



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 79 of 2017

EVANS NAKHABALA WEKESA.....PLAINTIFF

VS

KENYA AFRICAN NATIONAL UNION.....DEFENDANT

FIVE EMUKEI TRANSPORTERS LTD.....1STINTERESTED PARTY

CONSOLIDATED BANK OF KENYA LTD.....2NDINTERESTED PARTY

JUDGEMENT

1. On the 24/6/2013 the Plaintiff filed suit against the Defendant seeking an Order of permanent injunction restraining the Defendant from entering interfering and constructing any structures on the suit land, vacant possession and mesne profits in the sum of Kshs 50,0000/- from the time of filing suit to the date of vacation of the suit property.
2. The case of the Plaintiff is that he was the registered proprietor of Murang'a /Mun/Block 3/12, the suit land. That the Defendant has forcefully entered the premises and committed acts of wanton wastage, demolition of walls including the construction of illegal structures occasioning him loss and damage which is particularized under para 6 of the Plaintiff.
3. While the suit was pending the Plaintiff transferred the suit land to the 1st Interested Party on the 22/4/16 necessitating the joinder of the Five Emukei Transporters Limited as a party to the suit.
4. Vide its amended defence and counterclaim filed on the 13/3/2018 the Defendant denied the Plaintiff's claim and avers that it is the registered owner of the suit premises.
5. In its counterclaim contended that the title of the Plaintiff and subsequently the 1st Interested Party is irregular and fraudulent and ought to be cancelled as it was obtained in a corrupt manner. That the property reverted to the Defendant and therefore was not available for acquisition by the Plaintiff. That the transfer to the 1stInterested Party was meant to defeat the claim of the Defendant.
6. The Defendant sought declaratory Orders that it is the owner of the suit land and that the title to the suit land should be cancelled and registered in its name.
7. The 1stInterested Party in its defence to the counterclaim contended that the title it holds is regular and should not be cancelled. That the Defendant has no claim on the suit land. That the Salvation Army (hereinafter referred to as the "Church"), the previous allottee/registered owner surrendered its interest to Murang'a Municipal Council which did not cancel the title.
8. In its defence the 2nd Interested Party contended that it extended banking facilities in the sum of Kshs 5 million to Mr Paul Kimani Muna which facility was secured with the suit land. That it carried out due diligence which revealed that the title belonged to the 1stInterested Party and urged the Court to protect its rights as a chargee.
9. At the hearing the Plaintiff testified and relied on his witness statements dated the 24/6/13 and 5/4/19. He presented documents in support of his case marked as PEX 1-15.
10. He stated that he was the registered owner of the suit land as per the official search dated the 21/3/12 and paid rates to the County Government who did confirm his owners Interested Party status. That the Defendant's plot is at Makuyu. That he acquired the land through the exchange of UNS plot G with Salvation Army. That upon acquisition he wrote to the Defendant to vacate the suit land but it adamantly

ignored his demand.

11. In cross examination he confirmed that the official search dated the 16/12/11 shows that Salvation Army had a lease of 33 years from 1/7/1964 which lease expired in 1997. That he purchased the land in 2012 and did not inquire into the status of the lease nor was he shown any extension of the same.

12. In his further testimony the witness confirmed that he sold the UNS plot G to a Mr Kabai on the 29/5/2014. He also confirmed that the said UNS Plot G is the same one that he exchanged with the church in 2012.

13. He also confirmed that he sold the suit land to the 1st Interested Party after judgement but before the determination of an application to set aside the judgment. He justified it that there was no injunction barring him from disposing the suit land at the time.

14. PW2 – Alice Gisemba introduced herself as the Land Registrar Murang'a. She produced the certified copy of the white card of the suit land marked as PEX 16. That according to the said white card the land was registered in the name of the Salvation Army on the 28/2/1972 and the title issued on the 21/9/1978. That the property was registered in the name of the Plaintiff on 21/11/13 in exchange with UNS Plot G. See entry No 3 on the white card.

