



Gitukui v Njuguna & 3 others; Njoroge & 5 others (Interested Parties) (Environment & Land Case 642 of 2013) [2022] KEELC 14743 (KLR) (10 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14743 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 642 OF 2013
SO OKONG'O, J
NOVEMBER 10, 2022**

BETWEEN

GRACE MUGURE GITUKUI PLAINTIFF

AND

MARGARET NJOKI NJUGUNA 1ST DEFENDANT

JULIUS KIARIE MUIGAI 2ND DEFENDANT

KAMITI FARMERS COMPANY LIMITED 3RD DEFENDANT

COMMISSIONER OF LANDS 4TH DEFENDANT

AND

SIMON NJUGUNA NJOROGE INTERESTED PARTY

PETER MUNENE NDEGWA INTERESTED PARTY

PATRICIA WANJIKU KIHURA INTERESTED PARTY

WANJIKU KIARIE INTERESTED PARTY

IBRAHIM KAMAU NJENGA INTERESTED PARTY

DANIEL NDERITU GETHENJI INTERESTED PARTY

JUDGMENT

1. The Plaintiff brought this suit by way of a plaint dated 27th May 2013. The Plaintiff sought the following reliefs;
 1. Cancellation of the title held by 1st and 2nd Defendant in respect of all that parcel of land known as Nairobi/Block 117/513 (hereinafter referred to as “the suit property”) and the registration of the property in the name of the Plaintiff.



2. A permanent injunction against all the Defendants restraining them from interfering with the suit property.
 3. General damages for trespass.
 4. Any other reliefs the Court may deem fit to grant.
2. The Interested Parties were added to the suit on 20th March 2014 and granted leave to respond to the Plaintiff's suit. The 1st and 2nd Defendants filed a joint statement of defence on 25th July 2013 in which they denied the Plaintiff's claim in its entirety. The 3rd Defendant filed a statement of defence and counter-claim on 19th June 2018. In its counter-claim, the 3rd Defendant sought the following reliefs against the 1st, 2nd and 4th defendants and the 1st and 6th Interested Parties (hereinafter referred to together as "the Defendants' to the Counter-claim");
1. A declaration that the conduct of the Defendants to the counter-claim and in particular the purported sale/transfer of the suit property and the resultant Certificate of Title are tainted with fraud, illegality, impropriety, irregularity and corrupt scheme for which the 1st to 4th Defendants in the counter-claim are parties.
 2. An order for the Rectification of the title to the suit property and/or the register thereof by cancellation of the name of the 1st and 2nd Defendants in the counter-claim, if at all and the restoration of the 3rd Defendant as the duly registered owner of the suit property.
 3. A permanent injunction restraining the 1st to 4th Defendants in the counter-claim whether by themselves, their agents, officers, nominees and /or whosoever from entering, encroaching, selling, advertising, transferring, alienating and/or otherwise dealing with the suit property.
 4. General damages for fraud, deceit, illegality and obtaining registration of the suit property by false pretences.
 5. Any other order the court may deem fit to grant.
 6. Costs of the suit and counter-claim.
3. The 1st and 2nd Defendants filed a defence to the 3rd Defendant's counter-claim on 9th July 2018. The Interested Parties did not respond to the claim by the Plaintiff neither did they file a defence to the 3rd Defendant's counter-claim against them.

The Plaintiff's case:

4. The Plaintiff averred that she was allocated the suit property by the 3rd Defendant on 29th September 2001 after paying a sum of Kshs. 250,000/- and being issued with a receipt for the same. The Plaintiff averred that sometime in April 2013, officers from the provincial administration threatened to evict her from the suit property claiming that the property was registered in the name of the 1st and 2nd Defendants who held a Certificate of Lease dated 17th September 2012 in respect thereof. The Plaintiff averred that she had never transferred the suit property to anyone and that any transfer relating to the suit property was fraudulent and illegal. The Plaintiff pleaded several particulars of fraud against the Defendants. At the trial, the Plaintiff gave evidence as PW1. The Plaintiff adopted her witness statement dated 12th June 2018 as her evidence in chief and produced her bundle of documents as exhibits.
5. In her witness statement, the Plaintiff stated as follows: She was a *bona fide* shareholder of the 3rd Defendant. Sometime in September 2001, she purchased the suit property from the 3rd Defendant after



