



REPUBLIC OF KENYA



Yego & another v Kapsabet Municipality Board & 6 others (Environment & Land Case E129 of 2022) [2022] KEELC 14529 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14529 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E129 OF 2022**

**MN MWANYALE, J
OCTOBER 27, 2022**

BETWEEN

JOSPHAT KIPKOECH YEGO 1ST PLAINTIFF

EMMILY CHEPLETING YEGO 2ND PLAINTIFF

AND

KAPSABET MUNICIPALITY BOARD 1ST DEFENDANT

NANDI COUNTY MANAGER KAPSABET MUNICIPALITY . 2ND DEFENDANT

NANDI COUNTY PHYSICAL PLANNING OFFICER 3RD DEFENDANT

NANDI COUNTY SURVEYOR 4TH DEFENDANT

COUNTY GOVERNMENT OF NANDI 5TH DEFENDANT

JOHN SONGOK 6TH DEFENDANT

DAVID K. SEREM 7TH DEFENDANT

JUDGMENT

1. Vide their plaint dated May 8, 2019 Professor Josphat Kipkoech Yego and Emily Chepleting Yego sued 4 Defendant's to wit, Kapsabet Municipality Board, Municipal Manager Kapsabet Municipality, Nandi County Physical Planner and Nandi County Surveyor for orders that;
 - i. A declaration that the Plaintiffs are *bonafides* innocent purchasers for value of the plot known as Nandi/kapsabet Township/387 measuring 1.0003 hectares which was subdivided into 11 plots known as Kapsabet Township/536 – 546 hence this (sic) rights to ownership cannot be impeded by the Defendant's claims.



- ii. A declaration that the Defendants joint action of entry, destruction of fences and beacons and excavation of a road through the plots known as Kapsabet Twonship 536, 538, 541, 542, 544, 545 and 546 amounts to trespass to private property.
 - iii. An order compelling the Defendant jointly and severally to remove heaps of soil deposited on the Plaintiffs property known as Kapsabet Township 536 – 546 and restore them to usable state, restore fences and beacons to the positions they were prior to their joint illegal actions.
 - iv. An order of permanent injunctions restraining the Defendants by themselves, their agents, servants and/or any other person claiming. Under them from entry, occupation, trespass and any manner of interfering with Plaintiffs property and maps to the property known as Kapsabet Township 536 – 546.
 - v. Costs of the suit.
 - vi. Any other relief and order that this Honourable Court may deem fit to grant in the interest of justice and fairness.
2. The 4 Defendants initially filed a Defence and Counterclaim through the County Law Officers; they thereafter filed an Amended Defence and Counterclaim dated on February 17, 2020. Curiously the Amended Defence and Counterclaim joined three more Defendants that were not in the sued by the Plaintiffs, to wit the County Government of Nandi, John Songok and David Serem as 5th, 6th and 7th Defendants.
 3. The Amended Defence and Counterclaim pleaded fraud and unprocedural conduct of the 6th and 7th Defendants and sought mesne profits against the 6th and 7th Defendants.

Plaintiff's Case And Evidence: -

4. It is the Plaintiff's case that they are the joint registered owners of the head title Kapsabet Township/387 having purchased the same from the initial allottees John Songok and David K Serem the 6th and 7th Defendant's in the amended statement of Defence and Counterclaim.
5. The Plaintiff's further plead that the caused subdivisions on Kapsabet Township 387 into 11 portions upon receiving all necessary approvals from the then Senior Lands Administration Officer Nandi County, the Town Clerk Municipal Council of Kapsabet and the District Physical Planning Officer, Nandi District.
6. Than on 14/7/2018, the Defendants, jointly and severally moved into the Plaintiffs land parcels 537, 538, 541, 542, 544, 545 and 546 destroyed part of the fences and graded a 12 metres road passing through the said plots with impunity and without any prior Notice to them as the registered proprietors.
7. The Plaintiff further state that the action of the Defendants amount to illegal trespass to private property in contravention of Section 19 to 26 of the Land Registration Act, the Survey Act Cap 299 and the Constitution of Kenya 2010; and sought injunctive prayers against the Defendants.
8. The Plaintiffs further particularized their loss and damages occasioned to their private property by the illegal action of the 1st to 4th Defendants, they claimed further that they were bonafide and innocent purchasers for value for the plots known as Kapsabet Township 387 measuring 0.003 Hectares which was subsequent subdivided into Kapsabet Township 536 – 546.

PW1, the 1st Plaintiff testified and adopted his witness statement dated 8/5/2019, as well as a further statement dated January 31, 2022.



