



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 276 of 1997

AFRICAN INLAND CHURCH.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF NAKURU.....1ST DEFENDANT

FRANCIS NGAMBI RUKOMIA.....2ND DEFENDANT

JAMES NJUGUNA WARUKIRA.....3RD DEFENDANT

JUDGMENT

The plaintiff, the African Inland Church, filed suit against the defendants seeking judgment to be entered against the defendants jointly and severally as follows;

- (i) *A declaration that the plaintiff is the lawful owner of Grant No.I.R 53159 that is to say L.R No.15174 (hereinafter referred to as the suit land) Subukia Trading Centre of Nakuru District.*
- (ii) *A perpetual injunction to restrain the defendants from interfering with the plaintiff's quiet enjoyment of **L.R 15174** contained in **Grant No. I.R 53159** Subukia Trading Centre of Nakuru District.*
- (iii) *An order of eviction and demolition of all the defendants illegal structures constructed on the suit land.*
- (iv) *General damages.*
- (v) *Costs of the suit.*

The plaintiff averred that it was the registered owner of the suit land. It averred that the 2nd and 3rd defendants had in 1994 trespassed and entered into the suit land and erected structures thereon purportedly on the strength of letters of allotment which were issued to them by the 1st defendant. The plaintiff averred that the 1st defendant had no legal authority to allocate the suit land which was legitimately the property of the plaintiff.

The 1st defendant filed a defence. It denied the averment made by the plaintiff that it was the registered owner of the suit property and stated that the plaintiff had occupied the suit property as a tenant. The 1st defendant averred that it had lawfully allocated the suit property to the 2nd and 3rd defendants. It stated that the developments that were undertaken on the suit parcel of land were legitimate because the 2nd and 3rd defendants were the lawful owners of the suit property. The 1st defendant further averred that it was not notified by any authority that the plaintiff had acquired the suit parcel of land. The

1st defendant urged this court to dismiss the plaintiff's suit with costs.

The 2nd and 3rd defendants filed a joint defence. By their amended defence and counterclaim dated the 14th of May 2002, they denied that the plaintiff was the registered owner of the suit property. They stated that if the plaintiff was registered as claimed in its plaint, then it was through a fraudulent transaction between the plaintiff and the Commissioner of Lands. The 2nd and 3rd defendants averred that the Commissioner of Lands did not have authority in law to issue the title to the plaintiff in respect of the suit property. The 2nd and 3rd defendants particularized the purported fraudulent acts committed by the plaintiff and the Commissioner of Lands. Of importance to these proceedings is the allegation that the Commissioner of Lands disregarded the laid down procedure in which government land was to be allocated and further that he ignored the fact that it was the 1st defendant who could legitimately allocated the suit land and if the Commissioner of Lands desired to allocate the said parcel of land to any person, then he was mandated to seek the consent of the 1st defendant. The 2nd and 3rd defendants further averred that by the time the Commissioner of Lands purported to have allocated the suit land to the plaintiff, the 1st defendant had already allocated the suit land to the 2nd and 3rd defendants. The 2nd and 3rd defendants prayed this court to dismiss the plaintiff's suit with costs and enter judgment in their favour as prayed in their counterclaim.

In their counterclaim, the 2nd and 3rd defendants have sought a declaratory order of this court to declare them to be the owners of parcels **No.133** and **138** Subukia Trading Centre which they had purchased between 1988 and 1994 from one William Maina Kabuthia who had been allocated the same by the 1st defendant in 1988. They prayed for an order of perpetual injunction to be issued against the plaintiff from interfering with their possession of the suit property which they had developed by erecting permanent buildings. They further prayed for an order of this court to have the title deed irregularly issued to the plaintiff cancelled. They prayed for general damages and costs of the counterclaim.

The plaintiff filed an answer to the defence and a defence to the counter claim. It denied that it had fraudulently obtained the title in respect of the suit land by concealing material facts to the Commissioner of Lands. It reiterated that it was legally registered as the owner of the suit parcel of land. The plaintiff urged the court to dismiss the counterclaim filed by the 2nd and 3rd defendants with costs.