- being informed about the availability of plots for sale by the 3rd Defendant. She paid Kshs. 250,000/- to the 3rd Defendant and was issued with a receipt. In addition, she was issued with a certificate of ownership of the property and an introduction letter by the 3rd Defendant. She enjoyed quiet possession of the suit property until April 2013 when provincial administration sought to evict her therefrom.
6. She was informed by those who sought to evict her from the suit property that the property belonged to the 1st and 2nd Defendants who had a Certificate of Lease in respect of thereof. She was further informed that the suit property was allocated to the 1st and 2nd Defendants at the 3rd Defendant's Annual General Meeting held in 2005. The Plaintiff stated that as a member of the 3rd Defendant, she had no knowledge of the said meeting. The Plaintiff stated that the suit property could not have been sold or allocated to the 1st and 2nd Defendants in 2005 as it already belonged to the Plaintiff. She stated that the people who signed the purported transfer in favour of the 1st and 2nd Defendants on behalf of the 3rd Defendant were not *bona fide* directors of the 3rd Defendant. She stated that the issue of directorship of the 3rd Defendant was settled in ELC No 300 of 2013. The Plaintiff stated further that the 1st and 2nd Defendants were not *bona fide* shareholders of the 3rd Defendant. She stated that the purported transfer of the suit property to the 1st and 2nd Defendants and the resultant title issued to them were fraudulent and unlawful.
 7. On cross-examination by the 1st and 2nd Defendant's advocates, the Plaintiff stated that she did not follow up on the transfer of the suit property to her name due to lack money and the stroke that she had suffered. The Plaintiff stated further that she was also a director of the 3rd Defendant.
 8. On cross-examination by the 3rd Defendant's advocate, she stated that she paid for the suit property at the 3rd Defendant's offices which were located behind Kenyatta University. She stated that she got to know of the sale during a meeting of the 3rd Defendant. She stated further that she paid for the property in cash and was issued with a receipt. The original receipt was shown to the court. She reiterated that she did not effect the transfer of the property to her name because of financial constraints. When shown the transfer that was executed in favour of the 1st and 2nd Defendants, she stated that the people who executed the transfer on behalf of the 3rd Defendant were Simon Njuguna and Gethenji, the 1st and 6th Interested Parties who were fraudsters and had never been directors of the 3rd Defendant. She stated that the 1st Defendant who was one of the transferees was the wife of Simon Njuguna, the 1st Interested Party while the other was the 2nd Defendant who was not a shareholder of the 3rd Defendant.
 9. On cross-examination by advocate for the Interested Parties, the Plaintiff stated that she was a director of the 3rd Defendant but was not one during the purchase of the suit property. She stated that when she bought the suit property, those who were present were; Mbugua Kariuki, Chege, Alice Ndichu, Kimani, Esther Njeri and Wairimu. She stated that she would not have been issued with a receipt if she had not paid for the suit property. In conclusion she stated that the people who signed the transfer in favour of the 1st and 2nd Defendants were fraudsters and not directors of the 3rd Defendant.

The 1st and 2nd Defendants' case:

10. In their statement of defence, the 1st and 2nd Defendants averred that they were members/shareholders of the 3rd Defendant and that they were lawfully allotted the suit property in an open and transparent process and eventually issued with a title on 17th September 2012. They have averred that they were not aware of any allocation of the same property to the Plaintiff. The 1st and 2nd Defendants averred further that the plots owned by the 3rd Defendant were not for sale to third parties. They contended



that the Plaintiff was not a member of the 3rd Defendant and her name did not appear in the list of allottees dated 4th January 2005.

11. The 1st and 2nd Defendants stated that the Plaintiff lived on a neighbouring plot and had put up a makeshift structure on the suit property to support her claim in this suit. At the trial, the 2nd Defendant, Julius Kiarie Muigai testified as DW2 on his own behalf and on behalf of the 1st Defendant. He adopted his witness statement as his evidence in chief and produced the 1st and 2nd Defendants' bundle of documents as exhibits. In his witness statement, he stated as follows: The 1st and 2nd Defendants were allocated the suit property at a meeting of the 3rd Defendant that was held in 2005. Since there were fewer plots compared to the number of shareholders, the plots were allocated to groups rather than individual shareholders. Their group agreed that the 1st and 2nd Defendants should be issued with the title deed. They got the title and sought to develop the suit property but they faced opposition from the Plaintiff. He stated that the plots could not have been put up for sale as the shareholders had not passed a resolution to that effect.
12. On cross-examination by the Plaintiff's advocate, he stated that he had a share certificate but it was neither in his bundle of documents nor did he carry it to Court. He stated that he attended the 3rd Defendant's Annual General Meeting of 2005 although he was not a shareholder. He stated that he attended the meeting on behalf of his mother who was a shareholder. He admitted that the name in the minutes of those who attended the meeting was that of his wife and not his. He also admitted that although he was allegedly allotted the suit property in 2005, the receipts for the payments that he made were issued to him in 2012. He stated that the suit property was transferred to them by the 1st and 6th Interested Parties on behalf of the 3rd Defendant. He stated that the Plaintiff found them on the suit property but prevented them from developing it. He stated that the Plaintiff had put up a temporary structure on the property which was eaten away by termites leaving the suit property vacant.
13. On cross-examination by the 3rd Defendant's advocate, he stated as follows: The Plaintiff and 1st Defendant were his neighbours and co-shareholders in the 3rd Defendant. The 1st Interested Party was the husband of the 1st Defendant and the chairman of the 3rd Defendant. He (2nd Defendant) became a shareholder of the 3rd Defendant after the death of his mother. His mother transferred her shares to him in 2010 just before her death. He attended the 2005 meeting on behalf of his mother. The meeting was called by the 1st Interested Party and a notice for the same was issued. He was allocated the suit property on behalf of his mother who was very old. The minutes of the 2005 Annual General Meeting were taken by the 6th Interested Party. He conceded however that neither his name nor that of the 6th Interested Party were on the list of attendees of the said meeting.
14. He stated that the allocation of the plots by the 3rd Defendant was done at the discretion of the directors. He stated that they did not pay for the allocation. When asked about the sum of Kshs. 850,000/- indicated in the transfer as consideration, he stated that it was not paid by them. He conceded further that the transfer dated 20th April 2012 did not contain the 3rd Defendant's seal although it was signed by the 1st and 6th Interested Parties. He also conceded that he had no evidence that the 1st and 6th Interested Parties were directors of the 3rd Defendant.
15. On cross-examination by the advocate for the Interested Parties, he stated that the 1st Interested Party signed a number of documents as a director of the 3rd Defendant. He clarified that there was indication that he replaced his mother as a shareholder of the 3rd Defendant. He stated that his mother who died in 2015 had already made payment to be a shareholder of the 3rd Defendant and that explained why they did not make any payment for the suit property. The 2nd Defendant reiterated that since the commercial



plots were few, they were allocated to groups and that the other members of their group agreed that the suit property be registered in his and the 1st Defendant's name to hold in trust.

