



Szaredo Investments Limited v Chief Land Registrar & 2 others (Land Case 167 of 2016) [2022] KEELC 15589 (KLR) (21 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15589 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE 167 OF 2016
FM NJOROGE, J
NOVEMBER 21, 2022**

BETWEEN

SZAREDO INVESTMENTS LIMITED PLAINTIFF

AND

CHIEF LAND REGISTRAR 1ST DEFENDANT

**MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT 2ND
DEFENDANT**

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The Plaintiff (hereinafter also referred to simply as “Szaredo”) filed a plaint dated 11/5/2016 seeking the following orders:
 - a. Payment of the sum of Kshs 122,650,000.00 by the Defendants to the Plaintiff for compensation for loss occasioned by rectification of the Register;
 - b. Payment of special damages amounting to Kshs 4,138,566.00 being the total purchase price of the subject properties and mesne profits paid to Josphat Muthuri Mwangi by the Plaintiff;
 - c. Costs of this suit; and
 - d. Any other or further relief that this honourable court may deem fit and just to grant in the circumstances.
2. In the plaint the plaintiff claims that in conjunction with another firm by the name of Wildfire Limited it carries on the flourishing business of growing and exporting flowers. On or about July 2003 a director of the plaintiff was approached at the plaintiff’s premises by one Francis Mwangi who presented himself as the son to Margaret Nyambura concerning the sale to the plaintiff of 19 parcels of land



totaling to 5.643 ha. owned by Margaret. These plots are known as Naivasha/Mwichiringiri Block 4/243-246 (inclusive) and Naivasha/Mwichiringiri Block 4/5517-5535(inclusive). I will in the rest of this judgment refer to them by their last number for brevity e.g., “243,” etc. In the next month the same Francis introduced one James Karimi Waiganjo as Margaret’s agent for the purpose of the proposed transaction. The two gentlemen then provided the plaintiff with original title documents for the land parcels. Francis alleged that the parcels had belonged to his deceased father and they had been transmitted to Margaret through succession. James presented the plaintiff with an acknowledgement and undertaking issued by Margaret authorizing him to transact on her behalf. An official search by the plaintiff on 8/8/2003 at the Nakuru Lands Registry confirmed that Margaret was the registered owner of the suit properties. A sale agreement dated 19/9/2003 was drawn in which 4 of the 19 parcels, that is, Nos 243-246, were sold to Wildfire Ltd for Kshs 1,832,400/=. Margaret executed the agreement in the presence of the parties’ advocate. A land control board consent was obtained, all the relevant stamp duties and registration dues were paid and titles issued to Wildfire Limited as nominee for the plaintiff. After the success of that first transaction, on 18/2/2004, the vendor sold and transferred the rest of the plots to the plaintiff but without any sale agreements being executed between them and the plaintiff took possession and extensively developed the parcels. However, in 2009 Josphat Muthui Mwai the husband to Margaret who had been reported deceased, approached the plaintiff with title documents to the suit land claiming it. Two court cases emanated from the foregoing transactions: Josphat lodged a complaint with the Police and James Karimi was arrested and charged in Naivasha Criminal Case Number 1071 Of 2009 in which Josphat and the plaintiff’s director testified. Josphat also sued in ELC No 85 Of 2012 (Formerly HCCC No 268 Of 2009) *Josphat Muthui Mwangi Vs Chief Land Registrar, Szaredo Investments Ltd and Margaret Nyambura Kamau* seeking, and was granted, orders restoring his registration in the lands register as proprietor of the suit lands, mesne profits and an order that the plaintiff herein do vacate the suit plots.

3. The plaintiff’s claim herein is that it was a bona fide purchaser for value who conducted due diligence prior to purchase of the suit properties and during the transaction and paid all dues and costs in relation to the transaction besides surrendering to the Land Registry the titles given to it by the fraudsters. The plaintiff claims that it believed that under Sections 27,28, and 37 of the *Registered Land Act* (Cap 300) (now repealed) the results of the official search and the transaction and in general the registration and issuance of title documents were valid and that they guaranteed it an indefeasible and absolute claim to the land as proprietor. The plaintiff alleges that the Chief Land Registrar, joined here as the 1st defendant, despite having full responsibility to ensure the accuracy and authenticity of titles issued by his office, failed to exercise due care with respect to the entries in the land register and the handling of the register in relation to the suit properties thus leading to misrepresentation to the plaintiff by the fraudsters which occasioned the plaintiff loss and damage. The plaintiff alleges that the issuance of title documents to the fraudsters without any supporting documents demonstrated the participation of the 1st defendant’s officials in the fraudulent issuance of the titles to the fraudsters. The foregoing narrative forms the basis upon which the prayers set out at the beginning of this judgment are sought by the plaintiff.

