



**The General of the Salvation Army ( Kenya Territory) v Allan George  
Njogu Residence Ltd & 4 others (Environment & Land Case 227 of 2012)  
[2022] KEELC 12667 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12667 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 227 OF 2012  
EO OBAGA, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**THE GENERAL OF THE SALVATION ARMY ( KENYA  
TERRITORY) ..... PLAINTIFF**

**AND**

**BOARD OF TRUSTEES, THE CHURCH COMMISSIONER FOR KENYA  
(ACK) ..... 1<sup>ST</sup> DEFENDANT  
ALLAN GEORGE NJOGU RESIDENCE LTD ..... 2<sup>ND</sup> DEFENDANT  
COMMISSIONER FOR LANDS ..... 3<sup>RD</sup> DEFENDANT  
DISTRICT LAND REGISTRAR (UASIN GISHU) ..... 4<sup>TH</sup> DEFENDANT  
KENYA COMMERCIAL BANK LTD (KCB) ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a further amended plaint dated November 4, 2015, the plaintiff sought the following reliefs:-
  - a. An order that pending the hearing and determination of this suit, a temporary injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants/respondent's their servants, and/ or agents from interfering with, building/construction, trespassing onto, surveying, subdividing, alienating, selling, transferring, leasing or in any other way doing anything over and in respect of all those plots namely Eldoret Municipality Block 11/ (9,13 & 14).
  - b. An order for permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants/respondent their servants, and/or agents from interfering with, building/construction, trespassing onto,



surveying, subdividing, alienating, selling, transferring, leasing or in any other way doing anything over and in respect of all those plots namely Eldoret Municipality Block 11/ (9,13 & 14).

- c. An order that the title deeds currently held by the 1<sup>st</sup> and 2<sup>nd</sup> defendants be forthwith cancelled and/or revoked as they were acquired fraudulently and the 3<sup>rd</sup> and 4<sup>th</sup> defendants be ordered to issue new Title deeds/certificate of leases in favour of the plaintiff.
  - Cc. an order in the alternative compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendants to transfer the title deed that were irregularly/fraudulently acquired by them to the plaintiff unconditionally.
- d. Costs and interest of the suit.
  - dd. Any other such reliefs that the court may deem fit to grant in the circumstances.

## Background

2. As early as 1932, the plaintiff had established a church at Eldoret West in an estate which is now called Kidiwa. During the town planning of Eldoret, the defunct Eldoret Municipal Council designated the entire Block 11 of special plots which were exclusively to be allocated to various churches for religious purposes only. Block 11 comprised about seventeen plots. The plaintiff's church fell on plot 5.
3. The other churches which were established in the area included the Church of the Province of Kenya which is now called the Anglican Church of Kenya (ACK) and the Seventh Day Adventist church (SDA). These three churches were allocated plots in the area. As the churches expanded, there was need for construction of pastors houses, guest houses and other facilities associated with church work.
4. In 1974, the plaintiff which I shall herein after refer to as the Salvation Army applied for additional plots to the Eldoret Municipal council which request was granted. The allottees were expected to follow up their allocation with the Commissioner of Lands who was then to issue them with allotment letters pursuant to which leases were to be prepared upon the allottees meeting the conditions in the letter of allotment.
5. It would appear that once these churches were allocated their respective plots, they moved in and put up structures on some plots without following up with the Commissioner of Lands to get letters of allotment and issuance of certificate of leases. Because of this omission on the part of the churches, some private entities and persons saw an opportunity to pursue leases directly from the Commissioner of Lands.
6. One of the entities which took advantage of the church's omission is Allan George Njogu Residences Limited, the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant obtained certificate of leases in respect of Eldoret Municipality Block 11/9, 13 and 14 in the year 1996. The 1<sup>st</sup> defendant also obtained title in respect of Eldoret Municipality Block 11/16 during the same time. This plot is subject of a separate suit where the SDA has sued the 1<sup>st</sup> defendant. The case is still ongoing.
7. The 1<sup>st</sup> defendant obtained certificate of lease for Eldoret Municipality Block 11/9 on February 2, 1996. This plot was later transferred to the ACK the 2<sup>nd</sup> defendant who obtained certificate of lease in their favour on April 5, 2005.
8. The 1<sup>st</sup> defendant obtained certificate of lease for Eldoret Municipality Block 11/13 on March 13, 1996 and for Eldoret Municipality Block 11/14 on February 2, 1996. These two properties and another not subject of this suit were charged to Kenya Commercial Bank Limited, the 5<sup>th</sup> defendant to secure a sum of Kshs 1,000,000/=



