



Ondiege ((Suing as the Personal Representative of the Estate of Cornel Ondiege Ogola)) v Commissioner of Lands & 76 others (Environment and Land Case Civil Suit 823 of 2016) [2024] KEELC 607 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 607 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 823 OF 2016
SO OKONG'O, J
FEBRUARY 8, 2024**

BETWEEN

**JACOB OGOLA ONDIEGE PLAINTIFF
(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
CORNEL ONDIEGE OGOLA)**

AND

**COMMISSIONER OF LANDS 1ST DEFENDANT
JOEROS LIMITED 2ND DEFENDANT
MASENO UNIVERSITY COLLEGE STAFF RETIREMENT SCHEME 3RD
DEFENDANT
JOHN KAZINGO BYARUHANGA 4TH DEFENDANT
JOEL ADUMA OCHOLA 5TH DEFENDANT
GEORGE MARK ONYANGO 6TH DEFENDANT
FLORENCE YUKABET ODERO 7TH DEFENDANT
OMOLO ONGATI 8TH DEFENDANT
PARTRICK ODIWUOR 9TH DEFENDANT
DICKSON OTIENO OWITI 10TH DEFENDANT
ANDREW ODHIAMBO ODIWUOR 11TH DEFENDANT
KAMUKAM THOMAS ETTYANG 12TH DEFENDANT
ANNE DACHA 13TH DEFENDANT
RAPHAEL J. ACHOLA KAPIYO 14TH DEFENDANT**



JACOB OCHIENG DUNDE	15 TH DEFENDANT
ELIZABETH K. OSIDIANA GAKUO	16 TH DEFENDANT
COLUMBUS ABUTO OLAL	17 TH DEFENDANT
MARTIN NGESA ODERA	18 TH DEFENDANT
RICHARD SAGARA ONYANCHA	19 TH DEFENDANT
JULIUS ONYANGO ONG'NGO	20 TH DEFENDANT
JOSEPH BLASTUS OWINO OWALA	21 ST DEFENDANT
BLASTUS JOSEPH OWINO OWALA	22 ND DEFENDANT
SUSAN NEKESA MANANA	23 RD DEFENDANT
AGATHA ANNE ATIENO	24 TH DEFENDANT
FELIX MICHEAL OTIENO	25 TH DEFENDANT
EMMY KAVERE AWINO	26 TH DEFENDANT
EDWARDS JOASH KACHUNG	27 TH DEFENDANT
VIOLET NASIMIYU LICHUMA	28 TH DEFENDANT
CHRISTOPHER AMOL OGEMBO	29 TH DEFENDANT
ROSEMARY ATIENO OMOLLO	30 TH DEFENDANT
ZEDEKIAH OPIYO MISIGA	31 ST DEFENDANT
ANNE ADIKINYI OSIRO	32 ND DEFENDANT
GODFREY NETONDO	33 RD DEFENDANT
BERNARD ODHIAMBO ODHONG	34 TH DEFENDANT
OWEN OUKO MCONYANGO	35 TH DEFENDANT
ANDREW SOI CHERUIYOT	36 TH DEFENDANT
KEPHER OBONDO ONYANGO	37 TH DEFENDANT
PETER OCHIENG MULARE	38 TH DEFENDANT
NICANOR ACHOLA OGOLLA	39 TH DEFENDANT
DONE ABRAHAMS NYAGWALA	40 TH DEFENDANT
VITALIS OUKO OGILO	41 ST DEFENDANT
ALEXANDER OCHIENG OKOTH	42 ND DEFENDANT
PATRICIA ADHIAMBO ODUOR	43 RD DEFENDANT
MARTIN OBIENDE OWIDI	44 TH DEFENDANT
JUDITH MIGUNDA ATTYANG	45 TH DEFENDANT
JACK ODONGO OGEMBO	46 TH DEFENDANT