15. The witness informed the Court that there are no entries on the white card to support the Defendant's claim or ownership. That the current owner of the property is the 1st Interested Party under a lease of 99 years from 1/7/1964 from the County Government of Murang'a as seen in the white card.

16. While under cross examination by the Advocate for the Defendant, the witness admitted that there are some documents missing in the parcel file such as the lease to the church for 33 years from 1964; application for renewal of lease by the Salvation Army; details of UNS Plot G allegedly exchanged between the Plaintiff and the church;

17. Further she confirmed that there is no surrender of the certificate of lease by the church; no extension of lease document to the church from the Government after expiry of the initial lease of 33 years from 1964; no documents surrendering the lease by the church or application for extension of lease prior to 1997 or at all; That there are no documents to support the lease of 99 years from 1964.

18. The witness informed the Court that according to the white card on record the tenure of the lease is 99 years from 1/7/1964. However, the original title that was registered in the name of the Salvation Army reads 33 years from 1/7/1964. That all leases issued by the County Councils then was for 33 years and not 99 years. That in her records there is a transfer of land from the Salvation Army to the Plaintiff signed on the 21/3/12. She confirmed that there are no documents of lease for the period of 1997 – 2012 from the Government of Kenya with respect to the suit land to either the church or the Defendant. She stated that the white card which shows the term of the lease as 33 years from 1/7/1964 is missing from her records. That she does not have any documents to support the term of 99 years from 1964 as shown in the white card so much so that there was not at any time a document showing that the church had a lease of 99 years from 1964. That the original title surrendered to the registry and on record reads 33 years from 1964. That she does not know how the tenure of 99 years from 1964 as shown in the copy of the white card was created.

19. DW1 – Pharis Solomon Chege took the witness stand on behalf of the Defendant and introduced himself as the Secretary of the Defendant, Murang'a branch. He relied on his witness statement dated the 1/12/2015 and 10/6/2019 as his evidence in chief.

20. He explained that the Defendant occupied the Suitland since 1972. That the Salvation Army held a lease of 33 years from the 1/7/1964 which expired on the 30/6/1997. That as far back as 1975 the Salvation Army intimated to the Commissioner of Lands its intention to surrender the title back to the council. Then in 1972 the Defendant occupied the property with the knowledge of the council, build an additional building on the property and pursued the allocation of the land by the commissioner of lands. That it would appear that in 1997 the Salvation Army changed its mind and requested for the extension of lease but the same was rejected by the Town Planning Committee in its meeting held on the 11/3/1997.

21. The witness stated that in 2015 the council confirmed that the Plaintiff was allocated UNS Plot G but sold it to Kabai on the 29/5/2014. That this was the plot that the Plaintiff allegedly exchanged with the Salvation Army on the 9/3/2012. He explained to the Court that the exchange of the two parcels of lands was a fraud because the Salvation Army had no interest in the suit land, its interest having expired in 1997 and no extension of lease was registered in its favour. Secondly the Plaintiff sold the UNS plot to Kabai and the same was not available for exchange by the Plaintiff. That the Plaintiff has led no evidence on how he reacquired the said UNSG Plot. The witness informed the Court that it is plausible that the Plaintiff deceitfully never handed over the plot to the Salvation Army which remained in his name until 2014 when it was sold to Mr Kabai.

22. That the same UNS Plot G was allegedly used again in the transaction between the Plaintiff and the 1st IP. The consideration was indicated as exchange of UNS plot G. This was on the 12/1/2017.

23. The witness explained that the Plaintiff is the nephew of one Paul Kimani Muna, the proprietor of the 1st IP, the current registered owner of the suit land. That the said Muna witnessed the alleged exchange agreement between the Salvation Army and the Plaintiff in 2012. That the said Muna has vested interests in the property. That Muna was a long time councilor and a Mayor of Murang'a Town and has had dealings with the property.

24. In cross examination the witness admitted that the Defendant was not allocated the suit land despite having applied for it. That it did not pay rates as the same was not demanded by the council. That it has occupied the suit land since 1972 before the Salvation Army surrendered the title to the Government. On entry they found a building and added a small structure on the land. That at no time did the Salvation Army complain about their occupation of the suit land. That the Defendant was evicted in 2013.