### **Plaintiff's case**

9. It is the plaintiff's case that the acquisition of the three plots by the 1<sup>st</sup> defendant was fraudulent in that the 1<sup>st</sup> defendant was aware that the three plots had been allocated to it and that the church had put up structures on the properties. The plaintiff further states that as the entire Block 11 had been set aside for religious purposes, the Commissioner of Lands should not have allocated the said plots to the 1<sup>st</sup> defendant who had no church to qualify it for allocation of a plot where the area had been set aside for special plots which were only meant for religious purposes.
10. The plaintiff also contends that the transfer of Eldoret Municipality Block 11/9 by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was fraudulent in that whereas the three churches had on June 25, 1996 written a joint communique addressed to the District Commissioner, Uasin Gishu District with a copy to the commissioner of Lands, District Lands Officer, the Physical Planning Officer and the town clerk Eldoret, the 2<sup>nd</sup> defendant had gone ahead to acquire the disputed plot from the 1<sup>st</sup> defendant.
11. The plaintiff further states that whereas it was aware that it had transferred Eldoret Municipality Block 11/9 to the 2<sup>nd</sup> defendant, it again purported to cause an advertisement in Kenya Gazette Notice No 3947 of May 27, 2005 alleging that it had lost its certificate of lease and a new one was to be issued after 60 days if there was no objection. Already the 1<sup>st</sup> defendant had transferred the plot to 2<sup>nd</sup> defendant who obtained certificate of lease on April 5, 2005.
12. The plaintiff's contention is also that the 5<sup>th</sup> defendant accepted Eldoret Municipality Block/13 and 14 as security without undertaking due diligence. The plaintiff argues that had the 5<sup>th</sup> defendant gone to the ground, its officers would have noticed that the plaintiff was in possession of two properties which it had developed. The plaintiff therefore argues that the failure by the 5<sup>th</sup> defendant to go to the ground was a deliberate fraudulent act meant to defraud it of the two properties. The plaintiff justifies this by stating that the 1<sup>st</sup> defendant never bothered to service the loan and the 5<sup>th</sup> defendant could not exercise their statutory power of sale as the church was already in possession of he charged properties.

### **First Defendant's case**

13. The 1<sup>st</sup> defendant's case is that the three suit properties that is Eldoret Municipality Block 11/ 9, 13 and 14 had been allocated by the Commissioner of Lands to Zipporah Seroney. The 1<sup>st</sup> defendant then purchased the suit properties from Zipporah Seroney. There was an informal transfer of the allotment letter which was sanctioned by the Commissioner of Lands.
14. The 1<sup>st</sup> defendant then pursued and obtained titles in respect of the three properties. Titles to Eldoret Municipality Block 11/9 and 14 were obtained on February 2, 1996 whereas title to Eldoret Municipality Block 11/13 was obtained on March 13, 1996.
15. Sometime in 2005, the 1<sup>st</sup> defendant entered into a sale agreement with the 2<sup>nd</sup> defendant in respect of sale of Eldoret Municipality Block 11/9. This property was transferred to the 2<sup>nd</sup> defendant who obtained title to the same on April 5, 2005. The 1<sup>st</sup> defendant later charged Eldoret Municipality Block 11/13 and 14 to secure a loan of Kshs 1,000,000/=
16. The 1<sup>st</sup> defendant denies the plaintiff's contention that it conspired with the 4<sup>th</sup> defendant when a publication was published in the Kenya Gazette Notice of May 27, 2005 to the effect that title to Eldoret Municipality Bloc 11/9 was lost and that it was set to be replaced in 60 days if no objection was received.



17. The 1<sup>st</sup> defendant contends that it acquired the suit properties regularly and that all the three properties are not among those mentioned in the Ndungu report on irregularly acquired public land and that the Commissioner of Lands has never complained about the acquisition of the properties or have there been any investigations carried out by any investigative agencies over the suit properties.