The 2nd and 3rd defendants sought and were granted leave to issue a third party notice to the Commissioner of Lands to enjoin him as a party to this suit. The Commissioner of Lands was served with the third party notice. The Commissioner of Lands did not however enter appearance. Neither did he file a defence to the counterclaim of the 2nd and 3rd defendants.

At the hearing of this case, the plaintiff called four witnesses in its bid to establish its case against the defendants. PW1 Rev.Geoffrey Githinji Wairigi testified that he was employed by the plaintiff and worked as a pastor at Subukia. He testified that between 1978 and 1979, the plaintiff leased a disused beer hall which was owned by the 1st defendant at Subukia Trading Centre for the purposes of operating a dispensary. PW1 testified that the plaintiff established a dispensary which was operated by PW2 Dr. Billy Njuguna Magwa. He testified that the said dispensary was successfully operated by the plaintiff until 1990. Meanwhile PW2 testified that he managed the said dispensary at Subukia Trading Centre between 1978 and 1982 when he handed over the premises to the plaintiff. PW2 recalled that at the time, the plaintiff paid the rent for the said converted beer hall to the 1st defendant.

PW1 testified that in the late 80's, the plaintiff applied to the 1st defendant to be allocated the suit land so that it could continue rendering medical services to the members of the local community. The application letter was produced as *plaintiff's exhibit No.2*. The 1st defendant however did not respond positively to the request made by the plaintiff that it be allocated the suit land. In 1990, the plaintiff learnt that the 2nd and 3rd defendants had been allocated the suit land by the 1st defendant behind their backs. The plaintiff sought the intervention of the Provincial Administration (*letter produced as plaintiff's exhibit No.3*). The plaintiff then sought the intervention of the former President of the Republic of Kenya who instructed the

Commissioner of Lands to allocate the plaintiff the suit parcel of land. The Commissioner of lands allocated the plaintiff the suit parcel of land vide the letter of allotment dated the 7th of September, 1990 (*produced as plaintiff's exhibit No.4*). The plaintiff was required to pay a sum of Ksh.1704/=. The said sum was paid vide receipt produced as *plaintiff's exhibit No.5*. The District Commissioner, Nakuru then informed the area chief that the suit land had been allocated to the plaintiff (*letter dated the 3rd of December 1990 produced as plaintiff's exhibit No.6*).

PW1 testified that although the 2nd and 3rd defendants were notified that the suit land belonged to the plaintiff, they did not stop construction of permanent structures on the said parcel of land. They ignored the plea by the area chief not to construct any structures on the said parcel of land. The plaintiff was issued with a grant in respect of the said parcel of land. It was a lease of 99 years. The grant was issued on the 22nd of July 1991. It was registered as I.R No.53159 (**L.R No.15174**) (*copy of the grant was produced as plaintiff's exhibit No.7*). PW1 testified that the plaintiff had plans to construct a modern building on the said property. The plans were approved by the 1st defendant on the 17th of December 1997. The plans were produced as *plaintiff's exhibit No.10*. PW1 further testified that the plea by the plaintiff to seek the intervention of the 1st defendant to assist it take possession of the suit land has been in vain (*letters produced as plaintiff's exhibit No.8 and No.9*). PW1 testified that the plaintiff has always paid the land rent as demanded by the Commissioner of Lands (*receipts produced as plaintiff's exhibit No.11 (a) & (b) and 12*). PW1 urged this court to allow the plaintiff's suit as prayed.

PW1 denied that at the time the suit land was allocated to the plaintiff the same had already been allocated by the 1st defendant to the 2nd and 3rd defendants. PW1 denied that the plaintiff had obtained the title in respect of the suit land from the Commissioner of Lands by concealing material facts including the fact that the suit land had already been allocated to someone else by the time the Commissioner of Lands issued the letter of allotment to the plaintiff. He denied the suggestion put to him by the 2nd and 3rd defendants that the plaintiff had itself registered as the owner of the suit land behind the back of the 1st defendant. He denied that the plaintiff had illegally been allocated the suit land which belonged to the 1st defendant and not the government. PW1 reiterated that the 1st defendant acted unfairly when it allocated the suit land to the 2nd and 3rd defendants yet the plaintiff had applied to be allocated the same. PW1 conceded that the title issued in respect of the suit property could be the only title that had been issued to anyone at Subukia Trading Centre. He admitted that even the church owned by the plaintiff within Subukia Trading Centre did not have any title.