MICHEAL ODUOR WANYAMA	47 TH DEFENDANT
FRANCIS CHISIKWA INDOHSI	48 TH DEFENDANT
JACOB OGODO MANYASA NANDI	49 TH DEFENDANT
LUCAS O. AYODO OTHUON	50 TH DEFENDANT
JOHNSON ONONO APUKO	51 ST DEFENDANT
VINCENT JUMA MALOWA	52 ND DEFENDANT
CHRISPINUS SHIEKY MUGELA ITEYO	53 RD DEFENDANT
MONICA NDEGE	54 TH DEFENDANT
SUSSY GUMO- KURGAT	55 TH DEFENDANT
AYUB VICTOR O. OFULA	56 TH DEFENDANT
BENJAMIN ABAYA ONDIGI	57 TH DEFENDANT
KAREN NYAMBURA NYANGARA	58 TH DEFENDANT
REGINA AWINO OCHIENG	59 TH DEFENDANT
URICE OTIENO ODEMBO	60 TH DEFENDANT
PETER OMONDI OTIENO	61 ST DEFENDANT
JOHN OUMA KONYINO	62 ND DEFENDANT
JOSEPH WAMOCHA NASONGO	63 RD DEFENDANT
JARED OPIYO ONGO'ONGA	64 TH DEFENDANT
ROSELYN NYAWIRI OKETCH	65 TH DEFENDANT
EDWIN ODHUNO	66 TH DEFENDANT
JOHN ELIAZAR	67 TH DEFENDANT
EVELYNE MUCHOCHO	68 TH DEFENDANT
NATHAN BRONZE ONSARE ASIAGO	69 TH DEFENDANT
ELVESTONE MMEANG'OMBE C. ZENGE	70 TH DEFENDANT
ROSE AMBALO OLVAMBULA	71 ST DEFENDANT
SOPHIA ATIENO OGILA	72 ND DEFENDANT
PERIS AKINYI TEYI	73 RD DEFENDANT
MONICA ADHIAMBO ODHIAMBO	74 TH DEFENDANT
SYLVIA OGOLA	75 TH DEFENDANT
JOHN KODO ALWALA	76 TH DEFENDANT
NATIONAL LAND COMMISSION	77 TH DEFENDANT



JUDGMENT

1. The Plaintiff brought this suit in the High Court on 28th May 2008 through a plaint dated 15th May 2008. The suit was transferred to this court and given its current case number. The plaint was amended, further amended and further further amended on 25th March 2011, 18th April 2017 and 26th February 2020 respectively. In his further further amended plaint dated 26th February 2020, the Plaintiff sought judgment against the Defendants for;
 - a. A declaration that the title registered as L.R No. 18040 and all parcels of land arising from its subdivision in the name of the 2nd Defendant and its successors thereafter namely, the 3rd Defendant and all those deriving titles therefrom including the 4th to 76th Defendants were irregular, void and hence a nullity.
 - b. A declaration that the acquisition of the suit land by the Government through Gazette Notice No. 3400 of 6th November 1976 was unconstitutional.
 - c. A declaration that a constructive trust in favour of the estate of the late Cornel Ondiege Ogola over all the subdivided parcels of land registered in the names of the 4th to 76th Defendants was created from the subdivision of the suit parcel of land.
 - d. A declaration that the estate of the late Cornel Ondiege Ogola is the original owner of the suit land and hence the said estate's interest should be registered.
 - e. A permanent injunction restraining the 4th to 76th Defendants by themselves and/or through their agents and/or servants and/or any one claiming title under them from trespassing on and continuing to occupy the suit land in contravention of the law.
 - f. An order compelling the 4th to 76th Defendants to execute transfers in respect of the suit land in favour of the Plaintiff as the administrator of the estate of the late Cornel Ondiege Ogola within such time as shall be prescribed by the court in default of which the Deputy Registrar do execute the same on their behalf.
 - g. Costs and interest at court rates.
2. In the said further further amended plaint, the Plaintiff averred that the late Cornel Ondiege Ogola, deceased (hereinafter referred to only as "the deceased") acquired all that parcel of land that was ultimately registered as L.R No. 18040 (hereinafter referred to only as "the suit property") from his deceased father, one, Ogola Obonyo in 1948 and occupied the same until sometime in the 1990s. The Plaintiff averred that through a Gazette Notice No. 3400 dated 6th November 1976, the suit property was set apart for use by the Government of Kenya for housing and industrial development. The Plaintiff averred that on or about 15th December 1976, the deceased lodged an application for compensation for the suit property and on 6th July 1978, the deceased received a cheque for Kshs. 2,149/- for the developments that he had done on the suit property. The Plaintiff averred that the deceased was not compensated for the land on which he had carried out the said developments.
3. The Plaintiff averred that the deceased pursued compensation for the suit property from the 1st Defendant between 1976 and 1990 but his efforts bore no fruit. The Plaintiff averred that on 14th April 1993, the 1st Defendant without due regard to the interest of the deceased on the suit property unlawfully and fraudulently registered the suit property under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) in the name of the 2nd Defendant. The Plaintiff averred that the 1st