9. He equally produced the list of documents dated 8/5/2019 as P Exhibits 1 to 14 and the supplementary list of documents dated 31/01/2022 and produced P Exhibits number 15 – 43.
10. It was his testimony that he paid kshs 1,816,800/= to the 6th and 7th Defendants John Songok and David Serem in respect of Nandi/kapsabetmunicipality/387.
11. It was his testimony that before purchase, he had seen the allotment letter (P Exhibit 2) where the property measured 1.02 Ha He had also seen the PDP which was KAP/126/93/17 (Dated 30/9/1994) (P Exhibit 6).
12. That he verified that all payments due to the Government had been paid the receipts were produced as P Exhibit No 3 and 4. He had seen the correspondences from Commissioner of Lands (P Exhibit 5) in relation to an Amendment to RIM in respect to plot number 387 and acreage was 1.003 Ha The F/R was No 263/2012.
13. The beacons made pursuant to the Amendment in the F/R (P Exhibit 7) shows the beacons as they existed which is how they now exist.
14. It was his further evidence that he undertook all the procedures for subdivisions, including obtaining PPA 5 and an approval for sub division was done.
15. It was his testimony that the titles were issued upon subdivision and the titles are in his name as evidence by the searches P Exhibit 13 (a) to 13(k) and copies of green card showed no encumbrances.
16. The 6th and 7th Defendants as previous owners had paid rates of kshs 82,400/= before transferring to him.
17. It was his further evidence that the County Surveyor had filed a report in Court on 23/8/2019 and the findings on the report were that there was no road between plots number 387 and 341.
The boundary line was clear as defined on the road. The survey report was produced as P Exhibit 37.
18. It was his testimony that he had not been summonsed to surrender the leases.
19. In cross examination by Mr Sambu for the 1st to 5th Defendants, PW1 responded that he had bought property from 6 and 7th Defendants before they obtained the title which they were processing, he paid kshs 1,816,000 as purchase price.
20. At the time of preparing the agreement for sale, the lease had not been issued to the vendors, so he could not do a search. The head lessor was the County Council of Nandi.
21. It was PW1 further testimony in cross examinations that he had seen all the correspondences, from the commissioner of Lands, District Physical Planner P Exhibit 33 to 35. The PDP DRG NO KAP/126/93/4 was the same that was referred in the correspondences. The PDP in the allotment letter was KAP/126/93/7. The reference was the same for the last digit which relates to folio.
22. In further cross – examination he stated the PDP is dated 2/8/1993 (P Exhibit 6) approved by the Commissioner on 14/9/1994. The PDP Reference KAP/126/93/7 property has 1.02 Ha There was a 12 metre road reserve in dotted lines between the judiciary plot and CITC.
23. That he had demanded the beacon certificate before the purchase. There was no road only a dotted line. There was a fence between his property and the CITC. The fence was a live ledge and he had bought a fenced property.



24. In response to cross-examination by Mr Melly for 6th and 7th Defendants, the witness (PW1 stated that he had bought the property from 6th and 7th Defendants and paid the consideration.
25. He had conducted his due diligence and had been shown that the 5th and 6th Defendants had applied for allocation of the property and the commissioner had replied vide a letter (P Exhibit 31).
26. The physical planning officer identified a plot and he wrote comments to the town clerk. The District Surveyor received a letter from the District Planner with no objection (P Exhibit 32). The District land officer as well as the District Commissioner had no objection as evidenced in P Exhibit 33 and 35). Hereafter an allotment was issued on 30/9/1994 and payments for the allotment was made.
27. PW2 the Land Registrar Nandi County, testified. It was her testimony that the certificate of lease for Kapsabet Municipality 387 had been cancelled by her predecessor. She produced a copy as (P Exhibit 11).
28. There was a transfer of lease from David Serem and John Songok to the Plaintiffs and a consent from the head lessor dated 11/7/2008, payments for Registration had been made on 6/8/2009. Payment of stamp duty was made Title No Kapsabet/township387 was closed on subdivision. The subdivision had been approved as could be evidenced (P Exhibit 46) and certificate of compliance issued. Title number Kapsabet/township/387 ceased and 11 titles created from 536 to 546, copies (P Exhibits 14 a to 14 k).
29. It was her testimony that there was a relationship between subdivisions 536 – 546 and the original title 387.
30. In cross – examination by Mr Sambu, PW2 indicated the conditions attached to the lease, as development within 6 months and not to sale, transfer, sublet or part possession without the approval of city council, not to subdivide without approval of the Council.
31. PPA2– Notification of approval form PPA5- certificate of compliance, assured that everything is corrected. PPA is prepared by physical planner.
32. In further cross – examination by Mr Melly PW2 indicated that the white card for 387 was created on October 16, 2007, with the 1st registered proprietor of the lease being David Serem and John Songok.
33. Parcel 387 was closed on sub-divisions, and 11 parcels created 536 – 546.
34. PW3, was Kennedy Kiplagat Mutai the County Land Administration Officer and County Coordinator in Kitui, in 2012 he was the District Land Administration Officer Nandi. He had come across a file for subdivisions, changer of user, approval of building plans, and extension of user.
35. In respect to plot Kapsabet/township387, his office had received an application from Neplan Consultants – registered physical planner who were agents of the registered owner.
36. He confirmed ownership of the property by conducting a search, so as to confirm any encumbrances, and the tenure of the use, after confirmation be circulated proposal through letter dated 23/8/2012 (P Exhibit 46) to the town clerk the Physical planner and the District Surveyor.
37. The District Planner responded vide the letter dated 24/8/2012 (P Exhibit 47), while town clerk approved on 6/9/2012 (P Exhibit 48) and he received a compliance certificate dated 13/09/2012.
38. The subdivision plan had been approved by the Town Clerk, District Surveyor, so he recommended payments for subdivision and payments made.
39. He endorsed his approval after the payments had been made.