25. The witness admitted that the Defendants through its Kiharu Branch owns another property at Makuyu.

26. The case of the Interested Party was defended by Catherine Muthoni Kimani DW2 who stated that Paul Kimani Muna is her father. That he served in the County council of Murang'a as councilor and later a two-time Mayor. That she is a director of the 1st Interested Party and a resident of Murang'a County. That Mr Paul Kimani Muna is a director of the company as well. That she has no relations with the Plaintiff and all she knows is that he is a businessman in Murang'a town.

27. She relied on her witness statement dated the 20/3/19 as her evidence in chief. That the 1st Interested Party acquired the property from the Plaintiff devoid of fraud through an exchange with UNS Plot G, whose details she was not familiar with. She does not know who executed the agreement of exchange. That she is not aware how the 1st Interested Party acquired UNS Plot G in the first place. She did not produce any documents to support the owners Interested Party of the land by the 1st Interested Party and the exchange. That she learned that the Plaintiff had exchanged the suit land with Salvation Army in 2012.

28. That at the time they acquired the land there were no Orders preventing the company from acquiring the property. Later they charged the suit land to the 2nd Interested Party to secure a loan of Kshs 5 Million. That the property was unencumbered.

29. Charles Maina – DW3 testified on behalf of the Consolidated Bank and stated that he is the branch Manager, Murang'a branch and relied on his witness statement dated the 24/9/2020 and the list of documents of even date in support of the 2nd IPs case.

30. The witness stated that Paul Kimani Muna is their customer trading as Muki Auto Garage. That the bank advanced Kshs 5 million to the said company, secured with the property registered in the name of the 1st IP. That on application for the loan, the bank carried out due diligence which revealed that the suit land was registered in the name of the 1st Interested Party and had nil encumbrances. That the bank also valued the property and having satisfied itself proceeded to register the charge on the suit land. See charge document dated the 2/3/18. That the loan is still outstanding todate.

31. Parties filed written submissions which I have read and considered.

32. I have read and considered the Pleadings, the evidence of the parties as adduced on trial, the written submissions and all the materials placed before me and the issues that commend themselves for determination are as follows;

- a. Whether the suit as filed by the Plaintiff is moot.
- b. Whether the Plaintiff and the Defendant have established a right of ownership Interested Party in the suit land.
- c. Whether the Plaintiff, the 1st Interested Party and subsequently the 2nd Interested Party acquired a good title in the suit land.
- d. Whether the title held by the 1st Interested Party and the charge to the 2nd Interested Party should be cancelled.
- e. Who meets the costs of the suit.

33. The gist of the dispute is based on competing interests in the suit land. Each party is aiming at adverting its interest in the suit land and the dispute will turn on documentary proof produced by the parties in support of each of the claims. From the record it is not in doubt that the parties have produced various documents in support of their claims. The Court will analyze them in the judgment.

34. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

35. The Plaintiff filed suit against the Defendant on 24/6/2013 seeking eviction Orders, mesne profits and costs. The suit was heard exparte and the judgment entered in favour of the Plaintiff. The Defendant successfully applied to set aside the judgment and the suit was heard afresh. In the intervening period the Plaintiff quickly transferred the property to the 1st Interested Party and as at the time of writing the judgment the suit land is registered in the name of the 1st IP.

36. The Plaintiff led evidence that he was at liberty to transfer the suit land as he did to the 1st Interested Party in the absence of any ongoing suit as well as any injunctions barring his actions. The Defendant has argued that the said transfer during the pendency of the application was prohibited by the doctrine of Lis pendens.

37. Black's Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a Court over property while a legal action is pending. Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed.