The 3rd Defendant's case:

16. In its statement of defence and counter-claim dated 14th June 2018, the 3rd Defendant averred as follows: The Plaintiff was a *bona fide* shareholder of the 3rd Defendant and the lawful owner of the suit property having bought the same from the 3rd Defendant for valuable consideration. The purported transfer of the suit property to the 1st and 2nd Defendants was fraudulent and illegal as the persons who were claimed to have executed the transfer on behalf of the 3rd Defendant were not *bona fide* directors of the 3rd Defendant. The 3rd Defendant recognized only the Plaintiff as the owner of the suit property. The 3rd Defendant contended that the purported transfer of the suit property to the 1st and 2nd Defendants was of no legal consequence.
17. In its counter-claim, the 3rd Defendant averred that it was a public land buying and selling company. It was the owner of the original parcel of land that gave rise to the suit property upon subdivision. It sold the suit property to the Plaintiff in 2001 for Kshs. 250,000/-. It never sold the suit property to the 1st and 2nd Defendants. The people who witnessed the purported transfer to the 1st and 2nd Defendants were impostors with no authority to act on behalf of the 3rd Defendant. The transaction was illegal and fraudulent.
18. At the trial, Michael Chege Mwangi testified as DW1 on behalf of the 3rd Defendant. He adopted his witness statement as his evidence in chief. In his witness statement, DW1 stated as follows: He was the duly elected vice chairman of the 3rd Defendant which was a public land buying and selling company. The 3rd Defendant was the original owner of the parent title of the suit property. As per the 3rd Defendant's records, the suit property was sold to the Plaintiff in 2001. The 3rd Defendant never sold the suit property to the 1st and 2nd Defendants. DW1 stated further that the people who witnessed the execution of the purported transfer of the suit property to the 1st and 2nd Defendants were not directors of the 3rd Defendant as per the records held by the Registrar of Companies. He stated that the purported transfer of the suit property to the 1st and 2nd Defendants was fraudulent and illegal and the Certificate of Lease held by them should be cancelled.
19. On cross-examination by the Plaintiff's advocate, DW1 confirmed that the Plaintiff was a shareholder of the 3rd Defendant and that she held a share certificate. On being shown the list dated 4th January 2005 through which the 1st and 2nd Defendants were purportedly allocated the suit property, he stated that he was a stranger to it. He stated that the list was not signed by directors of the 3rd Defendant. On being shown share certificate No 0468 dated 11th July 2012 that was allegedly issued by the 3rd Defendant to the 1st and 2nd Defendants and others, he stated that it was neither issued by the 3rd Defendant nor signed by it. On being shown a letter dated 26th August 2012 through which the 3rd Defendant allegedly acknowledged the 1st and 2nd Defendants as the owners of the suit property, he stated that the letter head was not that of the 3rd Defendant and the letter was signed by Simon Njoroge, the 1st Interested party who was not the chairman of the 3rd Defendant at the material time.
20. On cross-examination by advocate for the 1st and 2nd Defendants, DW1 stated that the dispute over the leadership of the 3rd Defendant was resolved by the Court. He stated that he was a director of the 3rd Defendant in 2001 but had no proof of the same. He confirmed that the receipt dated 29th September 2001 in the name of the Plaintiff was signed by the chairman of the 3rd Defendant the same as the Plaintiff's share certificate. DW1 stated further that the transfer in favour of the 1st and 2nd



Defendants was signed by the 1st and 6th Interested Parties who were shareholders and not officials of the 3rd Defendant.

21. On cross-examination by advocate for the Interested Parties, DW1 stated as follows: He had been a shareholder and a director of the 3rd Defendant since the 1990s albeit with breaks in between. He stated that he was last elected on 23rd March 2011 in an election that was conducted by the Registrar of Companies. He stated that he did not see the court order that sought to stop the elections. He stated that the Registrar must have left the office by the time the Attorney General was served with the order.