PW3 Simon Peter Waichinga testified that he was the area chief of Subukia Location between 1971 and 1997 when he retired. He testified that the suit property used to be operated by the 1st defendant as a beer hall until 1978 when the sale of traditional liquor was banned by the government. The plaintiff then leased the disused beer hall from the 1st defendant and converted it into a dispensary. PW3 testified that the plaintiff operated the dispensary until 1990 when the suit land was allocated to the 2nd and 3rd defendants by the 1st defendant. He testified that although the plaintiff protested this allocation, the 2nd and 3rd defendant refused to vacate the suit premises and instead commenced construction of permanent structures on the said property. PW3 testified that the suit property belonged to the plaintiff who was operating a health clinic which assisted the members of the public from Subukia and the adjoining areas.

PW4 Mwenda Kinyinga Mbogori, a Land Officer working under the Commissioner of Lands testified that the suit land belonged to the plaintiff. He testified that the Commissioner of Lands lawfully allocated the said parcel of land to the plaintiff. He testified that Subukia Trading Centre being an area which was within the former white highlands and therefore constituted land which was part of the former Crown Lands was government land which could be allocated by the Commissioner of Lands. He denied the suggestion put to him by the defendants that the parcels of land at Subukia Trading Centre were Trust land which fell under the management and jurisdiction of the 1st defendant. He explained in detail the procedure that was followed by the Commissioner of Lands from the time the plaintiff applied to be allocated the suit land to the time it was issued with the title in respect of the same.

PW4 testified that the Commissioner of Lands followed the established legal procedure when he allocated the suit land to the plaintiff. He testified that the 1st defendant acted in ignorance of its powers when it purported to allocate the suit property to the 2nd and 3rd defendants. He further testified that the Commissioner of Lands had allocated another parcel of land at Subukia Trading Centre to the National Cereals & Produce Board. He reiterated that it is only the Commissioner of Lands who can allocate government land. He however conceded that the Commissioner of Lands could also allocate part of the land within Subukia Trading Centre to the 1st defendant as the local authority administratively in charge of the said trading centre. He reiterated that the suit parcel of land was properly allocated to the plaintiff who is recognized as the registered owner of the same.

The 1st defendant called one witness; Jacob Kipyegon Kesendagor. Jacob testified that he was in charge of keeping the plots records at the Nakuru County Council. He testified that the land that is now Subukia Trading Centre was purchased by the predecessor of Nakuru County Council from one Captain Belly. The predecessor, African District Council purchased a 30 acre parcel of land from the said Captain Belly in the year 1950. The African District Council subdivided the land into plots and set aside public utilities which included a market stall and a beer hall. He testified that when the country attained independence in 1963, the 1st defendant took over the functions of the African District Council. The 1st defendant also took over possession of market centres which were then owned by the said African District Council. Among the market centres which were taken over by the 1st defendant was Subukia Trading Centre. Jacob testified that he did not have any documents to support his evidence that the predecessor of the 1st defendant had purchased the parcel of land where Subukia Trading Centre is now situate from one Captain Belly.

He however testified that there was no doubt that the 1st defendant was the owner of the parcel of land that is Subukia Trading Centre. He testified that the 1st defendant had subdivided and created 350 plots at the said Subukia Trading Centre. He testified that the 1st defendant had allocated the majority of the plots to the residents of Subukia trading Centre. He testified that according to the records kept by the 1st defendant plot No.133 was allocated to James M. Warukira while plot No.138 was allocated to Francis W. Rukomia (*the 2nd and 3rd defendants respectively*). He testified that the 2nd and 3rd defendants had applied and were allocated the said plots by the 1st defendant in 1988. He further testified that the plaintiff had applied to be allocated the beer hall but the 1st defendant had rejected the plaintiff's application. He testified that the Commissioner of Lands had no legal authority to issue title in respect of a parcel of land which was owned and managed by the 1st defendant. He stated that the Commissioner of Lands lacked legal authority to allocate land without consulting the 1st defendant which was the owner of all the parcels of land in trading centres within its area of jurisdiction.