### **Second Defendant's case**

18. The 2<sup>nd</sup> defendant's case is that the ACK church was built at Eldoret West in 1931 on plot No 8. The ACK church later built a new church on plot No 7. The entire Block 11 plots were reserved for religious purposes. In 1996, the three churches which had plots in the area noticed that the Commissioner of Lands had allocated private entity plots yet the entity was not a religious organization. The entity which was allocated plots in the area was the 1<sup>st</sup> defendant.
19. The three churches that is ACK, SDA and Salvation Army agreed that Salvation Army which already had plot 10 and 11 were to apply for plot 12 and 13. The SDA which had plot 17 was to apply for plot 14, 15 and 16 and the ACK which had plot 7 and 8 was to apply for plot 6 and 9. This agreement was based on the fact that there were twelve (12) plots reserved for religious purposes and each church had to get four (4) plots each. The churches then wrote a joint Communique addressed to the District Commissioner with a copy to the Commissioner of Lands among others.
20. The 2<sup>nd</sup> defendant further states that it later on realized that the plot that the churches agreed was to be applied for by it had been registered in the name of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant denies that it colluded with the 1<sup>st</sup> defendant to have the property registered in its name as already the three churches had agreed that the ACK was to apply for plot 6 and 9.
21. The 2<sup>nd</sup> defendant states that since it had plot 7 and 8 which had no issues and plot 6 which had a dispute which was later resolved and plot 9 having been secured, they did not have any further claim and they therefore contend that the plaintiff has no claim against it. The 2<sup>nd</sup> defendant now has titles in respect of Eldoret Municipality Block 11/6, 7, 8 and 9.

### **Third and fourth Defendant's case**

22. The 3<sup>rd</sup> and 4<sup>th</sup> defendant filed their defence but they did not call any evidence in support of their defences.

### **Fifth Defendant's case**

23. The 5<sup>th</sup> defendant's case is that the 1<sup>st</sup> defendant approached it to extend a loan facility to it. It had three titles among them was Eldoret Municipality Block 11/13 and 14. The 5<sup>th</sup> defendant gave a loan to the 1<sup>st</sup> defendant and retained titles in respect of the three properties.
24. The 5<sup>th</sup> defendant states that it carried out due diligence and noted that the properties which they took as security had no encumbrances. The 5<sup>th</sup> defendant proceeded to give a loan to the 1<sup>st</sup> defendant. The 5<sup>th</sup> defendant stated that in cases where the property to be charged is not developed, there is no need for the bank officials to visit the ground before disbursing a loan.
25. The 5<sup>th</sup> defendant states that the plaintiff's claim to the charged properties cannot override its interest as a chargee of the properties and that the plaintiff's suit against it should be dismissed with costs.



## Analysis and determination

26. The parties were directed to put in written submissions. The plaintiff filed submissions on March 8, 2022. The 1<sup>st</sup> defendant filed submissions on March 29, 2022. The 2<sup>nd</sup> defendant filed submissions on April 4, 2022. The 3<sup>rd</sup> and 4<sup>th</sup> defendants did not file any submissions. The 5<sup>th</sup> defendant filed submissions on March 1, 2022.
27. I have carefully considered the evidence adduced by the plaintiff as well as that of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants. I have also considered the submissions of the parties. The following are the issues for determination:-
1. Whether this suit is statute barred.
  2. Whether the plaintiff applied to Eldoret Municipal council for allocation of Eldoret Municipality Block 11/9, 13 and 14 and whether the said applications were granted.
  3. Whether the allocation of Eldoret Municipality Block 11/9, 13 and 14 to the 1<sup>st</sup> defendant was regularly done and if the subsequent registration in the 1<sup>st</sup> defendant's name was lawful.
  4. Whether the second defendant obtained a clean title from the 1<sup>st</sup> defendant.
  5. Whether the charge registered in favour of the 5<sup>th</sup> defendant with respect to Eldoret Municipality Block 11/13 and 14 is lawful.
  6. Which reliefs can this court grant in the circumstances.
  7. Which order should be made on costs.