38. It is trite that the doctrine of Lis pendens is still applicable to our legal system through the application of section 3 of the Judicature Act read together with Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates,

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

39. It is a principle of law that a disposition made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

40. The facts of this case are that the ex parte judgment was delivered on the 16/3/16 and on the 2/4/16 the Defendant filed an application seeking stay of execution and setting aside the judgement. Uncontroverted evidence was led by the Defendant that it served the Plaintiff 's advocate on the 7/4/2016 and the Plaintiff filed a replying affidavit on the 20/4/2016. In spite of this he transferred the title to the 1st Interested Party on the 26/4/16 with the full knowledge that the Defendant's application to set aside the judgment was pending.

41. Going by this doctrine no rights were legally abrogated by reason that the case was still pending in Court and the rights of the parties were pending determination. By this time the rights of the parties were frozen in time awaiting the determination by the Court. The finding of the Court is that the property was transferred to the 1st Interested Party by the Plaintiff when the application to set aside Judgement was pending and in contravention with the doctrine of lis pendens.

42. It is also on record that on the 8/7/13 the Court granted the Plaintiff restraining Orders against the Defendant from interfering with the suit land pending the hearing and determination of the suit.

43. DWI and PW1 confirmed to the Court in evidence that the Defendant vacated the Suitland in 2013 in compliance with the said Orders. This suit was filed in June 2013 and the Defendant is said to have vacated in July 2013 or thereabouts. Therefore, if any mesne profits was to be payable it would be for a period of less than one month. I shall return to this later.

44. The Court finds that the prayers of the Plaintiff which were permanent injunction restraining the Defendant from interfering with the suit land, vacation of the Defendant from the land and mesne profits in the sum of Kshs 50,000 from the filing of the suit till payment in full have been overtaken by events because; the Defendant vacated the suit land in or around July 2013; the Plaintiff ceased ownership Interested Party of the land on the 24/6/16 when he transferred the land to the 1st IP; A prayer for trespass is founded on a finding of ownership of land which as earlier stated was extinguished on the transfer of the land. The Plaintiff has therefore no rights or claim over the suit land.

45. Consequently, the suit and Orders sought by the Plaintiff stood moot.

46. Issue No 1 is answered in the affirmative.

47. The Defendant denied the Plaintiff 's claim and, in its counterclaim, sought declaratory Orders that it is the owner of the suit land and secondly that the title was transferred to the 1st Interested Party fraudulently and during the pendency of the suit and that the title charged to the 2nd Interested Party should be cancelled.

48. From the onset let me lay the legal framework of land rights in Kenya. Property rights in Kenya are protected under the bill of rights as encapsulated in Article 40(6) of the Constitution. However the protections under Article 40(6) of the Constitution does not extend to any property that has been found to have been unlawfully acquired.

49. Section 24 and 25 of the LRA provides that interests conferred upon a registered owner of the property shall vest in that person the absolute ownership Interested Party of the land together with rights and privileges belonging or appurtenant thereto and with all implied and express rights and privileges. Further that the rights of the proprietor whether acquired on first registration or subsequently for valuable consideration or by Order of the Court shall not be defeated except as provided by the Act.

50. Indefeasibility of title as set out in Section 24 and 25 of LRA can however be challenged on the basis of existing overriding interests as set out in Section 28 of the RLA. These include customary trusts, rights of way, rights of compulsory acquisition, prescriptive rights, inter alia.

51. It is on record that the suit land was registered in the name of the Salvation Army on the 28/2/1972 under a leasehold for a term of 33 years from the 1/7/1964. In 1975 the church intimated to the Commissioner of Lands its intention to surrender the lease to the County Council of Murang'a, the head lessor. It would appear that no action was taken on this request. However, from the correspondence on record in 1994 the church changed its mind and requested for an extension of lease for a period of 99 years from 1/7/1997. See letter by Hamilton Harrison & Mathews Advocates.

52. The Defendant has averred that it occupied the land from 1972 to 2013 when it was sued for trespass. It led evidence that it vacated the suit land in 2013.

53. The Defendant led evidence that it was given possession by Murang'a council after the Salvation Army, the previous owner showed no interest in the land. That its application for allotment of the said land had been favourably considered by the council who recommended to the Commissioner of Lands.