40. In cross examination by Mr Sambu for 1st to 5th Defendant he stated that the physical planner received the application first before him PPA1 is the application and is ordinarily received at the local authority; for their comments, PPA 2 – either rejects or approves, he did not receive a copy of the PPA2 but he did not need to receive it.
41. It was his testimony that been a subdivision the conditions are enforced by the Local Authority and he did not check the conditions for the lease.
42. In cross – examination by Mr Melly for 6th and 7th Defendants, he stated that he received an application in respect of plot number Kapsabet/municipality387, it was registered in the name of Josphat Yego and Emily Yego the 1st and 2nd Plaintiff who had been registered as transferee from Dvid Serem and John Songok.
43. He had checked on physical file and there was no application to revoke the lease; the property was also free from any encumbrances and it was subdivided to 11 sub plots, 536 to 546 hence there is a relationship between plots Kapsabet Township536 – 546 and Kapsabet Twonship/387.
44. PW4, Mr Njogu Kamau testified, he was involved in the subdivisions and was familiar with DMFI4. He procured all the approvals from the Land Officer, district Surveyor, Physical Planner and Town Clerk. He also obtained subdivision scheme with approval comments, and a survey plan with FR No 236/12. He had a certified copy of the subdivision. Its folio number 546/108. Before subdivision he confirmed perimeter boundaries and noted the beacons ofKapsabet/township387.
45. It was PW 4’s further testimony that the beacons for plot number Kapsabet Township387 are B, C, LD 7. E and T4 all five in number. They prepared a fixed survey based on the coordinates, bearing and distance. LD7 was found on 2 + 23 U23.60N + 11 385.30 E are the beacon were identified in iron pin concrete.
46. Boundary C is located 83° 13’ 18” distance of 130.99 metres from LD7.
+23 039.06 N
+11 515.37 E
On the original survey plan 263/12 coordinates of LDF are
+23 023.60N
+11 385.30 E
The location for - 83°11’18” with distance of 130.99 meters.
47. It was his further evidence that the distance between Beacon Band C in the Survey Plan FR 263/2 is 76.22 Meters and that this was the same in respect of the subdivision in F/R 546/108 at 76.22 he produced the FR 263/12 as P Exhibit 52 while P Exhibit 53 – FR 546/108.
48. He further stated that in a subdivision the perimeter boundaries cannot be moved. There was no amalgamation of any road as there was no road.
49. In cross examination by Mr Sambu the witness stated that before a survey plan is made for the Government, a PDP and an allotment letter from the commissioner.
50. It was his testimony that a survey plan should be in conformity with the PDP, It was his further testimony that if an approved survey plan is at variance with the PDP, the survey plan takes precedence.



51. It was his further testimony in cross – examination that the beacons for Nandi Kapsabet 387, LD7 and C are shared by another property. That an amendment to a survey plan is done by Director of Survey who approves and authenticates and it thus when ready generates deed plans and /or the RIM and submitted to Commissioner.
52. The witness stated that the application for subdivisions was prepared by planners, and were issued with a PPA5 and that a PPA2 is an approval issued for construction works.
53. In further cross examination by Mr Melly, the witness stated that they did not need an allotment letter since the property was already registered.
54. That the property was 1.003 Ha and there was no road on the property. There was no amendment to increase to reduce the acreage, and 12 metre road would reduce the acreage, and 12 metre road would reduce the acreage by 0.1615Ha
55. It was his further testimony that once it is surveyed the dotted line becomes a solid line.
56. In re-examination, he stated that PPA2 – is known as approvals/refusals of development permission. Subdivision is not a development permission.
57. When shown P Exhibit 6 – it was his evidence that the dotted line does not cut through plot 387; it was on the lower side of beacon LD7 and C hence outside plot No 387. Any road created with the dotted line would thus be outside Kapsabet/township 387.
58. He confirmed that Amalgamation of 0.1615 being the 12 metre road to the 1.003 Ha would give it 1.1618 Ha If acreage was reduced by 0.1615Ha from 1.003 Ha it would have reduced by 0.8388 Ha, however plot number Kapsabet/township387was found to be 1.003 Ha It was his evidence therefore that the survey of Kapsabet/township/387 did not take any road.
59. The last Plaintiff's witness was PW5 – Monica Katiambo, a land Surveyor based in Nandi County equally testified. She produced a survey report that had been prepared by Mr Barnaba Kiplimo as P Exhibit 54. After production of the survey report she was cross - examined.
60. It was her testimony in cross – examination by Mr Sambu that the survey states that the reference map used was F/R 564/113. CITC F/R 158/2017, states the road in question dotted and is seems to have been swallowed by FR 263/2012, for parcel number 387 and 388. Coordinates for CITC LR 1181/341 beacons LD 7, A LD 6, and LB7, at a corner. The proposed road has bearing of $83^{\circ}13'18''$ distance from LD7A 330.93 metres to LD6, bearing LD7 60 bearing $83^{\circ}13'18''$; same bearing a boundary.
61. The road is adjacent to parcel LR No 1181/341. The neighboring survey plan number 263/2012, road passes through 387 and 388. It was her testimony that an allotment letter and a PPP must issue before land is surveyed.
62. A PDP is the base, but a survey plan is superior to the PDP. When there is a variance, it must be noted on the survey report, which shall be rectified by Director of Survey and Director of Physical Planning.
63. In answer to cross – examination by Mr Melly, the witness stated that she was not aware whether parcel 387 and 341 were adjacent.
64. On FR 158/2017, contains parcels 341, there is 388 and 387 and a road between the parcels; there was a fence on the ground describing end of 387 and beginning of 341.
65. There was a road described in parcel number Kapsabet/township/387 but with dotted line which means it had not been fully surveyed.