The Interested Parties' case:

22. The 1st Interested Party testified as IPW1. He adopted his witness statement as his evidence in chief. In his witness statement, he stated that:
 23. He was a former director of the 3rd Defendant who was forcefully removed from office. During his tenure, the 1st and 2nd Defendants and other shareholders of the 3rd Defendant were allocated the suit property which was free and registered in the name of the 3rd Defendant. He and another director of the 3rd Defendant signed the transfer form in favour of the 1st and 2nd Defendants in their capacity as chairman and secretary respectively of the 3rd Defendant. He stated that the transfer in favour of the 1st and 2nd Defendants was legal.
24. On cross-examination by the 1st and 2nd Defendant's advocate, he stated that by 2013, the allocation of the suit property had been done and the 1st and 2nd Defendants issued with a title. On cross-examination by the 3rd Defendant's advocate, he stated that: He was a director of the 3rd Defendant but had no evidence of it. With reference to ELC No 300 of 2013 which was a case involving the 3rd Defendant, he admitted that the Court recognized Mbugua Kariuki as the chairman of the 3rd Defendant. He also noted that there was no official record recognizing him as a chairman of the 3rd Defendant. He admitted that the 6th Interested Party and he were not in the list of officials of the 3rd Defendant as at 2011/2012 that was issued by the Registrar of Companies.
25. On his position as chairman of the 3rd Defendant, IPW1 stated that there was a Court order that allowed him to be chairman of the 3rd Defendant. When questioned further, he stated that the order restrained some members from holding an AGM but it did not state that he was the chairman. He stated that he was not aware that Mbugua Kariuki had been declared the valid chairman of the 3rd Defendant through a court order that was given in CMCC No 622 of 2011.
26. On cross-examination by the Plaintiff's advocate, he stated that the chairman of the 3rd Defendant in 2001 was Mbugua Kariuki. He stated that he was not the chairman of the 3rd Defendant in 2001 and was therefore not aware of the allocation of the suit property to the Plaintiff. He stated that that was why he allocated the same to the 1st and 2nd Defendants in 2005.

Submissions:

27. The Plaintiff filed her submissions on 9th February 2022. The Plaintiff framed a number of issues for determination by the court. The first issue concerned the ownership of the suit property. The Plaintiff cited Sections 24 and 25 of the *Land Registration Act* and the cases of *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* [2017] eKLR, *Republic v City Council of Nairobi & 2 others* [2014] eKLR and *Tsuma Mwangala & 5 others v Julius Karisa Deche* [2021] eKLR and submitted that she was the rightful owner of the suit property. The Plaintiff submitted that once she was issued with a certificate of ownership of the suit property by the 3rd Defendant, the property could not to be sold to another party. The Plaintiff submitted that in ELC No 300 of 2013, Justice Gacheru



had affirmed that Mbugua Kariuki and not the people who purported to transfer the suit property to the 1st and 2nd Defendants was the rightful chairman of the 3rd Defendant.

28. On the issue whether the Certificate of Lease issued by the 4th Defendant to the 1st and 2nd Defendants was proper/regular or the same was procured through fraud/illegally, the Plaintiff cited the cases of [Hubert L. Martin & 2 others v Margaret J. Kamar & 5 others](#) [2016] eKLR and [Magdalene Wanjiku Ndung'u v Jane Njoki Njuguna](#) [2020] eKLR and submitted that a title can be impeached if its root is investigated and it is found to have been illegally acquired. The Plaintiff argued that the title in this suit was illegally acquired as the transfer form was signed by people who had no authority to act for the 3rd Defendant in the transaction.
29. On whether the Certificate of Lease issued by the 4th Defendant to the 1st and 2nd Defendants should be cancelled and the suit property registered in the Plaintiff's name, the Plaintiff cited [Magdalene Wanjiku Ndung'u](#) (supra) and submitted that the title should be cancelled since; the transfer was signed by people who did not have authority to act for the 3rd Defendant, there were no evidence that the 1st and 2nd Defendants gave any consideration for the suit property, and there was no evidence that the meeting of 4th January 2005 (the allotment meeting) ever happened.
30. The 3rd Defendant filed its submissions on 17th February 2022. It also framed several issues for determination. The first issue framed by the 3rd Defendant was whether the Interested Parties together with the 1st and 2nd Defendants devised a corrupt and stealthy scheme to acquire the suit property by falsifying documents and instruments of the 3rd Defendant. Relying on the cases of [Merit Development Limited v Lenana Investment Limited & 2 others](#) [2018] eKLR, [Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another](#) [2013] eKLR and [Rajendra Sanghani & another \(Both Suing in their Capacities as Administrators of the Estate of Ratilal Gordhandas Sanghani\) v Fairmile Investments Limited & another](#) [2021] eKLR, the 3rd Defendant submitted that a title acquired through fraud should be cancelled. The 3rd Defendant submitted that the 1st and 2nd Defendant's title was acquired through a transfer executed by people who had no authority to execute it. Furthermore, the meeting where the purported allocation was done was not attended by the *bona fide* chairman of the 3rd Defendant, Mbugua Kariuki. It was also submitted that the 1st and 2nd Defendants did not challenge the directions given in ELC No 300 of 2013 by Gacheru J. where the issue of directorship of the 3rd Defendant was dealt with.
31. The second issue framed by the 3rd Defendant was whether the 1st and 2nd Defendants together with the Interested parties obtained registration of the suit property in the names of the 1st and 2nd Defendants by falsely pretending that they were bona-fide purchasers/directors of the 3rd Defendant with full authority to transfer the suit property. Relying on the [Rajendra Sanghani Case](#) (supra) and the directions given in ELC No 300 of 2013, the 3rd Defendant submitted that the Plaintiff had purchased the suit property in 2001. The 3rd Defendant submitted that it had written to the 4th Defendant in 2002 stating that the Plaintiff should be issued with a title. The 3rd Defendant submitted that the Interested Parties and the 1st and 2nd Defendants therefore pretended to have authority to transfer the suit property to the 1st and 2nd Defendants.
32. The third issue framed by the 3rd Defendant was whether the Certificate of Lease allegedly issued to the 1st and 2nd Defendants was crafted by the Interested Parties in unscrupulous ways. Relying on Section 24 of the [Land Registration Act](#) and the cases of [Rajendra Sanghani](#) (supra) and [Daudi Kiptugen v Commissioner of Lands, Nairobi & 4 others](#) [2015] eKLR, the 3rd Defendant submitted that there was no evidence that the Certificate of Ownership that had been issued to the Plaintiff had been cancelled