The defence

4. The defendants filed their joint statement of defence on 27/7/2017. In that defence they denied the claim; they stated that the official search conducted at the Nakuru Land Registry was not for the suit plots but for another parcel since the records for the suit plots are to be found in Naivasha Land Registry.



Evidence

5. The evidence of the plaintiff was given through the sworn oral testimony of its director Peter Szapary, PW1, who testified on 27/4/2022 and that of Josphat Muthua Mwangi given orally on 21/6/2022. The advocate who handled the conveyance also testified as PW3. The evidence of the three witnesses tallied with the contents of the plaintiff's plaint in the present suit.
6. The defendant's evidence comprised of the evidence of Minnie Wacuka, Land Registrar Naivasha. Her evidence is that according to the green cards plots numbers 243 -246 and plots Nos 5517 – 5535 are registered in the name of Josphat Muthua Mwangi who was issued with titles in 1987 in respect of the first, and in 1995 in respect of the second set of titles. They are all situate in Block 4 which was bought by Mirera Suswa Co Ltd. In March 2003 the 4 parcels (243-246) were transferred to Margaret Nyambura Kamau through transmission in Succession Cause No 1143 Of 2003. In November of the same year Margaret transferred the plots to the plaintiff herein. Parcels Nos 5517 – 5535 were transferred to Margaret by way of transmission in Succession Cause No 250 Of 2002 and in February 2004 she transferred them to the plaintiff. Thereafter Josphat sued in NKR ELC No 85 of 2012 – Nakuru and the then Land Registrar, Susan Muchemi gave evidence in that case. According to the witness, the Land Registrar was not obligated to verify if the documents presented to secure the registration in the name of Margaret were forged and no land registry official was charged with any offence in regard to the subject transactions.
7. In cross-examination, DW1 admitted that in 2003 the land registry was at Nakuru and not Naivasha; that Josphat testified in the Case Number NKR ELC 85 Of 2012 and stated that he still had his original title to the lands; that the plaintiff at the same time held parallel titles; that no title had been gazetted as lost; that she is not aware of any cancellation of the old titles and the only information available is in the green card; that she is not certain whether Margaret was issued with titles upon registration; that it is irregular to have two titles to the same parcel of land in existence at the same time; that when transactional documents are lodged with the land registry the main concern of the land registry officers is to ensure that they meet all the formal requirements; that the registry officials could not have known that the succession cause documents were in respect of a person who was still alive; that she did not have the parcel file and the succession documents were not produced by the defendants in evidence in the present case and she has never seen them. However, in re-examination by the State Counsel Ms. Nyambura, she admitted that some documents can go missing after being presented at the land registry.

Submissions of the parties

8. The plaintiff filed submissions on 12/9/2022 while the defendants filed theirs on 20/9/2022.
9. The plaintiff identified two issues for determination: one, whether the 1st defendant failed to exercise due care and responsibility with respect to the entries and handling of the land register relating to the suit properties, and two, whether the plaintiff is entitled to compensation.
10. The defendants on the other hand identified four issues as follows: whether the present suit is res judicata; whether the plaintiff is entitled to compensation by the Land Registrar for the loss occasioned by rectification of the register; whether the Land Registrar failed to exercise due care and responsibility with respect to the entries and handling of the land register relating to the subject properties and, lastly, who should bear the costs of the present suit.
11. I will start by addressing the first issue raised by the defendants in their submissions because in this court's view it is a preliminary issue albeit raised at a late stage, and if this court finds indeed that the present suit is res judicata then it must down its tools.