He testified that it was wrong for the Commissioner of Lands to have issued the title in respect of the suit parcel of land when the said parcel of land had already been allocated to the 2nd and 3rd defendants. He recalled that the plaintiff had applied and had been leased the beer hall to operate as a medical clinic. This was in 1979 after the said beer hall had been closed following a directive by the government. He testified that the plaintiff paid rent to the 1st defendant until the year 1991 when the plaintiff refused to pay rent because it claimed that it was registered owner of the suit property. Jacob testified that parcels No.133 and No.138 each measured 50 ft x 100 ft and had been excised from the parcel of land which was previously part of the beer hall.

He testified that the beer hall was still in existence and was being currently used as a social hall. He reiterated that the plaintiff had not followed the right procedure before it was allocated the suit property and the title thereof. He insisted that the 1st defendant did not recognize the title which was issued by the Commissioner of Lands to the plaintiff. He testified that the 1st defendant was in the process of issuing titles to the allottees of the plots at Subukia Trading Centre. He testified that apart from the National Cereals & Produce Board which was issued with the title to its plot at Subukia Trading Centre by the Commissioner of Lands with the consent of the 1st defendant, no other plot owner other than the plaintiff had been issued with a title. He testified that the government had no business or authority in purporting

to allocate parcels of land which belonged to the 1st defendant.

The 2nd defendant on his part testified that he was allocated plot No.138 at Subukia Trading Centre in 1988 after he applied for it from the 1st defendant. He testified that he was issued with a letter of allotment which he produced as *2nd defendant's exhibit No.1*. He testified that he paid the survey fees and land rent as per the conditions set by the 1st defendant. He produced the receipts thereto as the *2nd defendant's exhibit No.2*. He testified that after he was allocated the said plot, he prepared a building plan which was approved by the building superintendent of the 1st defendant. He produced the plan as *2nd defendant's exhibit No.3*. The approval was produced as *2nd defendant's exhibit No.4*. He testified that he commenced construction on the suit land in 1989. He recalled that in 1990, the plaintiff attempted to stop him from constructing on the said parcel of land ostensibly because it owned the suit land. He recalled that the plaintiff used the Provincial Administration in its bid to stop him from constructing a building on the said plot.

The 2nd defendant testified that he reported to the 1st defendant the incident and was given a green light to proceed with the construction. He testified that he was not served with any court order by the plaintiff to prevent him from constructing on the said parcel of land. He testified that he completed the building of the business premises which now comprise of three business premises and 19 rental houses. He testified that as far as he was concerned the allegation by the plaintiff that it owned the suit property was dismissed by the 1st defendant. He testified that he was not aware that the plaintiff had applied to be allocated the said parcel of land by the Commissioner of Lands.

The 2nd defendant further testified that although the plaintiff testified that its building plans were approved in 1997, his building plans were approved in 1989. He testified that he did not go to court to challenge the title which was issued to the plaintiff once he became aware of it because he was of the opinion that the plaintiff was a land grabber. He conceded that he had done nothing to safeguard his interest by filing suit in court once he became aware that the title in respect of the suit land had been issued to the plaintiff. He however insisted that he was the lawful owner of the suit land and asked the court to cancel the title which was issued to the plaintiff. He urged the court to dismiss the plaintiff's suit with costs and allow his counterclaim.