- or was invalid. The Certificate of Lease issued to the 1st and 2nd Defendant was therefore illegal and should be cancelled.
33. The 1st and 2nd Defendants filed their submissions on 20th April 2022. They submitted that the evidence of the Plaintiff and 3rd Defendant had not disproved the fact that the 1st and 2nd Defendants were the registered owners of the suit property. They submitted that the Plaintiff and 3rd Defendant only raised doubt on the validity of the process of acquisition. The 1st and 2nd Defendants submitted that such doubt was not enough to impeach a title. The 1st and 2nd Defendants submitted further that the directions issued in ELC No 300 of 2013 were not relevant to this suit as by the time they were given, the Interested Parties had already made the transfer as the then rightful officials of the 3rd Defendant. Their actions could not therefore be reversed by subsequent officials.
34. The Interested Parties filed their submissions on 21st April 2022. The first issue that was framed by them for determination was whether the 1st and 2nd Defendants were the *bona fide* owners of the suit property. The Interested Parties submitted that the 1st and 2nd Defendants were allocated the suit property as shareholders and members of the 3rd Defendant following a meeting that was held on 25th September 2005. The Interested Parties submitted that the 1st and 2nd Defendants were in group 13 and group 2 in the list of allottees. The Interested Parties submitted that the Plaintiff was neither listed as a shareholder nor member of the 3rd Defendant. The Interested Parties submitted that the 1st and 2nd Defendants were issued with a share certificate and thereafter with a Certificate of Lease. The Interested parties casted doubt on the documents produced by the Plaintiff in proof of her claim. They submitted that; the receipt produced by the Plaintiff did not have a certified stamp of the 3rd Defendant, the plot ownership certificate did not have a date of issue and the Plaintiff did not produce a sale agreement.
35. The second issue framed for determination by the Interested Parties was whether the Interested Parties were duly elected officials of the 3rd Defendant authorized to transact business on behalf of the 3rd Defendant. The Interested Parties submitted that, firstly, the directions issued in ELC No 300 of 2013 were not conclusive on the issue of directorship of the 3rd Defendant and were relevant to that suit only. Secondly, the said directions were issued eight years after the Interested Parties had allotted the suit property to the 1st and 2nd Defendants. Thirdly, the CR12 form relied upon by the Plaintiff was issued illegally in that it was issued on 31st May 2011 against the orders issued on 23rd March 2011 in CMCC No 622 of 2011. Fourthly, a letter issued by the Registrar of Companies dated 14th January 2011 recognized the Interested Parties as the directors of the 3rd Defendant.
36. The third issue framed for determination by the Interested Parties was whether the 1st and 2nd Defendants obtained the Certificate of Lease in respect of the suit property legally. Relying on Sections 24 and 25 of the *Land Registration Act* and the cases of *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR, *Daudi Kiptugen* (supra), *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR and *John Muchiri Mbutia v Rebecca Were Mutanda & another* [2015] eKLR, the Interested Parties submitted that the Plaintiff had not conducted due diligence before purchasing the suit property. The Interested Parties submitted that the Plaintiff was not issued with a letter of allotment by the Commissioner of Lands and that she had colluded with the 3rd Defendant to fraudulently acquire the 1st and 2nd Defendants' property.

Determination:

37. I have considered the pleadings, the evidence tendered by the parties and the closing submissions by the advocates for the parties. From the pleadings, I am of the view that the issues arising for determination in this suit are the following;



1. Who is the rightful owner of the Suit Property as between the Plaintiff and the 1st and 2nd Defendants?
2. Whether the 1st and 2nd Defendants' title to the suit property should be cancelled.
3. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
4. Whether the 3rd Defendant is entitled to the reliefs sought in its counter-claim.
5. Who is liable for the costs of the suit and the counter-claim.

Who is the rightful owner of the Suit Property as between the Plaintiff and the 1st and 2nd Defendants?