12. The defendants' submission is that ELC No 85 Of 2012 (Formerly HCCC No 268 Of 2009) Josphat Muthui Mwangi Vs Chief Land Registrar, Szaredo Investments Ltd and Margaret Nyambura Kamau decided the issue of ownership of the suit property and they cite the provisions of Section 7 of the [Civil Procedure Act](#).
13. The defendants cited the case of [Uburu Highway Development Ltd Vs Central Bank of Kenya & 2 Others](#) 1996 eKLR for the conditions necessary to enable one rely on the doctrine of res judicata. They submit that in order to decide whether the present case is res judicata is applicable in the present case the court should examine at the decision claimed to have settled the issues and the pleadings in that case and ascertain what issues were determined, whether they are the same as those in the instant case, and whether the parties are the same or litigating under the same title and finally that the decision in the previous case was made by a court of competent jurisdiction. The defendant cited the case of [Paul Ndungu Nyokabi & 31 Others Vs John Nzioka Nzuki & 4 Others](#) 2020 eKLR.
14. The preliminary issue has been brought to the attention of the court by way of submissions but nevertheless the court cannot afford to ignore it as it is a legal issue, and it must therefore address it, as legal issues can be raised at any point in proceedings before judgment.
15. The primary purpose of the doctrine of *res judicata* is to avert a multiplicity of suits regarding the same subject matter.
16. In the case of *Lotta vs Tanaki* [2003] 2 EA 556 it was held as follows:

“The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit”.

17. In the case of *Gurbachan Singh Kalsi vs Yowani Ekori* Civil Appeal No 62 of 1958 the former Court stated as follows:

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which The Parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every



fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.” (Emphasis mine.)

18. I have perused the judgment delivered by this court in the former case. There is no dispute that in ELC No 85 Of 2012 (Formerly HCCC No 268 Of 2009) Josphat Muthui Mwangi Vs Chief Land Registrar, Szaredo Investments Ltd and Margaret Nyambura Kamau the plaintiff herein was then a defendant, alongside the Chief Land Registrar and Margaret Nyambura Kamau, the latter being the person who purportedly sold the plaintiff the suit land while the plaintiff in that case was the genuine owner of the land and that in that case he secured orders restoring title back to his name.
19. The same set of facts relied on by the plaintiff in the present case were relied on in that case as its defence, chief among them being that the plaintiff herein was a purchaser for value without notice; the evidence adduced by the plaintiff was the same. The same facts that were raised by the defendants in the previous suit are the facts that have been pleaded in defence in the present suit and the evidence adduced for the defendant is similar in both cases.
20. Section 7 of the [Civil Procedure Act](#) is the embodiment of the doctrine of *res judicata* in our jurisdiction. It provides as follows:

“7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”



21. It is therefore common ground in the present suit that there was a former suit, to wit ELC No 85 Of 2012 (Formerly HCCC No 268 Of 2009) *Josphat Muthui Mwangi Vs Chief Land Registrar, Szaredo Investments Ltd and Margaret Nyambura* Kamau before a competent court which dealt with it to conclusion. It is common ground that the same parties in the present suit were involved in the former suit. The only issues now arising are as follows:
 - a. Whether matters in that suit which are the subject matter of the present suit were alleged by one party and either denied or admitted, expressly or impliedly, by the other;
 - b. Whether there were matters which might and ought to have been made ground of defence or attack in such former suit and which should be deemed to have been a matter directly and substantially in issue in such suit which arise in the present suit.
22. Are there matters in the former suit that were alleged by one party and denied by the other that form part of and are directly and substantial in issue in the present suit?
23. The 2nd defendant, Szaredo, in the former suit is the plaintiff in the present suit; it is clear that its pleadings and evidence in the former suit, just as in the present one, dwelt on the claim that it was a bona fide purchaser for value without notice of any defect in title held by the seller and that its titles are indefeasible, and that the plaintiff in that case ought to have sued the fake seller for damages. In the submissions on behalf of the Szaredo, it was stated that due diligence had been undertaken on its behalf which revealed no encumbrance on the titles. Section 26 of The *Land Registration Act* was relied on, with the further submission being made that Josphat should have been compensated by the government which is the custodian of land records, with the Ministry of Lands taking up responsibility. However, it was submitted by the State Counsel on behalf of the government that the Land Registrar was not a party to any fraud and that no officer from the lands office was convicted of any criminal offence. The State Counsel further blamed the plaintiff herein stating that it never conducted due diligence, and that due diligence should not stop at conducting a search, but also included carrying out a background check on the seller, perusing the green cards, enquiring from neighbours and establishing the history of the land. The State Counsel submitted that the land was transferred to the 2nd defendant by way of fraud and that the only viable remedy was to reinstate the plaintiff in that suit as the registered owner. In the judgment in the former suit, the trial court on its part in its decision blamed the plaintiff in the present matter for a certain casualness in the manner in which it approached the transaction.
24. It has already been made explicit in Section 7 of the *Civil Procedure Act* that the rule is that a matter that should have but was not made a point of either attack or defence by any party against another in the former case cannot be raised as a point of attack or defence in a subsequent suit.
25. The plaintiff and its chief adversary in the present suit, that is the Chief Land Registrar were parties in the former suit. Since both suits are premised on the same set of facts and the law, the plaintiff herein had the opportunity to lodge a counterclaim or file a notice of claim against a co-defendant in the former suit to rely on those same facts to seek the same reliefs he seeks against the Chief Land Registrar in the former suit. The dispute between it and the Chief Land Registrar would have been adjudicated in that very suit.
26. I will now interrogate in detail the claim, the respective defences of The Parties and the judgment in the former suit with greater depth in the inquiry as to whether the present suit is *res judicata*.
27. Josphat Muthui Mwangi had sought the following orders in the former suit:
 - (a) A declaration that he is the lawful owner of the suit properties.