Defendant while undertaking the said registration did not take into account the Gazette Notice No. 3400 of 6th November 1976, the provisions of the Land Acquisition Act and *the Constitution* of Kenya that was in force then. The Plaintiff pleaded several particulars of irregularities and/or fraud on the part of the 1st and 2nd Defendants.

4. The Plaintiff averred that the 2nd Defendant transferred the suit property to the 3rd Defendant on 14th May 2000 and the 3rd Defendant subsequently subdivided the property into several portions that it sold to the 4th to 76th Defendants.
5. The Plaintiff averred that since the 1st Defendant never acquired any interest in the suit property, it had no interest in the property that it could pass to the 2nd Defendant. Similarly, the 3rd to 76th Defendants who derived their titles from the purported title that was held by the 2nd Defendant did not acquire any valid interest in the suit property and the portions thereof. The Plaintiff averred in the alternative that, the 4th to 76th Defendants hold the titles for the portions of the suit property in their names in trust for the deceased's estate. The Plaintiff pleaded several particulars of constructive trust.

The defence

6. The 1st Defendant filed a defence to the original plaint on 19th September 2008. The 1st Defendant admitted that through Gazette Notice No. 3400 of 6th November 1976, the suit property was set apart under the Trust *Land Act* for use by the Government of Kenya for housing and industrial development. The 1st Defendant denied that the deceased received only compensation for the developments on the suit property and not for the land. The 1st Defendant also denied that it irregularly, unlawfully and fraudulently registered the suit property in the name of the 2nd Defendant under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). The 1st Defendant denied the particulars of fraud pleaded against it. The 1st Defendant averred that if at all it dealt with the suit property, all its actions were procedural and lawful.
7. The 2nd Defendant filed a defence on 21st August 2008 to the original plaint. The 2nd Defendant denied that it was irregularly and unlawfully registered as the proprietor of the suit property. The 2nd Defendant averred that it acquired the suit property procedurally and paid the requisite fees. The 2nd Defendant denied all the particulars of fraud pleaded against it. The 2nd Defendant averred that the Plaintiff's claim was time-barred under Sections 7 and 9(1) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and Section 3(1) of Public Authority Limitation Act, Chapter 39 Laws of Kenya. The 2nd Defendant averred that the Plaintiff was a busybody with no locus standi to institute the suit.
8. The 3rd Defendant filed a defence to the original plaint on 18th August 2008. The 3rd Defendant averred that the Plaintiff's claim was time barred. The 3rd Defendant averred that it was not a legal entity capable of suing and being sued in its name. The 3rd Defendant averred that it could sue and be sued only through its officials. The 3rd Defendant averred that it was a stranger to the alleged occupation by the deceased of the suit property until the 1990s, the Gazette Notice No. 3400 of 6th November 1976 and the deceased's attempts to follow up on compensation for the suit property. The 3rd Defendant denied that its acquisition of the suit property was irregular and fraudulent. The 3rd Defendant averred that it was an innocent purchaser of the suit property for valuable consideration from the 2nd Defendant without notice of any defect in the title that was being held by the 2nd Defendant. The 3rd Defendant averred that there was no encumbrance registered against the title of the suit property at the time the same was sold to it by the 2nd Defendant. The 3rd Defendant averred that the deceased had no proprietary interest in the suit property since his father Ogola was merely a squatter and a trespasser on the suit property which was owned by the Government of Kenya. The 3rd Defendant averred in