54. In the previous legal land regimes, all land in municipalities and trust lands were vested in the County Councils. Alienation of such public lands was through the approval of the full county council which in many cases recommended the allocation to the Commissioner of Lands that held delegated powers to allocate land on behalf of the President. The minutes of council would then be forwarded to the commissioner of Lands who would then issue a letter of allotment to the recommended allottee. The allotment letter would be issued on behalf of the specified council. It would spell out the terms and conditions of allotment and provide the requirements that would be met by the allottee leading to registration and issuance of title. In many cases the leases would be 33 years revisable. Upon expiry the allottee had the liberty to seek for extension of lease from the council and the process would be repeated until the said extension is registered and a new lease granted.

55. In the event of surrender of lease the lessee would approach the commissioner of lands with the proposed surrender which would be accompanied by the registration of a surrender document spelling the terms of surrender. Upon successful registration of the surrender the interest in the title is extinguished in favour of the head lessor or on such terms as may be approved by the Commissioner of Lands.

56. The Plaintiff and the Defendant failed to place any evidence before me to support any surrender of lease and or allotment or ownership of the title to either of them.

57. The occupation of the Defendant of the suit land from 1972 in the absence of documentary evidence of ownership or permission amounted to trespass to land that belonged to the Salvation Army. After the expiry of the lease, the Defendant continued to occupy the land belonging to the County Council from 1997 – 2013 allegedly with the knowledge of the County Council.

58. The Court finds that the Defendant has not proved any right in land capable of being protected by this Court. Its argument that the council had approved its allocation of the suit land did not materialize to a title.

59. For the Defendant to establish a proprietorship interest in the suit land capable of protection by this Court and a basis to impeach the competing title of the Plaintiff, it had to prove ownership in the property. It failed to do so. The claim of the Defendant therefore must fail for the reasons given above.

60. It is the view of the Court that the County Council of Murang'a is not without blame. In 1973 the council wrote to the commissioner of lands recommending that the plot be transferred to the Defendant to enable them collect rent to boost its revenues. Vide letter dated the 13/5/2010 it again gave its no objection to the land being transferred to the Defendant following the rejection of the application for extension by the church on the 11/3/1997. The proposal seems to have received no response from the commissioner of Lands. Suddenly in 2012 the council in a change of heart purports to approve an extension of lease of the suit land from 33 years to 99 years ostensibly to the church vide a minute No MIN/STPW&H/7/2012(2) (this minute was not produced). Even before the Commissioner of Lands approves the extension, the council vide its letter dated the 13/3/2012 approved the transfer of the suit land from the church to the Plaintiff.

61. The Council contributed to the confusion when it purported to support the recommendation of the allocation of land to the Church and the Defendant at the same time whilst knowing or ought to have known that the lease had expired in 1997.

62. The Plaintiff has placed reliance on a letter dated the 6/6/2012 to claim that the interest in the suit land was extended from 33 years to 99 years. I feel duty bound to determine this issue. To put it perspective I will quote the letter verbatim. It is addressed to the Commissioner of Lands by the Town Clerk Municipal council of Murang'a. It reads;

“ extension of lease block 3/12-Murang'a Municipality.

The council vide Min N MIN;STPW&H/7/2012(2) approved the extension of lease for the above quoted plot from 33 years to 99 years. The plot is fully developed. All council dues have been paid to date. Please find the attached minute of the Town Planning Works and Housing”.

63. The letter is copied to the Land Registrar, District Land Officer and the Chief Secretary Salvation Army. The minutes referred to above were not disclosed to the Court.

64. My understanding of this letter is that it was a proposal /recommendation to the Commissioner of Lands for the extension/renewal of the lease and not the lease or extension document itself. The extension of lease is a legal document prepared and registered on the title. It contains the name of the lessee and the terms and conditions in which the lease will be held. This letter with all its shortcomings could not have conveyed any interest to the church or to any party at all.