38. There are two competing claims of ownership of the suit property. The 1st and 2nd Defendants have claimed ownership of the suit property through a Certificate of Lease dated 17th September 2012. They have claimed that they were issued with a share certificate following an allotment process conducted by the 3rd Defendant before proceeding to process the title. The said allotment and title have been challenged by the Plaintiff and the 3rd Defendant who have averred that the same were acquired fraudulently as the suit property had already been allocated to the Plaintiff by the 3rd Defendant.
39. The Plaintiff's case is that she purchased the suit property in 2001 from the 3rd Defendant. She paid Kshs. 250,000 for it and was issued with a receipt, certificate of ownership and a letter of introduction addressed to the Commissioner of Lands. She produced these documents in evidence. The Interested Parties tried to cast doubt on the validity of these documents but I find that the veracity of the same was not shaken in cross-examination or through the evidence that was adduced by the 1st and 2nd Defendants and the Interested Parties. Firstly, while they have claimed that the receipt did not bear the stamp of the 3rd Defendant, the 1st and 2nd Defendants did not convince me that stamping of receipts was a mandatory requirement of the 3rd Defendant. Secondly, while it is true that the Plaintiff did not produce a sale agreement in evidence, she produced minutes of the 3rd Defendant's Board of Directors meeting that was held on 7th September 2001 showing that the board of directors of the 3rd Defendant agreed to put up some plots including the suit property for sale. She also testified that she would not have been issued with a receipt if she had not purchased and paid for the suit property. Thirdly, while the Interested Parties have contended that the Plaintiff's ownership certificate did not have a date of issue, they have not persuaded me that the said date was a material part of the document so as to cast doubt on the validity of the certificate. No evidence was produced before the court showing that dates were required in such certificates.
40. The 1st and 2nd Defendants have also contended that the Plaintiff's evidence did not disprove their status as the registered owners of the suit property and that it only casted doubt on the validity of the process of acquisition of the property. In *Munyu Maina v Hiram Gathiba Maina* (*supra*), the Court of Appeal stated as follows:

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



41. In *Daudi Kiptugen v Commissioner of Lands & 4 others* (*supra*), the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

42. In *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 others* (*supra*), the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain... Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

43. In view of the foregoing, having considered how the Plaintiff acquired the suit property, it is necessary to consider how the 1st and 2nd Defendants acquired title to the suit property. The 1st and 2nd Defendants have contended that the suit property was allocated to them as shareholders of the 3rd Defendant in a meeting of the 3rd Defendant held in 2005. However, their own evidence and that of the Interested Parties cast doubt on this claim. Firstly, the names of the 2nd Defendant and the 6th Interested Party who was said to have taken the minutes of the said meeting do not appear on the list of attendees. The 2nd Defendant claimed that he attended the meeting on behalf of his old mother but his name was not on the list of those who attended the meeting as proxies. IPW1 testified that the list of shareholders was corrected to include the 2nd Defendant. However, while the annexure containing the list is dated 24th September 2005, the stamp of the 3rd Defendant therein was put on 4th July 2013 which casts serious doubt on the genuineness of the document. This is clearly an afterthought as the suit herein was filed on 30th May 2013. Secondly, the 1st and 2nd Defendants claimed that the plots were allocated to groups because there were a few of them. However, they could not satisfactorily explain why the Plaintiff was not in any group although they admitted that she was a shareholder of the 3rd Defendant. While in their pleadings and submissions the 1st and 2nd Defendants stated that the Plaintiff was not a shareholder of the 3rd Defendant, during the hearing they admitted that she was one of the shareholders of the 3rd Defendant. The foregoing casts doubt on the allocation process they have sought to rely on.

44. The 1st and 2nd Defendant also contended that by the time they were being allocated the suit property in 2005, they did not know that it had been allocated to the Plaintiff in 2001. The status of allotted plots was discussed in *Kamau James Njendu v Serah Wanjiru & another* [2018] eKLR as follows:

“In the case of *M’ikiara M’Rinkanya & another v Gilbert Kabeere M’Mbijjiwe*, (1982-1988) 1KAR 196, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again.”



45. In *Republic v City Council of Nairobi & 3 others* [2014] eKLR, the court stated as follows:

“From the case as presented by the Applicant they no doubt had beneficial interest in the suit plot. As was held by Warsame, J (as he then was) in *Rukaya Ali Mohamed v David Gikonyo Nambacha & another* Kisumu HCCA No 9 of 2004 once an allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

46. The 1st and 2nd Defendants and the Interested Parties have not proved that the sale and allocation of the suit property to the Plaintiff was fraudulent or was in any way illegal or against public interest or that it was lawfully cancelled by the 3rd Defendant. While the Interested Parties have claimed to have been the directors of the 3rd Defendant, IPW1 admitted that he was not a director of the 3rd Defendant in 2001 when the suit property was sold to the Plaintiff and that Mbugua Kariuki was the chairman of the 3rd Defendant at the material time.
47. Based on the foregoing, I find that the sale and allocation of the suit property to the Plaintiff was lawful. Consequently, the suit property having been sold and allocated to the Plaintiff by the 3rd Defendant in 2001 and the Plaintiff having accepted the allotment, paid for the same and taken possession of the property, the property was not available for allocation to the 1st and 2nd Defendants in 2005. The 1st and 2nd Defendants’ alleged lack of knowledge of the Plaintiff’s purchase of the property is immaterial.
48. In addition to the foregoing, the 1st and 2nd Defendants did not satisfactorily explain why the ownership/share certificate for land they were supposedly allocated in 2005 is dated 11th July 2012 while the transfer of the suit property to them is dated 20th April 2012. This means that the suit property was transferred to the 1st and 2nd Defendants even before they became shareholders of the 3rd Defendant. The 1st and 2nd Defendants also claimed that the suit property was allocated to a group and that the group agreed that the property be registered in their names. They did not produce evidence of this agreement. They also failed to satisfactorily explain the sum of Kshs. 850,000 that is stated as consideration in the transfer of lease. The 3rd Defendant’s witness stated that the 3rd Defendant did not receive the said sum of Kshs. 850,000/-. The 1st and 2nd Defendants themselves denied paying it to the 3rd Defendant. They stated that they did not pay any money for the suit property. IPW1 who testified on behalf of the Interested Parties also stated that no payment was needed to be made for the suit property as the 1st and 2nd Defendants were shareholders of the 3rd Defendant. The 2nd Defendant stated on re-examination that the said sum of Kshs. 850,000/- was for stamp duty. This is not correct because the transfer of lease being relied upon by the 1st and 2nd Defendants clearly states that the amount was paid as a consideration for the transfer of the suit property from the 3rd Defendant to the 1st and 2nd Defendants.
49. There is also the issue of directorship of the 3rd Defendant. While I agree with the 1st and 2nd Defendants and the Interested Parties that the directions on directorship of the 3rd Defendant that was given in ELC No 300 of 2013 may not have been final as the court did not render a final judgment on the issue, it cannot be disputed that the issue of who the directors of the 3rd Defendant were when the suit property was allocated and transferred to the 1st and 2nd Defendants is material to this case.