The 3rd defendant, James Njuguna Warukira similarly testified that he is the legal owner of **plot No.133** at Subukia Trading Centre. He testified that he had purchased the said plot in 1994 from the original allottee from the 1st defendant, one Maina Kabuthia. He testified that after he had purchased the said plot for the sum of Ksh.85,000/=, the 1st defendant changed its records to reflect the said change of ownership. He testified that he had since paid all the land rent due in respect of the said parcel of land to the 1st defendant. He produced the documents in support of his ownership of the said parcel of land as *3rd defendant's exhibit 1(a)-(d), 2(a) – (e), 3 & 4 (a) – (c)*. He testified that after he had purchased the said parcel of land, he took possession and prepared building plans which were approved by the 1st defendant. He then constructed a commercial building on the said plot. He testified that he completed the construction of the said building in 1995 and was not served with any court order stopping him from constructing the said building. He however testified that if he had known that the plaintiff had been allocated the said parcel of land, he would not have purchased it or constructed a building thereon. He however insisted that he was the legitimate owner of the said parcel of land. Both the 2nd and the 3rd defendants produced photographs in evidence showing the nature of the buildings that had been constructed on the said parcels of land.

After the close of the plaintiff's and the defendants' case, the parties to this suit agreed by consent to file closing written submissions in support of their respective cases. The plaintiff's and the defendants' counsels filed written submissions in support of their respective positions. I have read the pleadings filed by the parties to this suit. I have also carefully considered the evidence that was adduced before me by the parties to this suit. I have read the written submissions filed by the plaintiff, the 1st defendant and the 2nd and 3rd defendants respectively. The issues for determination by this court are two fold; firstly

whether the plaintiff had legal capacity to file suit against the defendants. The second issue for determination is who as between the plaintiff and the 2nd and 3rd defendants is the legitimate owner of the suit parcel of land.

The 1st defendant in its written submission stated that the plaintiff, as a registered society did not have legal capacity to file suit against the defendant in its own name. It submitted that the plaintiff ought to have filed the suit through its officials. The 1st defendant relied on the High Court decisions of **Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank Nairobi HCCC No.5116 of 1992 (O.S) (Unreported)** and **Nairobi HC Misc.Civil Case No.283 of 2002 Francis Karani Elijah & Others vs Chairman KANU & 2 Others (Unreported)** where it was held that a suit file by a society in its own name is incompetent and ought to be struck out. Whereas I agree with the submission made by the 1st defendant that the plaintiff ought to have sued the defendants either through its registered trustees or through its officials, I read the defence filed by the 1st defendant and note that the 1st defendant did not raise the issue of the incompetence of the suit filed by the plaintiff. It is trite law that if a party wishes to raise an issue concerning the competence of a party to a suit, he has to raise it at the earliest possible opportunity.

A party cannot wait until the close of the pleadings and the close of the case to raise the issue of the competency of a party to the suit in its closing submission. This is because the issue as to the competency of a party to a suit goes to the jurisdiction of the court. As was held by Nyarangi JA, in his leading opinion in **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1** at page 14;

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

In the present case, the 1st defendant raised the issue of the competency of the plaintiff to file the suit so late in the day. This court will therefore refuse to uphold the submission made by the 1st defendant on the issue of competency because it ought to have been raised at the earliest possible opportunity.

On the substantive issue before the court as to who between the plaintiff and the 2nd and 3rd defendant is the owner of the suit land, having evaluated the evidence I do make the following comments concerning the evidence that was adduced before me by the parties to this suit. It is not disputed that the plaintiff is the registered owner of the suit property within which are parcels known as plot **No.133 and 138** Subukia Trading Centre owned by the 2nd and 3rd defendants. The registered trustees of the plaintiff were allocated the said parcel of land by the Commissioner of Lands in 1990. The title in respect of the suit land known as Grant No.53159 (*L.R No.15174*) was issued to the plaintiff on the 22nd of July, 1991. The Grant was produced as *plaintiff's exhibit No.7*. Annexed to the said grant is a Deed plan No.156654 which delineates the area that comprise the parcel of land which was granted to the plaintiff. The defendants do not challenge the fact that the plaintiff has the said Grant in respect of the suit land. They however challenge the process by which the plaintiff obtained the said Grant in respect of the suit land.