With regards to P Exhibit 8, there was a note that 6 metre truncation should not be raised, from District Surveyor Nandi to Director of Surveyor – the truncation was not to be implemented on the ground.

66. It was her further evidence that the road was shown on the Town Development Plan, which is not a PDP. The road graded but closed at extreme ends of parcels affected 358, 541, 542, 544, 545 and 546.
67. After the testimony of the 5 Plaintiff's witnesses, the Plaintiffs' case closed.

Defence Case And Evidence:

68. The first 4 Defendants in the Plaint were all represented by the Mr Sambu who also represented the 5th Defendant introduced by the Amended Defence and Counterclaim, while the 6 and 7th Defendants introduced in the Amended Defence and counterclaim were represented by Mr Melly.
69. The Court shall summarise the evidence of the Original 4 Defendants together with the 5th Defendant, but distinctly, from the 6th and 7th Defendants in the counterclaim.

1ST TO 4TH Defendants Case And Evidence.

70. DW1 Veronica Ndunge Musee a County Physical Planner testified on behalf of the 1st to 5th Defendants. She adopted her witness statement and produced the list of documents dated 25/9/2019, the Supplementary list of documents dated 1/02/2021 as well as the list of documents dated November 10, 2021.
71. She produced the town plans for 1981 as D Exhibit 43. She produced two PDPS in reference to CITC (D Exhibit 10 approved plan No 52 approved on 29/11/2020, PDP – 126/2010/01, which shows a road between CITC and parcel No Kapsabet Township/ 387 although in the map it reads Kapsabet Township/397. Prior to approval of D Exhibit 10 – the PDP was advertised in the standard newspaper and there were no objections to the same.
72. The Judiciary PDP was also approved on 28/7/1017 approval No 59 – PDP/KAP/126/27/01. There is a 12 metre road reserve between plot No Kapsabet Township/387 and CITC. This PDP was advertised in standard newspaper (D Exhibit 14) and no objections received.
73. The 12 metre road is a loop between the Highway and the properties. The road was there before the PDP for Judiciary was approved.
74. The PDP KAP/126/93/7 shows a 12 metre road reserved, however was not approved. She produced D Exhibit No 42 – register for PDPS. Where all PDPS prepared, their reference number, the purpose and date prepared, date circulated and date submitted for approval and date approved, approval number and remarks from April 1978 and was still in use today. D exhibit 35 PDP/126/93/7 was proposed site for residential plot prepared on 2/8/1993 however there is no record of approval or approval number, hence D Exhibit 35, was not approved.
75. D Exhibit No 19 is a letter from the Director of Physical Planning to Chief Officer Lands and Environment and Climate Change on PDP KAP/126/93/7 (D Exhibit 35) to the effect that the said PDP was not approved. It was her further testimony that PDP is an allocation plan, while a survey plan demarcates boundaries after allocation.
76. She further testified that a PDP predates a survey plan, and where there is a conflict between PDP and Survey Plan, a PDP takes preference because a parcel of land cannot be surveyed before allocation.



77. DW1 produced D Exhibit 43 the town plan for 1981, the area where property Kapsabet Township/387 was situated was reserved for low density residential area and was reserved for Government pool housing. The area was zoned as 04 as appearing in D Exhibit 43; the town plan.
78. With regard to P Exhibit 8, the letter dated 3/3/1997 from the District Surveyor Nandi to Director of survey Nairobi, the same was meant for survey of residential and church plots in Kapsabet, it was authority to survey plot numbers 385, 388 occupied by the New District Headquarters and Government pool houses.
79. It was her further testimony that PDP is subject to ground survey but no amendment to the amenities without approval of the planner.

A revision is usually made when there is ground variance.