- (b) An order directing the 1st defendant to restore and reinstate the plaintiff as the registered owner or proprietor of the suit properties.
 - (c) Eviction order against the 2nd defendant.
 - (d) A permanent injunction preventing the defendants or any other person from interfering with the plaintiff's titles to the said parcels of land or otherwise from quiet enjoyment and possession of the suit properties.
 - (e) A consequent permanent injunction against the 2nd defendant or any other person from trespassing and or remaining on the plaintiff's parcels of land or otherwise from quiet enjoyment and possession of the suit properties.
 - (f) General damages against the 2nd defendant for trespass.
 - (g) Order of account and or mesne profits in respect of the benefits drawn by the 2nd defendant from the suit property for the period of its occupancy until surrender thereof to the plaintiff.
 - (h) in the alternative, an order directing the 1st defendant to indemnify or otherwise to facilitate the indemnification of the plaintiff in respect of the loss of the suit properties at the current value.
 - (i) Costs and interest at court rates.
 - (j) Any other relief that this Honourable Court may deem fit to grant.
28. When Josphat claimed in the former suit that he is the rightful owner of the suit land, he was in effect putting Szaredo to its defence to prove the legality of the titles he holds over the suit lands. He was also putting the Chief Land Registrar to his defence to prove that the successive registrations of Margaret and Szaredo as proprietors were supported by law and procedure; he also put both Szaredo Ltd, Margaret Nyambura Kamau and the Chief Land Registrar to task to establish that the registrations of Margaret and Szaredo were fraudulent or not.
29. It would appear from the judgment of the court in the former suit that Szaredo was quite confident that its title documents were completely in order. In analyzing Szaredo's defence the court stated as follows:

“ 4. The 2nd defendant, entered appearance and filed Defence. It is denied that the plaintiff has always been the legal owner of the suit properties. It is pleaded inter alia that the 2nd defendant purchased the suit properties from the 3rd defendant pursuant to a sale agreement dated 17 September 2003 for a sum of Kshs 458,100/= each, in total, Kshs 1,832,400/=. It is further pleaded that the official searches revealed that the properties were registered in the name of the 3rd defendant who had also been issued with title deeds; that consent to transfer the properties from the 3rd to 2nd defendant was granted by the Naivasha Land Control Board; that the 2nd defendant paid stamp duty and all relevant fees and became registered as legal owner of the properties; that the 2nd defendant took possession and has been in occupation since; that the 2nd defendant is a purchaser for value; that as registered proprietor her rights over the property are indefeasible; and that the plaintiff's claim lies against the 3rd defendant for damages. The 2nd defendant has denied any knowledge of the alleged scheme and has averred that if there was any, she was not a party thereto. It is averred that the 2nd defendant has been in occupation since the year 2003



and has substantially developed the land. Demand was admitted.” (Emphasis mine)

30. The trial court also analyzed the defence of the Chief Land Registrar in the former suit as follows:

“ 5. The 1st defendant, the Chief Land Registrar, entered appearance and filed Defence through the State Law Office. It was pleaded inter alia that every action taken by the 1st defendant with regard to the suit properties was carried out in good faith without irregularities and in accordance with the law. It is averred that if any transfers were registered, then the same were done legally, procedurally and pursuant to and in exercise of the 2nd defendant's statutory duties. It is contended that the 1st defendant was not under any obligation to ascertain whether the documents presented for registration were forged. It was also pleaded that the prayers sought cannot be granted by dint of Section 16 of the *Government Proceedings Act* (CAP 40) and that the notice required by Section 13A was never sent.” (Emphasis mine)