## Whether this suit is statute barred

28. The 5<sup>th</sup> defendant submitted that this suit is statute barred. The contention of the 5<sup>th</sup> defendant is that as the plaintiff's claim is based on fraud which is a tort, then the suit should have been filed within 3 years from 1996 when the plaintiff alleges to have discovered fraud on the part of the 1<sup>st</sup> defendant. The 5<sup>th</sup> defendant submitted that instead of the plaintiff filing the suit within 3 years, it filed the same in 2006, a period of 10 years later.
29. In support of their contention, the 5<sup>th</sup> defendant cited section 26 of the *Limitation of Actions Act* and the case of *Edward Moonge Lengusuranga –Vs- James Lanaiyara & another* (2019). Section 26 of the *Limitation of Actions Act* provides as follows:-
- “Where, in the case of an action for which a period of limitation is prescribed, either—
- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
  - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
  - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it”
30. Section 26 of the *Limitation of Actions Act* states when time starts to run in case where fraud or mistake is discovered. In the instant case, the plaintiff is seeking to recover the suit properties from the 1<sup>st</sup> and 2<sup>nd</sup> defendants. According to the plaintiff, they discovered in 1996 that the 1<sup>st</sup> defendant had had itself



registered as owner of the suit properties. The plaintiff further discovered that the 1<sup>st</sup> defendant had transferred Eldoret Municipality Block 11/9 to 2<sup>nd</sup> defendant who had become registered as owner on April 5, 2005.

31. The limitation prescribed for bringing an action to recover land is 12 years. The plaintiff brought its action 10 years after the discovery of the fraud or mistake. The plaintiff's suit is therefore not statute barred. The plaintiff's claim was not based on tort but recovery of land.

**Whether the Plaintiff applied to Eldoret Municipal council for allocation of Eldoret Municipality Block 11/9, 13 and 14 and whether the said applications were granted;**

32. The plaintiff's contention is that they applied for allocation of the suit properties to Eldoret Municipal council in 1974 and that the applications were granted. The plaintiff then took possession and constructed thereon permanent structures and that they have been in occupation since then. A look at the evidence adduced by the plaintiff shows that the plaintiff applied for allocation of Plot Number 4 and 6 which had been designated as special plots which were only meant for public purposes. This is clear from the minutes of the Town Planning, works and Housing Committee held on October 8, 1974. The said Committee resolved that the finance, staff and General Purposes Committee was to allocate the two plots to the plaintiff on condition that the Plaintiff met all legal expenses and that they would use the plots for public purposes only.
33. On November 7, 1974, the Town clerk of Eldoret Municipal Council wrote to the plaintiff informing them that they had been allocated the two plots. The plaintiff was expected to accept the offer in writing. There was no evidence adduced whether the plaintiff accepted the offer.
34. Whereas the plaintiff claims that they applied for the three plots in 1974, there is no evidence to show that that was the case. From the evidence adduced by the plaintiff, it is clear that once the three churches realized that the 1<sup>st</sup> defendant had been allocated six plots within the special plots which had been reserved for religious purposes, they wrote a joint letter dated June 25, 1996 indicating that the three churches had applied for allocation of the plots in issue more than once. The churches went on to state that Salvation Army had applied for plot 13 and 14, the SDA church had applied for plot 15 and the ACK church had applied for plot 6 and 9.
35. The Salvation Army, the plaintiff herein already had plot 10,11 and 12 as admitted during cross examination of their witness. The SDA is said to have had plot 17 and was to apply for plot 14,15, and 16. The ACK had plot 6 and 9. The only evidence which shows that the plaintiff had interest in plot 9 is a letter dated November 27, 2001 in reference to a complaint letter contained in the plaintiff's letter of November 9, 2001 wherein the plaintiff complained that someone had fenced off plot No 9. The office of the town clerk wrote to the Plaintiff and indicated that they were also at a loss as to who fenced it and further advised the plaintiff to protect its land by lawful means from real or imagined trespassers.
36. On April 15, 2002, the plaintiff paid Kshs 8000/= being survey fees for plot 9. Upon payment of survey fees, the office of the District surveyor wrote a letter dated April 17, 2002 addressed to the Chief of Kibulgeny Location informing him that the officers from his office were to go to plot 9 to relocate the beacons on April 25, 2002. The letter was copied to the owner of plot 8, the ACK church. On April 23, 2002, the firm of A G N Kamau advocates wrote a letter to the District Surveyor Uasin Gishu protesting the intended visit to plot 9 which he said belonged to the 1<sup>st</sup> defendant.
37. The plaintiff thereafter embarked on writing complaint letters to the Commissioner of Lands and the Kenya Anti-Corruption Commission. The Kenya Anti-Corruption Commission wrote back to the plaintiff through letter dated October 17, 2003 and asked them to pursue the matter with the Commissioner of Lands as according to them, this was a case of double allocation. On March 8, 2005,



the plaintiff wrote a letter addressed to the attention of the Commissioner of Lands with a copy to the Town Clerk. On July 6, 2005, the Town clerk wrote to the plaintiff and informed them that the Eldoret Municipal council was not in a position to issue any allotment letter to any of the three suit properties.