80. The witness faulted the allocation process in allocation of plot number Kapsabet Township/387, which started with a letter dated July 23, 1993 from commissioner to the District Physical Planning. The proper procedure was that Land was supposed to be set apart, then go to committee for plot allocation, then gazette and interested parties would be vetted and a PDP would then be prepared by Physical Planner attaching minutes for allocation, thereafter PDP would be approved.
81. It was her evidence that the letter dated July 23, 1993 was the basis for the PDP Kapsabet Township/387. Letter dated 1/7/1994 referred to KAP/126/93/4 from District Surveyor to District Physical Planner. While letter dated 4/8/1994 from DC to physical planner refers KAP 126/93/4 PDP NO KAP/126/3 VOL.1/1997. The reference was the same.
82. It was her further testimony that the County Officers were justified in opening the roads so as to make a loop to the highway. The lease dated 21/9/2007 had conditions – condition 2 – no subletting 6 calendar months, and was to be developed with 24 months clause 9, no sale, charge transfer, sublet without prior authority of the County. No subdivision without authority from County.
83. It was her further evidence that a subdivision is a development requiring development permission in terms of an approval in PPA2. Hence since there was no PPA2 the subdivision was irregular. Further she stated that the implementation of the road was so as to open accessibility and reduce traffic from main road and prayed that the counterclaim be granted.
84. In cross – examination by Mr Rotich for the Plaintiff DW3 stated that the property had a fixed boundary at the time of issuance of title to the original allottees. She further stated that a physical planner is authorized to temper with fixed boundaries, although she had not authorized the grading in this case.
85. It was her further answer in cross examination that only a surveyor would be in a position to know whether a road passes through plot Kapsabet Township/538 to 546. She disputed the ownership of the certificate of leases since her records did not have an approved PDP alienating and allocating the property. The witness confirmed that there was a road from National Bank to Baraton Kapsabet Road. That the new Judiciary PDP (d Exhibit 42) has a new road which passes through the disputed property and the Judiciary land.
86. She further stated that there is a road on the survey plan but not on the PDP. A plan is a guide and a proposal plans are implemented through survey on the ground. A dotted line is a proposal and means that the property has not been surveyed. A PDP in respect of Kapsabet Township/387 was prepared but was not approved. Letter of allotment refers to PDP/KAP/126/93/07 which was not approved.



87. In further cross – examination by Mr Melly, she stated that she was an employee of the Ministry of Lands, but in this case. She was giving evidence on behalf of the 1st to 5th Defendants, having been seconded to the County Government of Nandi. There was confirmation that plot could have been allocated to David Serem and John Songok. Before issuance of an allotment letter there ought to be a PDP. It was her testimony that the plot that was allocated to David Serem. John Songok was unsurveyed residential plot. Plot No Kapsabet Township/387 did not have a PDP prior to 2010. The PDP on P Exhibit 40 refers to a residential plot but does have a related parcel number, hence any PDP after allotment could not be for parcel Kapsabet Township/387.
88. The ownership for the property is not in question during subdivision but the issue of allocation come up. The complaint was made after the suit was filed, about the non-existence of approval for the PDP for Kapsabet Township/387.
89. In re-examination the witness stated that it was the survey map that created the road, and when there is variance between the PDP and a survey map, the survey map takes precedence. She reiterated that the PDP/KAP/126/93/4 was different from parcel number 387 whose PDP was PDP/KAP/126/93/7.
90. DW2, Evans Chadira, gave testimony he stated that he had occasion to look at proposed PDP for plot number 341, but did not see the PDP for Kapsabet Township/387. It was his testimony that there is a 12 metre road that separates CITC from plot 387. He testified that during survey, the allotment must be accompanied by an approved PDP as an authority from director of survey.
91. It was his testimony that during the survey of plot number Kapsabet Township/387 the 12 metre road was swallowed as was observed in the comments of P Exhibit 54, FR 158/17 used to survey parcel No 341. Survey plan for Kapsabet Township/387 covered in FR/263/12.
92. On the survey plan on F/R/151/17 comments “that this road seems to have been swallowed by FR 263/12 please investigate.”
93. The said comment was the basis upon which the road was reopened. He further stated that during the survey, Reverend Kipkosgei from CITC indicated that there used to be a road and pointed to a closed gate and a sentry. It was his testimony that the opening of the road did not affect any developments on the property.
94. In cross – examination by Mr Rotich for the Plaintiff the witness stated that the neighboring PDP for the Judiciary, the property had not been registered but had been surveyed with No 569. The Judiciary property shares boundary with CITC. He confirmed that D Exhibit 44 there was a dotted line that and when a line is dotted it is a proposal. Any error of the survey plan ought to have been communicated to the Director of surveys. He was not aware whether the property had a fence. He stated that parcel number Kapsabet Township/387 had fixed boundaries. He stated that the CITIC property had no approved PDP, and its PDP was prepared in 2010.
95. The witness was also cross – examined by Mr Melly, where he stated that CITC does not share a common boundary with parcel number Kapsabet Township/387, only the Judiciary land and CITC had common boundaries.
96. There was a dotted line between parcel Kapsabet Township/387 And Kapsabet Township/341, means that survey for Kapsabet Township/387 had not been done. Parcel number Kapsabet Township/387 was 1.003 Ha, and if there was a road annex in between the acreage would have been increased.
97. The lease was issued irregularly to first registered owners, since there was no allotment minutes, and a lease was an end product; and an approved PDP was a primary documents for allocation.