- the alternative that if indeed the suit property was irregularly and illegally registered in its name, the Plaintiff's remedy is in damages. The Plaintiff filed separate replies to the 1st, 2nd and 3rd Defendants' defences in which he denied the various allegations made therein.
9. The 3rd to 76th Defendants filed further amended joint statement of defence on 5th November 2020 in which they denied the Plaintiff's claim in its entirety. The 3rd to 76th Defendants averred that if the suit property was compulsorily acquired by the Government as claimed by the Plaintiff then the Plaintiff was adequately compensated. The 3rd to 76th Defendants averred that they acquired the suit property legally. The 3rd to 76th Defendants averred that the Plaintiff was guilty of illegalities and indolence in relation to the suit property. The 3rd to 76th Defendants averred that the Plaintiff failed to diligently pursue compensation and when compensation was offered to the Plaintiff, the Plaintiff refused to accept the same claiming that it was inadequate. The 3rd to 76th Defendants averred further that the Plaintiff purported to dispose of the suit property to third parties while the process of compulsory acquisition was in progress. The 3rd to 76th Defendants averred that the Plaintiff's suit was time-barred and on that ground alone, the same should be dismissed. The 3rd to 76th Defendants admitted that the 3rd Defendant subdivided the suit property and allocated portions thereof to the 4th to 76th Defendants. The 3rd to 76th Defendants denied that the 1st Defendant did not acquire an interest in the suit property and as such no interest in the suit property passed from the 1st Defendant to the 2nd Defendant and subsequently to the 3rd to 76th Defendants.
 10. The 3rd to 76th Defendants averred that they were innocent purchasers of the suit property for value without notice of the Plaintiff's claim over the same. The 3rd to 76th Defendants denied that they held titles to the portions of the suit property registered in their names in trust for the estate of the deceased. The 3rd to 76th Defendants denied the particulars of constructive trust pleaded against them. The 3rd to 76th Defendants averred without prejudice that the Plaintiff was adequately compensated by the 1st Defendant for the suit property and for that reason, no claim could lie against the 3rd to 76th Defendants at the instance of the Plaintiff. The Plaintiff filed a reply to the 3rd to 76th Defendants' further amended joint statement of defence on 10th November 2020.
 11. The 77th Defendant filed a defence on 23rd May 2018. The 77th Defendant denied the Plaintiff's claim in its entirety. The 77th Defendant averred that the suit property was among the parcels of land that were compulsorily acquired through Gazette Notice No. 3400 of 19th November 1976 for the expansion of residential and industrial areas within Kisumu Municipality. The 77th Defendant averred that since the land had not been adjudicated, the said acquisition was effected through the setting apart of Trust land. The 77th Defendant averred that adjudication was subsequently done in 1979 but the suit property had already been declared government land as a result of the said acquisition. The 77th Defendant averred that the deceased was compensated in the sum of Kshs. 2,149/- on 6th July 1978 for the developments that he had on the suit property. The 77th Defendant averred that the deceased did not qualify for compensation for the land because the land had not been adjudicated.
 12. The 77th Defendant averred that under Section 10(1) of the Trust Land Act, Chapter 288 Laws of Kenya (now repealed), any person who was dissatisfied with the compensation awarded had a right to appeal against the same through the District Commissioner to the Provincial Agricultural Board of the Province in which the land that had been set apart was situated. The 77th Defendant averred that the Plaintiff had not demonstrated that the deceased lodged an appeal against the said award of compensation to him. The 77th Defendant averred that the Plaintiff's suit was bad in law and an abuse of the process of the court. The 77th Defendant admitted that the suit property was registered in the name of the 3rd Defendant and that the 3rd Defendant had subdivided the same and allocated portions



thereof to the 4th to 76th Defendants. The 77th Defendant denied that the 1st Defendant did not acquire title to the suit property that it could pass to the 2nd Defendant. The Plaintiff filed a reply to the 77th Defendant's statement of defence on 16th July 2018 in which the Plaintiff reiterated the contents of the further amended plaint.

The site visit

13. Before the commencement of the hearing of the suit, the court visited the site of the suit property on 19th September 2013. The Plaintiff, the representatives of the 3rd Defendant and the advocates for the parties were present. From the notes made by the court (Kaniaru J.), the Plaintiff showed the court his residence which he claimed was on the suit property. The court noted the presence of 9 structures. The court noted that the representatives of the Defendants who were present denied that the land that the Plaintiff was occupying was part of the suit property. The court went around the suit property and noted that there was no settlement on the land that the Plaintiff was claiming from the Defendants. The court noted that the land was fenced all around with barbed wire although there were sections of the boundary of the property that were not fenced. The court was told that the fences on those sections of the boundary were destroyed. The court noted further that the suit property had been subdivided. The court concluded that the portion of the suit property claimed by the Plaintiff was not occupied and that the Plaintiff and members of his family were occupying land that was not being claimed by the Defendants.