38. It is therefore clear that the plaintiff neither applied for allocation of the three properties in issue nor were they allocated the same.

**Whether the allocation of Eldoret Municipality Block 11/9, 13 and 14 to the 1<sup>st</sup> Defendant was regularly done and if the subsequent registration in the 1<sup>st</sup> Defendant's name was lawful**

39. There is no contention that all the plots falling under Block 11 were designated as special plots which were reserved for public purposes and specifically for religious purposes. The evidence adduced in this matter which is not controverted is that there are three churches in the area. The Salvation Army has title for Eldoret Municipality Block 11/10, 11 and 12. The ACK has titles for Eldoret Municipality Block 11/6, 7 8 and 9. The SDA church has title for Eldoret Municipality Block 17. According to the evidence adduced in this case, the SDA church filed Eldoret High Court Civil Case No 149 of 2004. In this case the SDA church is seeking to wrest Eldoret Municipality Block 11/14, 15 and 16 from Allan George Njogu Residences Limited who is named as the 1<sup>st</sup> defendant in this case.
40. The evidence shows that in all, the 1<sup>st</sup> defendant was allocated a total of six plots that is Eldoret Municipality Block 11/6, 9, 13, 14, 15 and 16. During cross examination the Director of the 1<sup>st</sup> defendant Mr Allan George Njogu Kamau admitted that the SDA church has filed a case against him and that the case is still going on. DW1 Rev Cannon Joseph Changach who testified on behalf of the 2<sup>nd</sup> defendant testified that plot 6 had a dispute but that the dispute was resolved and the 2<sup>nd</sup> defendant has title to plot 6. He also testified that the dispute regarding plot 9 was resolved when the ACK church agreed to purchase the said plot from the 1<sup>st</sup> defendant. This witness had testified that it was agreed that each of the three churches were to have four (4) plots each. With the dispute over plot 6 and 9 having been resolved, the ACK now has four plots and has no issues to raise.
41. The 1<sup>st</sup> defendant claimed that it purchased the three suit properties from Zipporah Seroney. The witness for 1<sup>st</sup> defendant stated that upon purchase of the suit properties, the seller handed over allotment letters. The 1<sup>st</sup> defendant then had an informal transfer of the allotment letters to it with sanction of the Commissioner of Lands. It thereafter processed titles. The plaintiff's contention is that the titles held by the 1<sup>st</sup> defendant were fraudulent or illegally obtained. This being the case, the 1<sup>st</sup> defendant was bound to adduce evidence to show that its titles were genuinely, properly and lawfully obtained. It was not enough for the 1<sup>st</sup> defendant to dangle the title as prove of ownership. It is these titles which are under challenge and the 1<sup>st</sup> defendant should have produced documents such as sale agreement, sanction by the Commissioner for the informal transfer of allotment letters from Zipporah Seroney and all other documents to show that the acquisition of the said properties were above board.
42. There were developments on Eldoret Municipality Block 11/13 belonging to the plaintiff. There were also developments on Eldoret Municipality Block 11/14 belonging to the SDA church. When the 1<sup>st</sup> defendant's witness was cross examined, he admitted that there are buildings on the suit properties but that the buildings have no approvals. The 1<sup>st</sup> defendant's witness also conceded that they have never taken possession.
43. As regards Eldoret Municipality Block 11/9 there is evidence on record that ACK had obtained building approvals as title was in their name. They had started constructing a block of residential houses when the plaintiff obtained an injunction stopping them from proceeding.