31. In the light of the defence of Szaredo Ltd and the defence of the Chief Land Registrar as analyzed by the trial court in the passages above, the main questions that arise are as follows:

- a. whether, though it was not done then, it was possible for Szaredo to lodge a counterclaim against its two co-defendants during the pendency of the former suit;
- b. why no counterclaim was never lodged; and
- c. whether it was open to Szaredo Ltd to lodge the present suit if it failed to utilize the chance to plead in the former suit in the manner indicated herein before.

32. The answer to the first and the third questions will determine if the present suit is res judicata. The answer to the third question essentially involves the interpretation that this court will give to the provisions of Section 7 of the *Civil Procedure Act* earlier set out in this judgment. The second question can only be answered by Szaredo Ltd or its counsel. All I will stated is that the courts have been aware that there are many reasons why a claim or part of it may be omitted and the case of Gurbachan Singh Kalsi (*supra*) deems some of these to be negligence, inadvertence, or even accident, but it is clear from that decision that these do not constitute good grounds that would allow the court to entertain a second suit on the same set of facts.

33. The first question must be answered in the positive, for there was no excuse not to file a counterclaim or notice of claim against co-defendant in that suit if upon perusal of pleadings it was crystal clear to Szaredo Ltd that:official searches revealed that the properties were registered in the name of the 3rd defendant who had also been issued with title deeds; that consent to transfer the properties from the 3rd to 2nd defendant was granted by the Naivasha Land Control Board;that the 2nd defendant paid stamp duty and all relevant fees and became registered as legal owner of the properties;that the 2nd defendant took possession and has been in occupation since;that the 2nd defendant is a purchaser for value;that as registered proprietor her rights over the property are indefeasible;and that the plaintiff's claim lies against the 3rd defendant for damages.The Chief Land Registrar's position was that the registrations were done in good faith, legally and with no irregularities.

34. The Chief Land Registrar stated in the former case, just as in the present case, that the transfers of suit properties to Margaret and Szaredo were carried out in good faith without irregularities and in accordance with the law and that the impugned transfers were registered legally, procedurally and



pursuant to and in exercise of the 2nd defendant's statutory duties. He also stated that the 1st defendant was not under any obligation to ascertain whether the documents presented at the Land Registry for registration were forged. I perceive the Chief Land Registrar's defence in both suits to be implicitly denying Josphat's entire claim and also any involvement in fraud or negligence on the part of his land registry officials.

35. Naturally, in the former suit the Chief Land Registrar's defence ought to have alarmed Szaredo who should therefore have gone flat out to prove in those proceedings that the land registry officers were either party to the alleged fraud or were negligent and that his loss is as a result of that negligence. However, in the judgment, though the court found that Szaredo was to blame for some recklessness in the transaction the trial court found that the scam was too sophisticated to be easily detected and it was initially unable to state with certainty that the officials at the land registry had acted in collusion with the fraudsters (see paragraphs 23 and 25 of the judgment.) Subsequently, the trial court observed that:

“...the scam could not have been pulled off without significant involvement of an officer, or officers, of the Lands Registry... it was admitted by PW-2, that a duplicate original title deed cannot be issued without the first one being surrendered, or being gazetted as lost. This was not done, and this omission allowed the fraudsters to obtain a duplicate title which they passed off as a good title for sale.”

It must be recalled that the role of the lands office staff is an issue that recurred in the present suit and it is common ground that none of them was convicted of any offence in connection with the forgery.

36. Szaredo Ltd must also be deemed to have been in a position to know and present to the court the full extent of loss and damage that it stood to incur in the event that its title deeds to the suit land were nullified. Indeed, it was evident throughout the former suit that Szaredo was aware of possibility of compensation under the law, for the trial court ended the summary of the evidence of Szaredo's director as follows:

“It was his view that the plaintiff be compensated by the Government and that it would be unjust to have them evicted, given the level of investment that they have put in.”