65. It is borne by evidence on record that the letter dated the 6/6/2012 is being given in June 2012 when the exchange took place on the 9/3/2012 meaning that there was no approval of extension in March 2012 so much so that the interest held by the church had expired in 1997 and in 2012 held nothing in the suit land. To the extent that this letter is purported to have been used by the Plaintiff to acquire a lease of 99 years from 1964 in June 2012 the interest purported to have been acquired as a result remains null and void.

66. In support of its case the Plaintiff produced PEX No 4 which is the official search of the suit land dated the 21/3/2012 which showed that the tenure of the title was a leasehold for a term of 33 years from the 1/7/1964 and the title holder being the Plaintiff. This is the date when the Plaintiff became registered as owner as seen in the white card. The Defendant adduced an official search dated the 16/12/11 annexed to its application dated the 2/4/2016 seeking to stay execution and setting aside of the said judgement issued on the 16/3/2016. The search discloses that the suit land is owned by the church holding a leasehold of a term of 33 years wef 1/7/1964 with a rent of peppercorn if demanded.

67. On the 20/4 2017 the Plaintiff's advocate annexed an official search of the property in the name of the 1st Interested Party reading a leasehold for a term of 99 years from 1/7/1964. The question that begs an answer is at what point was the tenure of this title changed from 33 years from 1964 to 99 years from 1964.

68. On the 16/9/2019 the Plaintiff finally filed a further list of documents showing a certified white card certified by the land registrar on the 12/9/2019. It discloses the tenure as 99 years from the 1/7/1964. This is the first time that the copy of the white card is being annexed to the pleadings. On being served with this document the counsels on record by consent moved the Court for witness summons to be issued to the Land Registrar to shed light on the document.

69. PW2, the Land Registrar produced many documents among them a certified copy of white card marked as PEX 16 which showed the

lease is for 99 years from 1/7/1964. Under intense cross examination the Land Registrar explained that there were a number of documents missing in the parcel file among them the original white card, the lease issued to the church, the application of renewal of the lease by the church from 33 years to 99 years, surrender of the lease by the church (if any), the white card showing the lease of 33 years in the name of the church.

70. She later forwarded the original white card vide a letter to the Deputy Registrar of this Court on the 20/11/2019. The letter is copied to all the counsels on record. I have perused the original white card and on a naked eye noticeable on the card, the part of the period of lease showing 99 years has a visible erasure. I do not know what may have erased it.

71. That notwithstanding the evidence of the Land Registrar with respect with the PEX No 16 the record does not contain any evidence to support a lease of 99 years from 1/7/1964. The record is in agreement with a lease of 33 years from 1/7/1963 and this is buttressed by the following; the original title of the church shows a lease of 33 years from 1/7/1964. This agrees with the official search dated 21/3/2012 annexed by the Plaintiff to his pleadings on filing suit; it also agrees with the Defendants official search of 2011; letter dated 22/8/1975 the church sought to surrender its lease to the council; letter dated the 13/10/94 the church through its lawyers seeks an extension of lease for a period of 99 years from 1/7/1997; this agrees with the period when the lease was to expire which was 30/6/1997; minutes of the council town planning meeting on the 11/3/1997 rejecting the extension of lease for a period of 99 years; letter dated the 20/1/2012 by the Salvation Army to Commissioner of Lands seeking extension of lease from 33 years to 99 years; letter dated the 10/1/2012 by the Commissioner of Lands confirming that the land is leased for 33 years w.e.f. from 1/7/1964 and that the church has applied for the renewal of the lease. The letter called for comments from the District Land Registrar, Surveyor and the Physical Planner. All the three offices gave letters of no objection; agreement of exchange dated the 9/3/2012 which disclosed the interest being exchanged to be 33 years from 1/7/1964; letter dated the 20/3/2012 by the church to the commissioner of lands reads 33 years to 99 years;

72. From the above documents, every other person and correspondence on record concluded that the lease was for a period of 33 years from 1/7/1964. Even if the Court discounts the missing documents, the conclusion arrived by the Court remains as thus;

- a. The lease of the suit land held by the church was 33 years from the 1/7/1964;
- b. By reason of operation of law (effluxion of time) the interest in the title reverted to the council from the 1/7/1997.
- c. There is no extension of lease after the 30/6/1997.
- d. Neither the Plaintiff, the church nor the Defendant were allocated the suit land after the expiry of the lease previously held by the church.
- e. From the analysis given in para 72, there is reason to believe that the original white card PEX No 16 is doubtful/questionable.