44. It is common knowledge that plots within a particular municipality were held in trust for the benefit of the persons within the area. These plots could either be designated public plots for a specific purpose or land available for allocation. What the municipalities were permitted to do is that in case of available land for allocation, they could allocate and then inform the Commissioner of Lands who would then issue letter of allotment and give a nod for preparation of lease from the concerned land registry within the particular municipality.
45. In the instant case, the 1<sup>st</sup> defendant did not follow the said procedure. It instead obtained titles in respect of the suit properties direct from the Commissioner of Lands without disclosing that the plots had been built up and were being occupied by churches. It is therefore clear that the 1<sup>st</sup> defendant obtained title through misrepresentation. It does not help the 1<sup>st</sup> defendant to claim that the Municipal Council had no say in allocation of plots within its jurisdiction.
46. The suit property had been designated as special plots specifically reserved for public purposes and more so for religious purposes. In the case of *Kipsirgoi Investments Limited –vs- Kenya Anti-Corruption Commission* (2011) eKLR, the Court of Appeal dealing with the issue of land reserved for a particular purpose stated that there was uncontested material that as early as 1974, the suit property was planned as an open space and held that the subsequent lease to the appellant was on the face of section 3 of the *Government Lands Act* irregular. Quoting from section 3 of the *Physical Planning Act* cap 286, the court concluded that reservation for a particular purpose renders that land alienated.
47. In the instant case, the suit properties had been alienated by the same being reserved as special plots reserved for religious purposes. The Commissioner of Lands therefore had no powers to issue certificate of lease to the 1<sup>st</sup> defendant. On July 4, 1996 following a complaint by the SDA church over Eldoret Municipality Block 11/16, the Commissioner of Lands sought to know from the District Lands office Uasin Gishu whether the SDA church was in occupation of plot 16. The Commissioner asked the District Lands Officer to identify all plots occupied by the churches and ask the allottees to surrender the plots to the respective churches. The Commissioner of Lands also asked the District land Officer to register caveats on the titles. This is because it was realized that the Commissioner had issued allotment letters over plots reserved for churches. Indeed, the Commissioner of Lands through letter dated October 16, 1998 asked the 1<sup>st</sup> defendants to surrender title for Eldoret municipality Block 11/16 for cancellation but the 1<sup>st</sup> defendant declined to do so. This is clear from the plaint in Eldoret HCCC No 149 of 2004 between the SDA church and the 1<sup>st</sup> defendant in this case.
48. The above being the case, it follows that the 1<sup>st</sup> defendant was irregularly issued with titles over the suit properties. The registration in the 1<sup>st</sup> defendant's name was procured by way of misrepresentation and was therefore unlawful.

#### **Whether the second Defendant obtained a clean title from the first Defendant**

49. While dealing with the third issue herein, I have demonstrated that the 1<sup>st</sup> defendant's titles were not obtained lawfully. The titles were obtained through deliberate misrepresentation. When the misrepresentation was brought to the attention of the Commissioner of Lands, the Commissioner asked that the titles be returned for cancellation. It is therefore clear that the 1<sup>st</sup> defendant had no clear title which it could transfer to the 2<sup>nd</sup> defendant.
50. The 2<sup>nd</sup> defendant was not an innocent purchaser for value without notice of defect in title which it was taking from the 1<sup>st</sup> defendant. On the June 25, 1996, the 2<sup>nd</sup> defendant together with Salvation Army and the SDA church had written a letter addressed to the District Commissioner Uasin Gishu District complaining that the 1<sup>st</sup> defendant had irregularly been allocated plots which had been reserved for



religious organizations. As at this time, the 2<sup>nd</sup> defendant was aware that the 1<sup>st</sup> defendant had title to Eldoret Municipality Block 11/9. This is the same plot the 2<sup>nd</sup> defendant claimed to have applied for previously. Nine years later on April 5, 2005, the 2<sup>nd</sup> defendant was registered as owner of the same plot allegedly by way of purchase from the 1<sup>st</sup> defendant whom nine years earlier on was being called a grabber.