37. In his submissions, Szaredo's counsel also emphasized on the loss to be incurred and, most importantly of all, hinted at Josphat's possible claim for compensation against the government. The court's summary of his submissions went as follows:

“20. Mr Musangi for the 2nd defendant, submitted that the 2nd defendant is a bona fide purchaser for value. He submitted that prior to the purchase, due diligence was undertaken and the same showed no encumbrance on the subject titles. He submitted that the title of the 2nd defendant is protected by Section 26 of the *Land Registration Act*. He submitted that cancellation of the title of the 2nd defendant would be a draconian measure since the plaintiff's loss is purely pecuniary and can be compensated. He further submitted that such action will have a negative impact on local and foreign investment in land in the country; that it will lead to significant loss of employment of about 640 employees; that the same will lead to shut down of the operations of the 2nd defendant leading to loss of tax revenues, and that there will be significant damage to investor confidence. He submitted that the plaintiff ought to be compensated by the Government, as the custodian of land records, is the Lands Ministry which ought to take responsibility.”



38. Why Szaredo never focused on the issue of compensation payable by the government to itself in that case cannot be clearly understood.
39. In the foregoing circumstances Szaredo Ltd was perfectly at liberty to file a counterclaim against its co-defendants in the former suit or file a notice of claim or of indemnity against its co-defendant, the Chief Land Registrar seeking compensation for loss that would be occasioned by the possible cancellation of its titles and rectification of the register as well as damages and legal costs; instead it came to lodge a fresh suit much later, being the present suit, after the former suit was concluded.
40. I have noted that the court in the former suit addressed the issue of compensation of Szaredo thus:

“29. Neither I am convinced by the reasoning of the 2nd defendant that the remedy of the plaintiff is an indemnity from the Government. True, indemnity was sought, but this was only as an alternative, in case the plaintiff failed in his quest to have back the properties. In fact, it is the 2nd defendant who should probably consider claiming indemnity from the Government. But I am unable to consider such claim, in this present suit, as it was not pleaded, and the 2nd defendant did not utilize the provisions of Order 1 Rule 24, to make a claim for contribution or indemnity against the Government as co-defendant. Whether they wish to pursue this avenue is up to them, but I am not in doubt that the most prudent remedy in the circumstances, is to take the plaintiff back to the position that ensued before the fraud was committed, and this means that the plaintiff must be reinstated in the register of the suit properties, as the proprietor of the land parcels in question.”

41. And that is the passage in the judgment in the former suit from which Szaredo apparently took the cue and filed the present suit. Order 1 Rule 24 provides as follows:

“24. Defendant claiming against a co-defendant.

- (1) Where a defendant desires to claim against another person who is already a party to the suit—
- (a) that he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.



- (2) No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.
- (3) Nothing contained in this rule shall operate or be construed so as to prejudice the rights of the plaintiff against any defendant to the action.”

42. It is clear that upon a purposive reading of Section 7 of the Civil Procedure Act together with Order 1 Rule 24, the inescapable interpretation with regard to res judicata is that there was nothing that prevented Szaredo, who already knew of the effect of Section 26(1) (b) of the Land Registration Act with regard to a title acquired illegally, unprocedurally or through a corrupt scheme, from lodging a claim against the Chief Land Registrar within that former suit.

43. In the final analysis, it is this court’s view therefore that there were matters in the former suit ELC No 85 Of 2012 (Formerly HCCC No 268 Of 2009) Josphat Muthui Mwangi Vs Chief Land Registrar, Szaredo Investments Ltd and Margaret Nyambura Kamau which are subject matter of the present suit that were alleged by Szaredo and either denied or admitted, expressly or impliedly, by the Chief Land Registrar; there are also matters which might and ought to have been made ground of defence or attack between Szaredo and the Chief Land Registrar in that former suit. This court deems those matters, which arise in the present suit, to have been matters directly and substantially in issue in that former suit which are incapable of being subjected to a second opinion by this court in the present or in any other suit between Szaredo and the Chief Land Registrar. This revelation ineluctably leads to the conclusion that the present suit is *res judicata* ELC No 85 Of 2012 (Formerly HCCC No 268 Of 2009) Josphat Muthui Mwangi Vs Chief Land Registrar, Szaredo Investments Ltd and Margaret Nyambura Kamau.

44. Consequently, I find that this court lacks jurisdiction to determine this suit on its merits in respect of the remaining issues and it must peremptorily down its tools. Consequently, I strike out the plaint dated 11/5/2016 with costs to the defendants.

45 It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 21ST DAY OF NOVEMBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