According to the 1st defendant all the parcels of land within Subukia Township are owned by it. The 1st Defendant's witness testified that the predecessor of the 1st defendant purchased the said parcel of land from one Captain Belly. The 1st defendant however did not produce any evidence to prove or establish that the African District Council did in fact purchased the said parcel of land that comprised Subukia Trading Centre from one Captain Belly in 1950. PW4 testified that the records kept by the Commissioner of Lands clearly indicate that the parcels of land within Subukia Township, being within the former white highlands, as government land. It was not trust land as stated in evidence by the 1st defendant. PW4 testified that trust land is land which was formerly African reserved areas. The nearest trust land to

Subukia Trading Centre is land within Baringo District.

Having carefully evaluated the evidence adduced by the parties to this suit, I am persuaded by the explanation given by PW4 on the status of the parcels of land within Subukia Trading Centre. PW4 explained that the parcels of land within Subukia Trading Centre were parcels of land within the former Crown land which became government land when Kenya gained independence in 1963. The Commissioner of Lands has authority to allocate any land that is government land in accordance with the provisions of the **Government Land Act**. The Commissioner of Lands therefore acted within his powers when he allocated the suit land to the plaintiff. The 1st defendant claims that the Commissioner of Lands could not have allocated the suit land to the plaintiff without seeking its consent. I hold that this would have been the case if the parcels of land within Subukia Trading Centre were trust land. I therefore hold that the 1st defendant allocated the parcels of land to the individuals at Subukia Trading Centre at its own risk and subject to the power exercised by the Commissioner of Lands under the **Government Land Act**.

I further hold that once the Commissioner of Lands allocated the suit land to the plaintiff, the 1st defendant did not have any authority in law to challenge the decision of the Commissioner of Lands. The Commissioner of Lands did not require the consent of the 1st defendant before it could allocate land to any applicant who had applied to be allocated government land. I further hold that the allocation of the parcels of land to individuals by the 1st defendant at Subukia Trading Centre was a result of the Commissioner of Lands failing to exercise his power of allocation under the **Government Land Act**.

It is therefore evident from the above holding by this court that the letters of allotment issued to the 2nd and 3rd defendants by the 1st defendant were subject to the allotment made by the Commissioner of Lands. Once the Commissioner of Lands issued the title in respect of the suit land to the plaintiff, the 1st defendant purported allocation to the 2nd and 3rd defendants became null and void. The 2nd and 3rd defendants have argued that they were issued with the letters of allotment in respect of part of the suit land by the 1st defendant in 1988. They argued that the plaintiff applied to be allocated the suit land by the Commissioner of Lands in 1990. It is therefore their argument that by the time the Commissioner of Lands allocated the suit land to the plaintiff, they were already in occupation of part of the suit land having been allocated the same by the 1st defendant. I find this argument to be disingenuous because a title cannot be compared to a letter of allotment. The plaintiff applied to the proper authority to be allocated the suit land. It was allocated the suit land.

The 2nd and 3rd defendants applied to be allocated part of the suit land from a body which lacked legal authority to allocate such parcels of land. The plaintiff was issued with the title in respect of the suit land. The plaintiff was thus the registered owner of the suit land. As was held by the Court of Appeal in the case of **Wreck Motor Enterprises vs The Commissioner of Lands & 3 Others CA Civil Appeal No.71 of 1997 (Unreported)**;

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held. See Dr. Joseph N. K. Arap Ngok vs Justice Moijo Ole Keiwua & 4 Others Civil Appl. No.NAI 60 of 1997 (Unreported). Section 23(1) of the Registration of Titles Act reads as follows;

‘Section 23(1)

The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.’”