The evidence

14. The hearing of the suit commenced before Ombwayo J. on 7th March 2022 when the Plaintiff gave evidence and closed his case. The Plaintiff adopted his witness statement dated 2nd September 2020 filed in court on the same date as his evidence in chief and produced the documents attached to the Plaintiff's list of documents dated 10th September 2012, supplementary list of documents dated 22nd August 2013 and 2nd supplementary list of documents dated 2nd September 2020 as exhibits. On cross-examination, the Plaintiff stated that the suit property was part of trust land and had not been registered as of 1976. He stated that the land had no land reference or documented acreage. He stated that the land was compulsorily acquired by the Government but no compensation was paid in respect thereof. He stated that the land was acquired by the Government on behalf of the County Government of Kisumu(sic). He stated that his deceased father made an application for compensation. He stated that the deceased was not listed among the landowners who were to be compensated. He stated that he was still occupying the suit property. He stated that he learnt of the fraudulent dealings with the suit property on 14th May 2000. He stated that he was aware that the 2nd to 76th Defendants had acquired titles to the portions of the suit property.
15. Following the transfer of Ombwayo J., the matter was mentioned before this court when the parties agreed that the proceedings be typed and the hearing of the suit proceed from where it reached before Ombwayo J. The hearing of the suit resumed before me on 27th July 2023 when the 3rd to 76th Defendants' witnesses gave evidence and closed the 3rd to 76th Defendants' case. The 3rd to 76th Defendants' first witness, Monica Akello Ogada (DW1) told the court that she was the manager of Pension Funds at Maseno University. She adopted her witness statement filed on 21st August 2020 as her evidence in chief. She stated that the suit property was transferred to the 3rd Defendant by the 2nd Defendant at a consideration of Kshs. 6,715,000/-. She produced a copy of Grant No. I.R 61505 for L.R No. 18040 as D.EXH.1. She also produced; a list of members of the 3rd Defendant who purchased portions of the suit property from the 3rd Defendant as D.EXH.2, a bundle of documents filed on 14th August 2015 containing copies of 73 titles out of the 103 titles that had been issued to the members



of the 3rd defendant as D.EXH. 3, a bundle of documents dated 11th December 2017 filed on 18th December 2017 with a copy of Gazette Notice No. 6863 dated 17th July 2017 being a determination by the 77th Defendant as D.EXH. 4, a bundle of documents filed on 21st August 2020 containing a copy of the transfer of the suit property to the 3rd Defendant by the 2nd Defendant as D.EXH. 5. DW1 stated that the purchase of the suit property by the 3rd Defendant was above board.

16. On cross-examination, DW1 told the court that she was an employee of the 3rd Defendant. She stated that the 77th Defendant upheld the allocation of the suit property to the 2nd Defendant. She stated that the claim before the 77th Defendant was brought by an entity known as Kikako. She stated that the Plaintiff appeared not to have been among the claimants. She stated that while purchasing the suit property, the 3rd Defendant was not aware of the Plaintiff's claim. She stated that the process of subdividing the suit property was ongoing and that they had not obtained all the titles.
17. The 3rd to 76th Defendants' second witness was Raphael Kapiyo (DW2). He stated that he was an associate professor at Maseno University and had worked there for 24 years. He adopted his witness statement dated 20th August 2020 filed on 21st August 2020 as his evidence in chief. On cross-examination, he stated that he was among the members of the 3rd Defendant who had built houses on the suit property. He stated that he was not residing on the suit property.

The submissions

18. The 1st, 2nd and 77th Defendants did not give evidence at the trial. After the close of the hearing, the court directed that the parties make closing submissions in writing. The Plaintiff filed submissions dated 2nd October 2023 and supplementary submissions dated 3rd October 2023. The 3rd to 76th Defendants filed submissions dated 28th September 2023. The 1st, 2nd and 77th Defendants did not file submissions.