50. The suit property is alleged to have been allocated to the 1st and 2nd Defendants in 2005. The transfer on record in favour of the 1st and 2nd Defendants is dated 20th April 2012 and was signed by the 1st and 6th Interested Parties. The Interested Parties have claimed that the 1st and 6th Interested Parties were *bona fide* directors of the 3rd Defendant at the material time and that the 1st Interested Party was the chairman of the 3rd Defendant. The 1st and 2nd Defendants and the Interested Parties have not convinced me that the 1st and 6th Interested Parties were directors of the 3rd Defendant on 4th January 2005 when the suit property was allegedly allocated to the 1st and 2nd Defendants and on 20th April 2012 when the property was transferred to them.
51. IPW1 sought to rely on the order given in CMCC No 622 of 2011 (page 47 DEx2) as having allowed him to act as the chairman of the 3rd Defendant. On further questioning, IPW1 admitted that the order only restrained the Defendants in that suit from holding an Annual General Meeting. The 1st and 2nd Defendants also sought to rely on the affidavits filed in the same suit stating that they were sworn by the 1st Interested Party in his capacity as the chairman of the 3rd Defendant. I however do not find that this proves that the 1st and 6th Interested Parties were officials of the 3rd Defendant. The Interested Parties also contended that they had been in office since 2004 and that they had never been removed and that there was a letter from the Registrar of Companies and a Court order to that effect. However, no evidence was produced to support these assertions. The Plaintiff on the other hand testified that the 1st and 6th Interested Parties were not officials of the 3rd Defendant during the transfer period. A letter from the office of the Registrar General to the 3rd Defendant dated 31st May 2011 was produced by the Plaintiff and the 3rd Defendant in evidence in proof of that fact. It identified the directors of the 3rd Defendant. The 1st and 6th Interested Parties were not among them. The letter stated that the said officials were elected in a meeting conducted by the Registrar General on 23rd March 2011. There is no evidence on record that another election was held after 23rd March 2011 and that the Interested Parties were elected as officials of the 3rd Defendant. There is also no evidence on record that the elections that were held on 23rd March 2011 were cancelled by the court. I therefore find on a balance of probabilities that the Interested Parties were not officials of the 3rd Defendant on 20th April 2012 when they purported to transfer the suit property to the 1st and 2nd Defendants. Since the 1st and 6th Interested Parties were not officials of the 3rd Defendant when they purported to transfer the suit property to the 1st and 2nd Defendants, they had no legal capacity to effect the said transfer. The transfer was in the circumstances, illegal, null and void and could not confer any interest in the suit property upon the 1st and 2nd Defendants.
52. Having investigated the roots of the conflicting ownership claims to the suit property, I find that the Plaintiff has proved on a balance of probabilities that she is the lawful owner of the suit property. She has proved that she purchased the suit property from the 3rd Defendant in 2001, she took possession and remained in possession until 2015 when the 1st and 2nd Defendants attempted to evict her from the property using the provincial administration officers. On the other hand, I find the 1st and 2nd Defendants' claim of ownership of the property fraught with illegalities and nullities. The Plaintiff is therefore the *bona fide* owner of the suit property.

Whether the 1st and 2nd Defendants' title should be cancelled.

53. The suit property is registered under the [Registered Land Act](#), Chapter 300 Laws of Kenya (RLA) (now repealed). Sections 27 and 28 of the [Registered Land Act](#) provides as follows:

“27. Subject to this Act -



- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:
- Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

54. Section 143(1) and (2) of the *Registered Land Act* provides as follows:

- “(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

55. Sections 24, 25 and 26 of the *Land Registration Act*, 2012 provides as follows:

- “24. Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging



or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

56. Both under the *Registered Land Act* and the *Land Registration Act*, 2012, the registration of a person as a proprietor of land or lease confers upon that person the absolute ownership of the land and in the case of a lease, the leasehold interest in the land. Under the *Registered Land Act* which is the statute under which the suit property was registered, a register of land can be rectified by the cancellation of any entry therein where such registration has been obtained by fraud or mistake.

57. I have held that the suit property had already been purchased and allocated to the Plaintiff by the 3rd Defendant and as such the same was not available for allocation to the 1st and 2nd Defendants. I have also held that the 1st and 6th Interested Parties who purported to transfer the suit property to the 1st and 2nd Defendants had no capacity to do so and as such the transfer was illegal, null and void.