51. The 2<sup>nd</sup> defendant appears to have been working closely with the 1<sup>st</sup> defendant. Plot No Eldoret Municipality Block 11/6 had been allocated to the 1<sup>st</sup> defendant. When the witness for 2<sup>nd</sup> defendant testified, he stated that plot 6 had a dispute but that the dispute was resolved and that they had obtained title. Just like the 1<sup>st</sup> defendant surrendered back plot 9, it is the same way plot 6 must have been surrendered back. There was no sale involved as the 2<sup>nd</sup> defendant would like the court to believe. There was no evidence of sale of plot 9 shown. Equally there were no details on how the dispute regarding plot 6 was resolved. In the letter of June 25, 1996, the 2<sup>nd</sup> defendant was listed as having a claim over plot 6.
52. When the District surveyor, Uasin Gishu wrote a letter to the Chief of Kibulgeny location informing him that the surveyors from his office were to visit plot 9 for purposes of relocating the beacons on April 25, 2002 at the request of the plaintiff, the 1<sup>st</sup> defendant's advocates wrote a letter to the District survey on April 23, 2002 protesting the intended visit arguing that the plot belonged to the 1<sup>st</sup> defendant. The surveyors letter was not copied to the 1<sup>st</sup> defendant. It was only copied to the plaintiff and the 2<sup>nd</sup> defendant in their capacity as owners of plot 8 which was neighbouring plot 9. The only logical conclusion is that it is the 2<sup>nd</sup> defendant's officials who informed the 1<sup>st</sup> defendant about the intended visit. This is so because the 2<sup>nd</sup> defendant had interest in plot 9 which they actually obtained when the 2<sup>nd</sup> defendant had the plot transferred to it on April 5, 2005, about three years later.
53. For a person to rely on the doctrine of innocent purchaser for value without notice, he must prove the ingredients which were enunciated in *Katende –Vs- Haridar & Company Limited* (2008) 2 EA 173 where the Court of Appeal of Uganda stated as follows:-

“For the purposes of this appeal, it suffices to describe a bonafide 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 bonafide 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.”

54. In the instant case, the 2<sup>nd</sup> defendant has not met any of the conditions set out in the *Katende case*(supra). No evidence of purchase has been given. No amount or consideration has been disclosed. The 2<sup>nd</sup> defendant decided to benefit from the fraudulent title knowingly as has been demonstrated herein above. There is therefore no good title which passed from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant.



**Whether the charge registered in favour of the 5<sup>th</sup> Defendant with respect to Eldoret Municipality Block 11/13 and 14 is lawful;**

55. I have already found that the titles in respect of Eldoret Municipality Block 11/13 and 14 were fraudulently obtained by misrepresentation. The 5<sup>th</sup> defendant's witness stated that the bank did not go to the ground because there were no developments. Contrary to the 5<sup>th</sup> defendant's contention, there is evidence which even the 1<sup>st</sup> defendant's witness who was the chargor admitted that there were buildings on the suit properties albeit without approval by the Eldoret Municipal council. The chargor having not had valid titles and the charge having not gone to the ground to ascertain the position, there was no valid charge registered which was capable of protection. In the case of *Alice Chemutai Too – Vs- Nickson Kipkurui Korir & 2 others* (2015) eKLR the trial court held as follows:-

“that having analyzed the totality of the evidence adduced, having found that the title of the 1<sup>st</sup> defendant was acquired fraudulently, the onus was on the 2<sup>nd</sup> defendant to challenge the claim of the plaintiff that the title upon which they advanced the loan is tainted with fraud. It did not discharge that duty. It then follows that there was no valid title that was charged to the 5<sup>th</sup> defendant capable of conveying a legal interest in the suit by way of a realizable security”.

56. The 1<sup>st</sup> defendant took a loan of Kshs 1,000,000/ which it did not bother to service. This was because its officials were aware that the suit properties did not lawfully belong to them. They had nothing to lose even if the properties were sold in an auction. The 5<sup>th</sup> defendant did not provide any evidence to show that the 1<sup>st</sup> defendant repaid even a cent towards offsetting the loan. The 5<sup>th</sup> defendant stated that they wrote off the loan. The 1<sup>st</sup> defendant's witness stated that he has never bothered to discharge the properties because he wants to keep off grabbers.

57. The 1<sup>st</sup> defendant having been found to have not acquired titles to the suit properties lawfully, it follows that the charge which resulted from these titles cannot stand. The charge was unlawfully registered having had its basis on a fraudulent title which the 5<sup>th</sup> defendant never bothered to visit the ground before the charge was registered. The 5<sup>th</sup> defendant may have written off the loan as they could not auction a church's property.