The Plaintiff's submissions

19. The Plaintiff submitted that the Plaintiff's deceased father, Cornel Ondiege Ogola (deceased) was the proprietor of the suit property since 1948. The Plaintiff averred that the suit property was among the parcels of land that were to be acquired compulsorily by the Government of Kenya through Gazette Notice No. 3400 of 1976 for housing and industrial development in Kisumu Municipality. The Plaintiff averred that the compulsory acquisition process was not completed for the suit property. The Plaintiff averred that the Government of Kenya admitted in the letters dated 7th December 1987 and 17th June 1988 that the deceased was not compensated for the suit property. The Plaintiff averred that the deceased lodged an application for compensation on or before 15th December 1976 under Section 8 of the Trust *Land Act* and on 6th July 1978, he received a sum of Kshs. 2,149/- for the developments on the suit property. The Plaintiff submitted that the deceased was not compensated for the land. The Plaintiff submitted that the name of the deceased was omitted from the list of the land owners who were to be compensated for the land. The Plaintiff submitted that the deceased died while still pursuing compensation for the suit property. The Plaintiff submitted that the deceased's brothers received compensation and moved out of the parcels of land adjacent to the suit property that they inherited from the Plaintiff's grandfather, Ogola, while the deceased remained in occupation of the suit property waiting for compensation that he never received.
20. The Plaintiff submitted that when the deceased died, he was buried on the suit property and that he left the Plaintiff residing on the property. The Plaintiff submitted that the site visit conducted by the court on 19th September 2013 confirmed that the deceased and the Plaintiff had been in possession and occupation of the suit property. The Plaintiff submitted that the graves of the deceased and the Plaintiff's ancestors seen on the suit property during the site visit were evidence of long occupation



- under customary land tenure. The Plaintiff submitted that the fencing and subdivision of the suit property also observed by the court during the site visit were evidence of trespass on the suit property by the Defendants.
21. The Plaintiff submitted that compulsory acquisition of land at the material time was anchored on the repealed constitution, the Trust *Land Act*, Chapter 288 Laws of Kenya (now repealed) and the Land Acquisition Act, Chapter 295 Laws of Kenya (now repealed) (hereinafter together referred to as “the enabling law”). The Plaintiff submitted that the enabling law provided for an elaborate procedure to be followed in the compulsory acquisition of land. The Plaintiff submitted that the compulsory acquisition of land was completed by a just compensation to the person having an interest in the land acquired. The Plaintiff submitted that the suit property was not put into the public use for which it was acquired and the deceased was not paid compensation for the property. The Plaintiff submitted that the suit property was to be acquired compulsorily for housing and industrial development by the Government.
 22. The Plaintiff submitted that the consequence of the Government of Kenya’s failure to complete the process of compulsory acquisition of the suit property was that any purported acquisition of the property was not compulsory acquisition as it was contrary to the enabling law. The Plaintiff submitted that the deceased was entitled to prompt payment of full compensation for the suit property under Section 117(4) of the repealed constitution.
 23. The Plaintiff submitted that the suit property was never acquired by the Government of Kenya and as such the deceased’s interest therein was never extinguished. The Plaintiff submitted that the suit property remained trust land in which the deceased retained ancestral proprietary rights. The Plaintiff submitted that the suit property was therefore not unalienated public land available for allocation by the 1st Defendant. The Plaintiff submitted that the purported allocation of the suit property by the 1st Defendant to the 2nd Defendant was ultra vires the 1st Defendant’s powers. The Plaintiff submitted that the purported allocation of the suit property to the 2nd Defendant deprived the deceased of his land and homestead contrary to Article 40(3) of *the Constitution* of Kenya 2010. In support of this submission, the Plaintiff cited Attorney General v. Zinj Limited [2021] KESC 23(KLR). The Plaintiff urged the court to find that since the Government of Kenya did not use the suit property for the purpose for which it was acquired and did not pay compensation for the same to the Plaintiff, the property was not compulsorily acquired.
 24. The Plaintiff submitted that the titles held by the 3rd to 76th Defendants could only be upheld by the court if they had established that the same were acquired legally. In support of this submission, the Plaintiff cited Munyu Maina v. Hiram Gathiha Maina[2013]eKLR and Dina Management Limited v. County Government of Mombasa & 5 others [2023]KESC 30 (KLR). The Plaintiff submitted that the 3rd to 76th Defendants were unable to prove the validity of their titles since the same were founded on illegality; the purported allocation of the deceased’s land which was not compulsorily acquired to the 2nd Defendant by the 1st Defendant. The Plaintiff submitted that the 3rd to 76th Defendants had also purported to hold portions of the suit property as private developers contrary to the purpose for which the suit property was purportedly acquired by the Government of Kenya. The Plaintiff submitted that the irregularities that have been highlighted rendered the 3rd to 76th Defendants’ titles worthless and their occupation of the suit property unlawful. The Plaintiff submitted that he had proved trespass against the Defendants.
 25. The Plaintiff submitted that the doctrine of innocent purchaser without notice could not come to the aid of the Defendants since the titles held by them were founded on fraud. In support of this submission, the Plaintiff cited the portion of the judgment of the Supreme Court in Dina Management