98. On re-examination, he stated that D Exhibit 44, had comments “that his road had been swallowed by F/R No 262/12.” He stated that where they are inconsistencies between a PDP and survey plan; the inconsistencies are recorded in the survey plan.
99. He insisted that the entry to the property was so as to open a road and hence here was no trespass.

6Th And 7Th Defendant’s Case:

100. The 6th Defendant Mr David Kipkoech Serem, testified in Court, it was his testimony that he had acquired the property regularly. He initially applied for a plot vide a letter dated 23/7/1993 and the town clerk allowed the application on November 17, 1993. He obtained a letter from District Surveyor to the Planner but copied to him with no objection on the PDP.
101. The Land Officer and the District Commissioner equally allowed the application and he was issued with an allotment letter on 30/9/1994. He made the requisite payments and was issued with lease where he paid the rent and sold property to Professor Joseph Yego.
102. At time of sale, he had the property in his name and he transferred the same to Plaintiff after settling a debt he owed his sister. He had fenced the property and there was no protest and or objection, he did not participate in any fraud neither did he obtain the title through corrupt means. He received a consent to transfer and transferred to the Plaintiffs and he prayed that the counterclaim be dismissed with costs.
103. In cross examination by Mr Sambu for the Plaintiffs in the counterclaim, the witness stated that he was told that the plots were for allocation, but there was no advertisement. He made the first application to the Town Clerk, and thereafter to the commissioner for lands who responded vide the letter dated 23/7/1993. That the allocation was approved before identification of the property according to the letter dated 23/7/1993. The letter dated 23/7/1993 had no PDP number.
104. In D Exhibit 3, the PDP number is KAPSABET/126/93/4 while the PDP number in the allotment letter was KAPSABET 126/93/7 the two numbers are different.
105. It was his further testimony in the cross – examination that he was shown the plot after the PDP had been prepared and beacons inserted after the letter of allotment was issued. It was his further evidence in cross examination that the Agreement for sale was prepared on 11/7/2007 before he was issued with the lease on October 16, 2007 and a Certificate of Lease on October 19, 2007. At time of sale the property was vacant. He sold the property with no development on it although condition 2 required that submissions of building plans with the Municipality within 2 months.
106. There was no road between the CITC property and suit property at the time of allocation. The sale was based on the lease property that he had secured.
107. In further cross – examination by Mr Rotich, the witness confirmed that, the Plaintiff Professor Yego had not sued him. He further stated that before fencing, beacons were in situ and not interfered with; and that there was no complaint of encroachment by anyone. That he had a Certificate of Lease.
108. In re-examination, the witness stated that KAP/126/93/4 is a reference number on a letter and not a PDP. DW3 Exhibit No 6 was not the PDP given at time of allocation. That the lease had not been revoked for non-compliance. He received full consideration at time of transfer and he had not been sued by the professor; and that there were beacons in situ at time of transfer. He had been called to testify and produce the Original document or certified copy under the Director of Survey’s Land of Survey Plan FR NO 158/2017.



109. Under the provisions of Section 146 (4) of the *Evidence Act* and Order 18 Rule 10 of the *Civil Procedure Rules*, the Court summonsed the County Land Surveyor Nandi, so as to produce Survey Plan Folio No FR 158/2017 whose production of a copy thereof by DW2 had been objected to, by Counsel for the Plaintiff and the 6 and 7th Defendants in the counterclaim as it contained handwritten notes. This the witness testified as DW3 (in respect to the 1st to 5th Defendants case).
110. DW3, Bernard Kiplimo, the County Land Surveyor, testified. It was his testimony that he had before transfer of the same, Certificate of lease was dated October 19, 2007, transfer was made on 6/8/2009; he paid Land Clearance Certificate dated 5/8/2009 before transfer.
111. The said survey plan related to LR No 118/341 and borders survey plan No 262/2012 to the North. There is a 12 metre road between FR No 262/2012 and FR No 158/2017. FR NO 158/2017 has not surveyed the road. It was his evidence that D Exhibit No 44 is the as FR No 158/17. On the ground there was no road, and that FR NO 263/12 is the one that swallowed the road, and it related to Kapsabet Municipality 387. He produced the exhibit as D Exhibit 45.
112. On further cross – examination by Mr Melly, the witness stated that the author of the notes was not certain whether the road had been swallowed or not and ordered an investigation. It was his answer that if the road had been swallowed plot number 387 ought to be bigger.
113. In re-examination, the witness stated that FR 158/17 was prepared first on 10/8/1981 and received 26/8/1981 while FR 263/12 was received on 19/1/1996 that FR 262/12 adopted the boundaries' done in respect of FR 158/17. The survey work for FR 263/12 did not provide for the road.
114. After the testimony of DW3 the Defence closed its case and parties filed their submissions on the case.
115. I have analysed, the pleadings, the evidence on record as well as the submissions filed and frame the following as issues for determination.

