant or disposition of any estate, interest or right in or over a portion that was a part of a public road and therefore not un-alienated Government Land. The learned Judges in this case quoted with approval the case of Paul Nderitu Ndung’u & 20 Others v Pashito Holdings Limited & Another (Nairobi HCCC No 3063 of 1996) where it was held that the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated.
88. In the Paul Nderitu Ndung’u case Justice Mbogholi Msagha said:
- “Under the Government Lands Act (Cap 280, Laws of Kenya) the Commissioner of Lands can only make grants or dispositions of any estates, interests or rights in over unalienated government land. (Section 3). In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienated was void ab initio.”
89. This court finds that the Commissioner of Lands acted illegally and contrary to the provisions of the Government Lands Act (Cap 280), the Kenya Railways Corporation Act (Cap 397) and the State Corporations Act (Cap 446) when he purported to issue a lease over the suit property to the plaintiff and the 2nd to 4th defendants in the counterclaim.
90. For this court to find that the leases held by the plaintiff and the 2nd to 4th defendants to the counterclaim are valid, it must be demonstrated that they were properly acquired. It is not enough that one dangles a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material and important especially when there are doubts to the regarding the process.
91. It is therefore necessary for the court to determine how the plaintiff and defendants to the counter claim ended up having a Leases and Certificates of Lease in their name, and further determine if the Government did intend to issue the plaintiff and defendants to counterclaim with Leases over the suit lands. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



92. In the case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another* (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.

Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows:-

the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

93. The Court in the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* [2015] eKLR stated that:

94. It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new *Constitution 2010* and the *Land Registration Act, 2012* will have a positive impact for land investors in future.”

95. In *Republic vs Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others* Mombasa HCMCA No 617 of 2003 [2006] 1 KLR (E&L) 563 Maraga, J (now Chief Justice) expressed himself as follows:

Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the *Constitution* or under section 1 and 1A of the *Constitution* or under the doctrine of public trust a title would have to be nullified because the *Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the *Constitution*.”

96. Similarly, Nyamu, J (as he then was) in *Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs Attorney General & 5 Others* Nairobi HCMCA No 158 of 2005 [2006] 1 KLR 443 held:

Should the Land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests? How for instance are the Courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the Courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the *Constitution*. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins.”In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of the *Constitution* captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in “a democratic society.” This phrase also appears in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency...A democratic society holds public land and resources in trust for the



needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of the Constitution in my view...The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and “kayas” just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land.”

97. Further in the same vein in *Chemel Investments Limited vs The Attorney General & Others* Nairobi Petition No 94 of 2005 at para 64 it was held:

The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of *Milan Kumar Shah & 2 Others vs City Council of Nairobi & Another* (supra) where 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 accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons 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.”

98. Also in the case of *Dr Joseph Arap Ngok vs Justice Moijo ole Keiwua & 5 Others*, Civil Appeal No Nai 60 of 1997 the court stated thus that:

Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

99. If violation of such sanctity which is guaranteed by the State is proved, then section 24 of the same Act states as follows:

Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription.

100. The above judicial authorities are in consonant with the plaintiff’s case. The 1st defendant had no authority to alienate land that had been reserved for Kenya Railways as has been proved by the evidence and the documents produced.. The defendants claimed that they were bona fide purchasers for value without notice. For a person to rely on this doctrine, he must prove the following ingredients as was enunciated in the case of *Katende v Haridar & Company Limited* [2008] 2 EA 173 where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- a) he holds a certificate of title;



- b) he purchased the property in good faith;
- c) he had no knowledge of the fraud;
- d) he purchased for valuable consideration;
- e) the vendors had apparent valid title;
- f) he purchased without notice of any fraud;
- g) he was not party to any fraud.”

101. The plaintiff and the 2nd to 4th defendants therefore do not qualify as innocent purchasers for value without notice as the 1st defendant had no authority to alienate the land. He could therefore not pass a good title to the defendants. If they have any claim for the land then their remedy ly against the 1st defendant. Moreover, public interest outweighs bonafide purchaser for value without notice.
102. Section 26 of the *Land Registration Act* provides that 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

title.

- 103 As Justice Munyao aptly put it in the case of *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR

... it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.

104. This court finds that the land in dispute was registered in the names of East African Railway Corporation awaiting the vesting of the same in the Kenya Railways Corporation and therefore the subdivision of the same and subsequent registration in the names of the defendant and plaintiffs was an illegality because the land was not to be divested from Kenya Railways. On whether the Defendant proved fraud, I find that the act of subdividing the parcel of land No 365 was done illegally and fraudulently, however there is no evidence that the defendants party to the fraud and therefore are not guilty of fraud.
105. On Damages, I do find that though the plaintiffs are entitled to damages to be paid by 1st Defendant to the counter claim due to the fact that the Commissioner of Lands alienate and allocated the land to the initial allottees illegally, the plaintiff and defendants to the Counter Claim have not prayed for the same against the 1st defendant to the Counter Claim and that the pleadings do not disclose a cause of action against the 1st defendant to the counter claim. The upshot of the above is that the plaintiff’s suit is dismissed and that the counter claim is allowed in the following terms:-



106. The court grants a permanent injunction to restrain the plaintiff and the 2nd, 3rd and 4th defendants to the counterclaim respectively and the two other unidentified persons registered as the proprietors of Kisumu Municipality/Block 7/546 and Kisumu Municipality/Block 7/548 either by themselves or through their agents or servants from entering onto the suit property and the suit lands, from purporting to collect rent from or detain for rent against the occupants thereof and from transferring, leasing, charging or otherwise howsoever alienating the suit property and the suit lands.
107. In terms of a declaration of a constructive trust of the proprietary interest in the suit property and the suit lands in favour of the defendant and an order that a transfer of the titles comprising the same be duly executed and registered in favour of the defendant either by the plaintiff and the 2nd, 3rd and 4th defendants to the counter claim respectively and the two other unidentified persons registered as the proprietors of Kisumu Municipality/Block 7/546 and Kisumu Municipality/Block 7/548 or in their default by the deputy registrar of the High Court of Kenya. I do decline to grant mesne profits as the same was not proved. Costs of the suit to the defendant, the Kenya Railways Corporation.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the Covid-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020