Limited v. County Government of Mombasa & 5 others (supra) where the court stated that where the root of a title is challenged, the holder cannot benefit from the doctrine of bona fide purchaser.

26. The Plaintiff submitted that the evidence of the failed compulsory acquisition of the suit property by the Government of Kenya, unlawful allocation of the property by the 1st Defendant to the 2nd Defendant, the sale of the suit property by the 2nd Defendant to the 3rd Defendant which subdivided the same and allocated portions thereof to the 4th to 76th Defendants also proved the existence of a constructive trust in favour of the Plaintiff which binds the 4th to 76th Defendants. The Plaintiff submitted that the 4th to 76th Defendants held their respective titles in trust for the Plaintiff. The Plaintiff urged the court to find that the Plaintiff had proved his case against the Defendants and was entitled to the prayers sought in the plaint.

The 3rd to 76th Defendants' submissions

27. The

1st to 76th Defendants

framed four issues for

determination by the court

namely,

1. Whether or not the suit property was irregularly, unprocedurally and fraudulently registered under the Registration of Titles Act in the name of the 2nd Defendant.
2. Whether or not the 1st Defendant did not acquire title to the suit property constitutionally and therefore had nothing to transfer to the 2nd Defendant.
3. Whether or not the 3rd to 76th Defendants who acquired the suit property from the 2nd Defendant were innocent purchasers for value.
4. Whether or not the Plaintiff's suit was statute-barred.

On the first issue, the 3rd to 76th Defendants submitted that the Plaintiff admitted that the suit property was acquired by the 1st Defendant on behalf of the Government of Kenya through Gazette Notice No. 3400 of 1976. The 3rd to 76th Defendants submitted that the said Gazette Notice called upon persons who claimed to be entitled to compensation under Section 8 of the Trust *Land Act* for the parcels of land that were to be acquired to apply for such compensation to the District Commissioner, Kisumu between 15th November 1976 to 15th December 1976. The 3rd to 76th Defendants submitted that the Plaintiff admitted that the deceased applied for compensation but he was only compensated for the developments on the land and not for the land itself. The 3rd to 76th Defendants submitted that if the deceased was dissatisfied with the compensation that was awarded to him, he was supposed to lodge an appeal against the award to the Provincial Agricultural Board under Section 10 of the Trust *Land Act*. The 3rd to 76th Defendants submitted that the Plaintiff did not adduce any evidence showing that the deceased appealed to the Provincial Agricultural Board within 30 days against the compensation that was awarded to him as required by law. The 3rd to 76th Defendants submitted that the deceased letter dated 18th May 1979 (P.EXH.2) to the District Commissioner could not amount to an appeal to the Provincial Agricultural Board. The 3rd to 76th Defendants submitted that the letter was not addressed to the Board and secondly, the letter was written on 18th May 1979 while the payment was made on 6th July 1978 outside the 30 days that was allowed for appeal. The 3rd to 76th Defendants submitted further that the letter did not amount to an appeal as it merely sought clarification. The 3rd to 76th Defendants submitted that the deceased was informed by the Town Clerk, Municipal Council of Kisumu in a letter dated 19th November 1990 (P.EXH.13) that disputes regarding valuation for compulsory acquisition were to be dealt with within the statutory timelines under the Land Acquisition Act.