The Plaintiff has proved fraud in the acquisition of the suit property by the 1st and 2nd Defendants. The Plaintiff has proved that the 2nd Defendant was the wife of the 1st Interested Party and that the 1st Defendant's mother was a shareholder of the 3rd Defendant. The 1st and 2nd Defendants were therefore aware through association that the 1st and 6th Interested Parties were not officials of the 3rd Defendant. In purporting to accept a transfer of the suit property from the 1st and 6th Interested Parties whom they knew not to be officials of the 3rd Defendant who owned the property, the 1st and 2nd Defendants aided and abetted the fraudulent activities of the 1st and 6th Interested Parties and as such were parties to the fraud. In the circumstances, the 1st and 2nd Defendants acquired the suit property fraudulently. In any event, even if fraud was not proved by the Plaintiff, the transfer to the 1st and 2nd Defendants was void ab initio the same having been effected by persons who were not officials of the 3rd Defendant and as such had no legal capacity to do so. Since the transfer was void, it was a nullity. It could not therefore confer any interest in the suit property upon the 1st and 2nd Defendants. In *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169 it was stated as follows concerning an act that is void:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

58. Due to the foregoing, it is my finding that the title held by the 1st and 2nd Defendants is a candidate for cancellation on account of being void and for having been acquired illegally and fraudulently.

Whether the Plaintiff is entitled to the reliefs sought in the plaint.

59. I have set out herein earlier the reliefs sought by the Plaintiff. I am satisfied that the Plaintiff has established her claim against the 1st and 2nd Defendants on a balance of probabilities. The Plaintiff is therefore entitled to an order for the cancellation of the title held by the 1st and 2nd Defendants. The Plaintiff is also entitled to the injunction sought to restrain the 1st and 2nd Defendants from interfering with the suit property. The Plaintiff did not prove that any of the Defendants trespassed into the suit property. The Plaintiff is therefore not entitled to general damages for trespass. The Plaintiff is also not entitled to an order for the registration of the suit property in her name. The property was sold to be Plaintiff by the 3rd Defendant. The 3rd Defendant has not denied that sale and has not refused to transfer the property to the Plaintiff. The Plaintiff will have to pursue the transfer from the 3rd Defendant once the property is restored to its name.

Whether the 3rd Defendant is entitled to the reliefs sought in its counter-claim against the Defendants in the counter-claim.

60. From the findings that I have made above, I am satisfied that the 3rd Defendant has proved its counter-claim against the 1st to 4th Defendants in the counter-claim and that it is entitled to prayers (a) to (c) in the counter-claim. The 3rd Defendant has however not proved that it suffered any damage or loss as a result of the fraud, deceit and illegality on the part of the Defendants in the counter-claim. A case has therefore not been made out for the award of general damages sought.

Who is liable for the costs of the suit and the counter-claim?

61. Under Section 27 of the *Civil Procedure Act*, cost is at the discretion of the court. As a general rule, costs follow the event unless for good reason, the court orders otherwise. In this case, the Plaintiff and



the 3rd Defendant have succeeded in their claims. In the absence of any valid reason to warrant denying the Plaintiff and the 3rd Defendant the costs of the suit and the counter-claim, costs shall be awarded accordingly.

Conclusion:

62. In conclusion, I hereby make the following orders;

1. Judgment is hereby entered for the Plaintiff in the main suit against the 1st and 2nd defendants in the main suit as follows;
 - a. The title held by the 1st and 2nd Defendants in respect of all that parcel of land known as Nairobi/Block 117/513 (hereinafter referred to as “the suit property”) is hereby cancelled.
 - b. The 3rd Defendant shall make arrangement to transfer the suit property to the Plaintiff in accordance with the agreement between them once the property is restored to the name of the 3rd Defendant.
 - c. A permanent injunction is issued restraining the 1st and 2nd Defendants from interfering with the suit property.
 - d. Costs of the suit.
2. Judgment is entered for the 3rd Defendant in its counter-claim against the 1st, 2nd, 3rd and 4th Defendants in the counter-claim as follows;
 - a. A declaration is issued that the conduct of the 1st, 2nd, 3rd and 4th Defendants in the counter-claim and in particular the purported sale/transfer of all that parcel of land known as Nairobi/Block 117/513 (“the suit property”) to the 1st and 2nd Defendants in the counter-claim and the resultant Certificate of Title issued to them are tainted with fraud, illegality, impropriety, irregularity and corrupt scheme.
 - b. The register of all that parcel of land known as Nairobi/Block 117/513 (the suit property) is hereby rectified by the cancellation of entries numbers 3 and 4 therein through which the 1st and 2nd Defendants in the counter-claim were registered as the owners of the suit property and certificate of lease issued to them.
 - c. The 3rd Defendant is restored in the register of the suit property as the duly registered owner of the suit property subject to order 1(b) above.
 - d. A permanent injunction is issued restraining the 1st to 4th Defendants in the counter-claim whether by themselves, their agents, officers, nominees and /or whosoever from entering, encroaching, selling, advertising, transferring, alienating and/or otherwise dealing with the suit property.
 - e. Costs of the counter-claim.

DELIVERED AND DATED AT KISUMU THIS 10TH DAY OF NOVEMBER 2022

S.OKONG’O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Musyoka for the Plaintiff



N/A for the Defendants

N/A for the Interested Parties

Ms. J. Omondi-Court Assistant