73. Given my findings above I am satisfied that the white card showing the leasehold interest of 99 years from 1/7/1964 is a fabrication that remains unsupported by any legal documents and evidence. It is not rocket science to see that the interest of 99 years from 1/7/1964 has no root, baseless and is anchored on quick sand. It is a hollow interest which as a matter of course the Court will declare it null and void. I say this because the interest comprised of the leasehold tenure held by the church for 33 years expired on the 30/6/1997. On its expiry the property reverted to the County Government of Murang'a.

74. The lease of Salvation Army expired by operation of law on the 30/6/1997 and technically the land reverted to the lessor, the County Council of Murang'a. In the absence of renewal and extension of the lease, the Salvation Army ceased to have any rights to the suit land at all.

75. Given the explanation above it is the finding of the Court that when the Plaintiff filed suit against the Defendant, he did not have a valid claim against the Defendant because the interest he purported to possess had been extinguished by operation of the law (effluxion of time) and reverted to the County Council of Murang'a in 1997.

76. The Court found no evidence of lease extension to the Salvation Army nor allotment to the Plaintiff or the Defendant as at 1/7/1997 or thereafter. It is the finding of the Court that the alleged acquisition of the title by the Plaintiff was illegal fraudulent and through a corrupt scheme and therefore falls under section 26 (b) of the LRA in which a proprietor's title can be impeached.

77. The suit by the Plaintiff is therefore not tenable and cannot found a valid claim of ownership or sustain a claim for trespass against the Defendant.

78. Let me revert to the title held by the Church. Evidence was led by the Plaintiff that on the 9/3/2012 he entered into a land exchange agreement with the church in which the church granted him its leasehold interest disclosed as 33 years from 1/7/1964 in exchange with UNS plot G. This plot had been allocated to the Plaintiff on the 9/12/1997. Thereafter the Plaintiff proceeded to register a transfer of lease on the 21/3/2012 consideration having been disclosed as exchange with Murang'a/Mun/Plot UNS. G. The transfer is executed by one of the undisclosed officials of the church. The Plaintiff admitted in evidence that the lease to the church expired in 1972 and that no lease was extended to it.

79. By this time the lease of the church had been extinguished by affluxion of time and for the church to convey any interest in the suit land it must as of legal necessity show that its lease was extended for it to exchange with the Plaintiff. The finding of the Court is that the church exchanged nothing and the Plaintiff equally received nothing in exchange for the simple reason that the title had reverted to the council 15 years before. The church possessed nothing capable of being conveyed in law. The exchange was nothing but an illegality and therefore null and void to the extent that it conveyed no interest to the Plaintiff.

80. The Court finds that the Plaintiff having received nothing from the church he could not have lawfully obtained a valid title. By the same token, the Plaintiff transferred nothing to the 1st Interested Party on the 26/4/2016 who in turn offered nothing as the security of the loan advanced to Paul Kimani Muna t/a Muki Auto Garage.

81. I must return to the UNS plot G which has played a devious role in the whole saga. The Plaintiff was allocated this piece of land vide the letter of allotment dated the 9/12/1997. He proceeds to exchange it with the suit land in favour of the church. Vide its letter dated the 20/11/2015 the council confirmed that the UNS plot G was sold by the Plaintiff to a Gibson Karinga Kabai on the 29/5/2014. The Plaintiff confirmed the same during evidence. Fast forward the said UNS plot G was allegedly exchanged with the suit land between the 1st Interested Party and the Plaintiff on the 26/4/16. There was no agreement of exchange placed before the Court to support the averments of the Plaintiff or DW2. The transfer to the 1st Interested Party is disclosed as a gift. DW2, Catherine Kimani confirmed to the Court that the transaction was in consideration of exchange of UNS Plot G. She however could not confirm if the said plot was ever owned by the 1st Interested Party nor the circumstances of the exchange.