Issues For Determination:

116.
 - a) Was the acquisition of plot number 387 by the 6th and 7th Defendants regular as claimed by them or irregular as claimed by the 1st to 5th Defendants in their counterclaim?
 - b) If answer to a above is in the affirmative, did the 6th and 7th Defendant pass a good title to the Plaintiff?
 - c) If answer to b above is in the negative is the Plaintiff a *bonafide* purchaser for value without notice.
 - d) Was there a 12 metre road reserved to pass through the boundary of plot number 387?
 - e) If answer to (d) above is in the affirmative did the 1st to 5th Defendants trespass on the Plaintiff property.
 - f. Has the Plaintiff proved his case on a balance of probabilities?
 - f. Have the 1st to 5th Defendants proved their counterclaim on a balance of probabilities?
 - f. What reliefs ought to issue?
 - f. Who bears the costs of the suit?



Analysis And Determination:

117. The process of allocation of unalienated Government land was well elaborated in the decision in the case of; *Nelson Kazungu Chai & 9 Others vs Pwani University College* 2014 (Eklr), where the Court held as follows:-

“130 It is trite law that under the Repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any alienated Government Land could be allocated. After a part Development Plan has been drawn, a letter of allotment based on the approved part Development Plan is then issued to the allottee.

“131’ it is only after the issuance of the letter of allotment and compliance of the terms, therein that a cadastral survey can be conducted for the purposes of issuance of a certificate of lease.”

118. It is the Plaintiff case, that the 6th and 7th Defendants followed the above process before issuance of their title. In support the Plaintiff produces as P Exhibit number 2 – an allotment letter dated September 30, 1994, addressed to the 6th and 7th Defendants David Serem and John Songok. In the said letter of allotment it states the plot shown edged red on attached KAP/126/93/7. The Plaintiff further produced as P Exhibit 6, a part Development Plan of KAP/126/93/7 dated 14/9/1994, that had been prepared and circulated on 2/8/1993, by a Mr Naliayanya Wasike.

119. Based on the above documents, it is the Plaintiffs case that the allocation to the 6th and 7th Defendants was regular and proper, as there was a PDP that was prepared and circulated before the allotment was done.

On their part the 6th and 7th Defendant equally contend that the allocation of plot number Kapsabet/township/387 to them was proper and regular, and not through fraud and/or a corrupt scheme.

120. It was DW3 David Serem (the 2nd Defendant in the counterclaim) testimony that he applied for a plot in Kapsabet Town vide his letter dated 23/7/1993, (that the various offices by correspondences did not object to the allocation of the plot to them.

121. The officers indicated include the District Commissioner, the Lands Officer and the District Surveyor which culminated to issuance of an allotment letter, after he had paid the for the same. Consequently the obtained a lease and transferred the same to the Plaintiffs.

122. The 1st to 4th Defendants through DW1, testified that Kapsabet Municipality 387 had been zoned for Government low density housing. The witness further testified that any Part Development Plan, ought to have been approved prior to the allocation and that there was no public auction nor minutes on allocation of the property hence the same was irregular. The witness stated that the letter of no object following the 6th and 7th Defendants application for a property alluded to by the 6th and 7th Defendants and relied on by the Plaintiffs all related to a different parcel and that the PDP/NO KAP/126/93/4 referred to a different parcel from PDP/No KAP/126/93/7 referred to in the allotment letter.

123. The witness further produced D Exhibit 35 a register of PDP prepared and approved from 1978, the exhibit does not indicate an approval number and date of approval for PDP No KAP 126/93/7, further D exhibit 19, a letter from the National Director Physical Planning dated 18/7/2019 equals confirms that the PDP or plot number Kapsabet/township/387 was not approved. D Exhibit 35 also shows that KAP/126/93/7 and KAP/126/93/4 are different PDPs.