**Which reliefs can the court grant in the circumstances;**

58. This is an interesting case. Whereas there is no doubt that the entire Block 11 had been designated as special plots reserved for churches, it is clear from the evidence adduced that neither the plaintiff nor the 2<sup>nd</sup> defendant as well as the SDA church had applied for allocation of plot Nos 9, 13 and 14. The idea of applying for the aforesaid three plots came up after the three churches realized that a private entity had been allocated plots which had been reserved for religious purposes. This is when they wrote a letter dated June 25, 1996 claiming that they had previously applied for the same. The Salvation Army claimed to have applied for plot 9, 13 and 14 in 1974. There was no evidence that they made such an application. The Salvation Army appears to hinge their alleged application for the plots particularly plot No 9 on letter dated June 14, 2002 from the Town clerk Eldoret Municipality. This letter was prompted by the inquiries made by Salvation Army on the status of public plots within Block 11.

59. The SDA church is claiming plot Nos 14, 15 and 16 *vide* their claim in HCCC No 149 of 2004. Evidence adduced by the witness of the 2<sup>nd</sup> defendant is that the three churches had agreed that each of the three gets three plots. According to the sketch which was produced by the plaintiff, there are 12 plots ranging from plot 6 to plot 17. Already the ACK which is the 2<sup>nd</sup> defendant has titles for plot Nos



Eldoret Municipality Block 11/6, 7, 8 and 9. The Salvation Army has plot Nos. Eldoret Municipality Block 11/10, 11 and 12. The SDA church has plot 17. The SDA church has filed a suit in which it is claiming plot Nos 14, 15 and 16. If its claim will succeed, it will end up having four plots. The Salvation Army is less by one plot to make it four.

60. The witness for the 2<sup>nd</sup> defendant was candid in saying that as churches, they agreed to have four plots each. I agree with this mode of sharing the plots which had been earmarked for religious purposes but were illegally allotted to the 1<sup>st</sup> defendant. The churches are in occupation of their respective portions which they are claiming. The 1<sup>st</sup> defendant has already surrendered plot No 6 and 9 to the 2<sup>nd</sup> defendant.
61. Besides the Salvation Army having plot Nos 10, 11, and 12, they also have other plots such plot 5 where their original church was constructed. This is according to their letter of February 23, 1974 in which they were seeking to be allocated plot 2,3, and 7. In that letter they stated that their church which was built in 1931 falls on plot 5. This being the case and given the fact that they will benefit from plot 13 which is the subject of this suit, there is no basis upon which they will again seek plot 9 which has already been given to 2<sup>nd</sup> defendant who have title over the same. Equally, there is no basis upon which the plaintiff can claim plot 14 which is also being claimed by the SDA church through HCCC No 149 of 2004.
62. Justice is about equity and equity equals to equality. The plots in Block 11 were reserved for religious purposes. All the three churches in the area pray the same God. They are all assisting the people of God. There is no reason why one church will seek to get more than the other. It is in this spirit that I will decide the dispute herein as hereunder.

#### **Disposition;**

63. Following the above analysis, I find that the following final orders are appropriate;
  - a. Though the 2<sup>nd</sup> defendant obtained title to Eldoret Municipality Block 9 in an unlawful manner, the same shall not be cancelled. The 2<sup>nd</sup> defendant shall retain the title in view of the circumstances of this case as stated hereinabove.
  - b. The titles in respect of Eldoret Municipality Block 11/13 and 14 which are in the name of the 1<sup>st</sup> defendant are hereby cancelled.
  - c. The Land Registrar, Uasin Gishu County is hereby directed to rectify the register in respect of Eldoret Municipality Block 11/13 by removing the name of Allan George Njogu Residences Limited and replacing the same with the name of the plaintiff or its registered trustees whichever is applicable.
  - d. The title in respect of Eldoret Municipality Block 11/14 shall stand cancelled but the land shall not be allocated to any other person pending determination of Eldoret HCCC No 149 of 2004 (Now ELC No 189 of 2012) in which the Seventh Day Adventist church is laying claim to it.
  - e. The charge which was registered in favour of the 5<sup>th</sup> defendant in respect of Eldoret Municipality Block 13 and 14 is hereby declared to be null and void.
  - f. Owing to the intricacies involved in this case and considering the parties involved, each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**E. O. OBAGA**

**JUDGE**



In the virtual presence of;

Ms. Kosgey for Mr. Omboto for Plaintiff.

Ms. Odwa for 5<sup>th</sup> Defendant.

Mr. Simiyu for 1<sup>st</sup> Defendant

Court Assistant –Albert

**E. O. OBAGA**

**JUDGE**

**29<sup>TH</sup> SEPTEMBER, 2022.**