82. Did the Plaintiff acquire an interest in the UNS Plot G.? From the letter of allotment on record, it is clear that the Plaintiff was allocated this land on the 17/12/1997. The position of a letter of allotment has its roots in the law of contract. A letter of allotment is an offer from the Government to an allottee. By its preliminary nature, it cannot convey a proprietary interest by itself.

83. In this case there is no evidence that it was accepted in writing, paid for nor the terms and conditions complied with. Some of the conditions required the Plaintiff to commence construction of the plot within 24 months in default the Government would reenter the property and reposes it. There is no evidence that the Plaintiff complied with this fundamental condition. Further in the absence of any evidence of acceptance and payment of the statutory dues, or extension of the same the letter of allotment lapsed or expired after 30 days that is 16/1/1998. The Plaintiff purports to exchange the offer with the suit land 15 years later, way after the expiry of the offer.

84. There is no evidence to show that the consent of the commissioner of lands was ever sought or obtained for the purported exchange.

85. The letter of offer created no proprietary interest and he conveyed none. It is trite that a party cannot convey a greater or better title than he holds. In this case he held nothing. In the eyes of the law, the Plaintiff held no interest or title in UNS plot G.

86. The finding of the Court is that this exchange was a decoy and in actual sense no exchange took place. This was in furtherance of the fraud, illegalities perpetrated by the Plaintiff in concert with the 1st IP.

87. Land registration in Kenya is based on the Torrens system wherein indefeasibility of title is the basis of land registration. The state guarantees the accuracy of the register of the land title and that is why a person whose name appears on the title is guaranteed ownership of the property. Indefeasibility of title is however impeachable in circumstances of fraud, illegality inter alia.

88. In the case of **Munyua Maina V Hiram Gathiha Maina (2013 EKLR** the Court of appeal held as follows;

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

89. In this case neither the Plaintiff, the 1st and 2nd Interested Party have explained the root of the title they alleged to hold. The Court has made a finding that there was no valid title received by the Plaintiff. The 1st Interested Party received nothing and consequently no interest was created in favour of the bank.

90. Section 143 of RLA which is replicated in section 80 of the LRA empowers this Court to cancel title if satisfied that the same was acquired improperly. In this case I am satisfied that the title was acquired through fraud and an illegal and corrupt scheme.

91. In the case of **Samuel Kamere Vs Land Registrar (2015) EKLR** the Court of Appeal held that;

“ in Order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

92. The 2nd Interested Party cannot be afforded the defense of a bonafide Purchaser for the reason that the title was illegal abinitio.

93. Going by section 26 (b) of the RLA I am satisfied that the title was acquired illegally through a corrupt scheme and unprocedural manner. There was no legal title that was conveyed to the 2nd IP. Mandated by this section, the title cannot be left to stand given my holding that the Plaintiff and the 1st and 2nd IPs received nothing because the interest in the title had reverted to the council in 1997. There is no evidence that the suit land has been alienated to either of the contestants in this suit.

94. Final Orders and disposal;

a. The Plaintiff's suit is dismissed.

b. The Defendants counterclaim is dismissed.

c. It is hereby declared that the title held by FIVE EMUKEI TRANSPORTERS LIMITED is invalid and is hereby ordered cancelled forthwith.

d. Consequently, the charge registered in the name of the 2nd Interested Party is null and void.

e. For avoidance of doubt, the leasehold interest in the suit land reverted to the County Council of Murang'a (County Government of Murang'a) effective the 1/7/1997.

f. Each party to bear their costs of the suit.

95. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14TH JANUARY 2021

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Ndegwa HB Kinuthia

Defendant: Kebuka Wachira

1st & 2nd Interested Party: Absent

Kuiyaki: Court Assistant