124. On the strength of the above evidence the 1st to 5th Defendants submit that the allocation process was irregular since there was no approval of the PDP, and on the strength of the fact that the area had been zoned for Government low density housing and hence it was not available for allocation.
125. To buttress the point the 1st to 5th Defendants have placed reliance on the case of *Attorney General vs Electrical Options Limited, as well as the case of Nelson Kazungu Chai & 9 Others vs Pwani University* 2014 (eKLR), where the Court held inter alia “where land has been reserved for public purpose, like in this case, any allocation of such land to private persons cannot be recognized by Court. Public interest outweigh an individual’s right to own the same property. It therefore does not matter that the Plaintiff’s had a legitimate expectation to be allocated the suit property.”
126. With regard to the 1st issue as to whether the allocation to the 5th and 6th Defendants was regular as claimed by claimed or irregular as claimed by the 1st to 5th Defendants in the counterclaim, the Plaintiff’s submissions are silent on it. The Plaintiff has submitted on the other issues as framed for determination.
127. The 6th and 7th Defendants raised an issue as to whether they had proprietary interests in Kapsabet/township/387, and they submitted that they certificate of lease.
128. There being no approval of the PDP for Kapsabet/township/387, it follows that an allotment letter could not have validly and procedurally being issued. It is the Court findings that they were anomalies in the issuance of the allocation and in so far as the allocation was made to a property reserved for Government low density housing, the acquisition of plot number Kapsabet/township/387 by the 6th and 7th Defendant was irregular.
129. Having answered the first issue in the affirmative, it follows that the 6th and 7th Defendants, having irregularly and unprocedurally acquired the above property they did not have a good title and could not possibly pass a good title to the Plaintiff in this matter.
130. The above settles issue No 2 and the Court now considers the issue as to whether the Plaintiff was an innocent/bonafide purchaser for value? Under this head of submissions the Plaintiffs submit that they acquired the property from the 6th and 7th Defendants and their lease P Exhibit No 11 – head certificate of lease was uncontested. P Exhibit No 15 – transfer from the head certificate of lease. P Exhibit No 16 – initial lease document. P Exhibit 44 – being letter of consent.
131. The Plaintiff avers that by dint of the said documents, the subdivision of the property was lawful, the Court has found that the acquisition of the property by the 5th and 6th Defendant was irregular and unprocedurally for want of;
- i. An approved PDP prior to allocation
 - ii. The property having not been set aside for allocation
 - iii. The property having been set aside for Low Density Government Housing and;
 - iv. There being no minutes for allocation hence the process for acquisition of Government Land as set out in the Nelson Kazungu (supra) case was not adhered to.
132. The Plaintiff submits that he is an innocent purchaser for value thereby availing themselves the protection under Section 26 of the *Land Registration Act*, and submits that the Doctrine of innocent purchaser is available to him in the case.
133. The Court has not found any evidence of fraud or acquisition of the property by corrupt means, as the 6th and 7th Defendant applied for the property, their application was approved and there was no objection to their acquisition.



134. In *Arthi Highway Developers vs West End Butchery*, the Court of Appeal, quoted the decision in *Charles Karathe Kiarie & 2 others vs Administrators of Estate of John Wallace* where the protection of an innocent purchaser for value was considered and held that it was not applicable where there was evidence of fraud.
135. This was the similar conclusion reached by the Court of Appeal in *Dr Joseph arap Ngok vs Justice Moiwo Ole Keiwua* where the Court held “Section 23 (i) of the Act gives an absolute and Indefeasible title to the owner of the property.....”
136. From the above two decisions, it follows that where there is no evidence of fraud, like in this case, then the protection of the law is available to an innocent purchaser for value.
137. In the *Arthi Highway Developers Case*, the Appellate Judges observed at paragraph 66 to 68, of the qualification to the basic rule of the doctrine of purchaser without notice, which demonstrates distinction between legal estates and equitable interests.... The Judges observed “the doctrine of purchaser without Notice never enabled a purchaser to take free from any legal rights as distinct from equitable rights.” Applying that in the present case the legal rights herein, meant that the acquisition by the 6th and 7th Defendants ought to have been regular and procedural, having found that it was irregular and unprocedural and they could not pass good title, even though there was no fraud or acquisition through corrupt means, the property having been set aside for Low Density Government Pool Housing, was not available for allocation and as the lease is an end product, the doctrine of innocent purchaser cannot be used to defeat the initial irregular and unprocedural acquisition as only regular and unprocedural acquisition would have resulted to legal rights. Furthermore Section 26 (2) *Land Registration Act* does not protect unprocedural acquisition.
138. The inevitable conclusion that whereas there was no fraud and/or acquisition through corrupt means by the 6th and 7th Defendants there was simply no property to allocate so as to give legal rights and the Plaintiff therefore does not deserve the tag of an innocent purchaser for value- under Section 26 of the *Land Registration Act* as the title was acquired irregularly and thus unprocedurally.
139. Having reached the finding that the land was unregularly allocated thus the lease issued unprocedurally, and that no good title passed to the Plaintiff and that he is not protected by the doctrine of innocent purchasers for value, issues No d, e, and f shall not be dealt with as their would to be dealt with once I had found negative on issue d) hence on a balance of probability the Plaintiff have not proved their case and the same is dismissed.
140. The Court thus finds for the 1st to 5th Defendants in the counterclaim, and enters judgment for them in terms that;
- i. Kapsabet Township/387 is a public Land reserved for Government low housing density.
 - ii. Declaration that the title deeds to Plaintiff in Kapsabet/township/387 and subdivisions Kapsabet/township/536 – 546 were unprocedurally procured and the same be cancelled and are hereby cancelled.
141. However the Court declines to grant prayers (g) of the counterclaim as there was no fraud committed by the 6th and 7th Defendants.
142. Each party shall bear its costs.
- Judgment accordingly.

DATED AT KAPSABET THIS 27TH DAY OF OCTOBER, 2022.



**HON. JUSTICE M. N. MWANYALE
JUDGE.**

In the presence of;

Mr Sambu for 1st to 5th Defendants

Mr Kiprono for 6th and 7th Defendants

Mr Rotich for Plaintiffs