The Court of Appeal recently restated the above position of the law in the case of **Faraj Maharus vs J. B Martin Glasses Industries & 3 Others CA Civil Appeal No.130 of 2003 (Mombasa) (Unreported)** when it held at page 5 that;

“These were, firstly, the disputed land has at all material times to the suit being public land vested in the government under the Government Lands Act Chapter 280, Laws of Kenya and its precursor, the Crown Lands Ordinance. Disposition thereof can only therefore be in accordance with that Act. There was no disposition to the appellant under the Act. Secondly, that there can be no adverse possession on public or government land however long one may have been squatting thereon without let or hindrance from the government. Therefore the appellant cannot benefit from the long period of occupation of the disputed property. Thirdly, the temporary occupation licence issued in 1926 could not oust the certificate of title granted under the Registration of Titles Act. The appellant does not possess title under the Act....the learned judge correctly relied on the decision of this court in Wreck Motor Enterprises vs The Commissioner of Lands Civil Appeal No.71 of 1997 (Unreported). This decision affirms the sanctity of title under Section 23 of the Registration of Titles Act except on ground of fraud or misrepresentation.”

In the present case, the defendants, particularly the 2nd and 3rd defendants have argued that the plaintiff fraudulently obtained the title in respect of the suit land from the Commissioner of Lands by concealing the fact that the 1st defendant had allocated part of the suit land to the 2nd and 3rd defendants. This argument can only hold water if this court had found that the 1st defendant had authority superior to that of the Commissioner of Lands in dealing with parcels of land within Subukia Trading Centre. This court having found that it is only the Commissioner of Lands who has power to allocate government land, it cannot therefore be said that when the Commissioner of Land allocated vacant parcel of land belonging to the government land to the plaintiff he did so fraudulently.

The totality of the reasons given hereinabove is that this court holds that the plaintiff is the registered owner of the suit property and is entitled to the possession of the same. This court noted that 2nd and 3rd defendants have developed part of the suit land which they refer to as plot No.133 and plot No.138 Subukia Trading Centre. However evidence was adduced by the plaintiff which establish that the 2nd and 3rd defendants were made aware of the ownership of the suit land by the plaintiff before they had commenced construction on the said parcels of land. The 2nd defendant confirmed in his testimony before this court that he was notified to stop any construction on the said parcel of land but still went ahead and constructed the building which is now erected on the said parcel of land.

The 2nd defendant testified that he ignored the notice which was given to him by the Provincial Administration that the said parcel of land belonged to the plaintiff. Similarly, the 2nd defendant did not undertake a search to confirm whether the person who sold him the parcel of land where he has constructed a building belonged to the said person. It is the view of this court that the 2nd and 3rd defendants took a calculated risk when they constructed on the said parcel of land knowing very well that the plaintiff had title to it and was claiming the same. It did not matter that the plaintiff did not file a case in court to seek an injunction to restrain the 2nd and 3rd defendants from constructing structures on the said land. It behoves someone who is making a major investment on a parcel of land to confirm the status of such parcel of land before he commences expensive development on the same.

The upshot of the above reasons is that the plaintiff’s suit against the defendants must succeed. Judgment is entered for the plaintiff and against the defendants jointly and severally as hereunder;

- (i) **This court hereby declares that the plaintiff is the lawful owner of all that parcel of land comprised in Grant No.I.R 53159 that is to say L.R No.15174 Subukia Trading Centre, Nakuru District and which is delineated in the Deed plan No.156654 annexed to the said Grant which is dated the 19th of July, 1991.**
- (ii) **The 2nd and 3rd defendants are hereby ordered to remove the structures which were**

constructed without the permission of the plaintiff on Grant No.I.R 53159 that is to say LR. No.15174 Subukia Trading Centre, Nakuru District within sixty (60) days of the delivery of this judgment or in default thereof the plaintiff shall be at liberty to demolish the said illegal structures at the 2nd and 3rd defendants costs.

(iii) The 2nd and 3rd defendants are hereby ordered to give vacant possession of the suit land to the plaintiff within sixty (60) days of today's date or in default thereof the plaintiff be at liberty to evict them.

(iv) This court hereby issues a permanent injunction restraining the defendants from interfering with the plaintiff's quiet enjoyment of L.R No.15174 contained in Grant No.IR.53159 Subukia Trading Centre, Nakuru District.

(v) The counterclaim filed by the 2nd and 3rd defendants lacking in merit is hereby dismissed with costs.

(vi) The plaintiff shall have the costs of the suit.

DATED at NAKURU this 16th day of November, 2006

L. KIMARU

JUDGE