29. The 3rd to 76th Defendants submitted that in the absence of an appeal against the award of compensation that was made in favour of the deceased, the deceased was adequately compensated for



the suit property by the 1st Defendant. The 3rd to 76th Defendants submitted that the suit property was procedurally and lawfully acquired by the 1st Defendant. The 3rd to 76th Defendants submitted that the Plaintiff could not be permitted to raise the issue of compensation in these proceedings. The 3rd to 76th Defendants submitted that the Trust Land Act had an elaborate appeal procedure. The 3rd to 76th Defendants submitted that any person aggrieved with the decision of the Provincial Agricultural Board had a right of a further appeal to the Resident Magistrate's Court with a right to appeal further to the High Court under Sections 10(4) and 10(5) of the Trust Land Act. The 3rd to 76th Defendants submitted that the deceased should have come to this court by way of a second appeal but not through a suit challenging the acquisition of the suit property and the compensation that was awarded to the deceased.

30. The 3rd to 76th Defendants submitted further that the acquisition of the suit property by the 1st Defendant complied with the law that was in force at the time. The 3rd to 76th Defendants submitted that there was no irregularity or fraud in the acquisition of the suit property. The 3rd to 76th Defendants submitted that there was no law barring the 1st Defendant from allocating the suit property to the 2nd Defendant or anyone else.
31. On whether the 1st Defendant acquired title to the suit property illegally and therefore had no title to pass to the 2nd Defendant, the 3rd to 76th Defendants submitted that the suit property was lawfully acquired by the 1st Defendant who had a right to allocate the same to the 2nd Defendant. The 3rd to 76th Defendants submitted that the 2nd Defendant acquired a valid title in the suit property from the 1st Defendant. The 3rd to 76th Defendants submitted that all the correspondence between the deceased and the District Commissioner showed that the deceased was pursuing compensation and not the land since he knew that the land had been lawfully acquired. The 3rd to 76th Defendants submitted that a complaint was lodged with the 77th Defendant regarding the suit property and other parcels of land that were acquired compulsorily by the Government in 1976 and the 77th Defendant made a determination that was published in the Gazette Notice No. 6863. The 3rd to 76th Defendants submitted that the 77th Defendant upheld all the allocations that were undertaken by the 1st Defendant. The 3rd to 76th Defendants submitted that the Plaintiff's recourse was to seek compensation for the suit property from the 77th Defendant.
32. On whether or not the 3rd to 76th Defendants were innocent purchasers of the suit property for value without notice, the 3rd to 76th Defendants submitted that the 3rd Defendant purchased the suit property from the 2nd Defendant at a consideration of Kshs. 6,715,000/-. The 3rd to 76th Defendants submitted that the Plaintiff did not deny that the suit property was allocated to the 2nd Defendant by the 1st Defendant and that the 2nd Defendant sold the same to the 3rd Defendant. The 3rd to 76th Defendants submitted that the Plaintiff did not deny that the 3rd Defendant subdivided the suit property. The 3rd to 76th Defendants submitted that there was no evidence that the deceased or the Plaintiff had registered any caution or restriction against the title of the suit property to prevent any dealings with the same. The 3rd to 76th Defendants submitted that they were innocent purchasers of the suit property for value and as such their titles could not be impeached in the absence of proof of fraud, misrepresentation or any other illegality. In support of this submission, the 3rd to 76th Defendants relied on Section 26(1) of the Land Registration Act, 2012, *Weston Gitonga & 10 others v. Peter Rugu Gikanga & another* [2017]eKLR and *Katende v. Haridar & Company Limited* [2000] 2 E.A 173.
33. On whether the suit was statute-barred, the 3rd to 76th Defendants submitted that the suit property was acquired by the 1st Defendant in November 1976 and the payment of compensation was made to the deceased in 1978. The 3rd to 76th Defendants submitted that the Plaintiff's suit was filed in May 2008,



30 years after the cause of action accrued. The 3rd to 76th Defendants submitted that the suit should have been filed within 12 years from the time the cause of action accrued. The 3rd to 76th Defendants submitted that the suit was time-barred and should be dismissed. In support of this submission, the 3rd to 76th Defendants cited *Gathoni v. Kenya Co-operative Creameries Ltd.* [1982]KLR 104.

34. The 3rd to 76th Defendants urged the court to dismiss the Plaintiff's suit with costs to the 3rd to 76th Defendants.

Analysis and determination

35. I have considered the pleadings, the evidence tendered and the submissions by the advocates for parties. The following in my view are the issues arising for determination in this suit;
1. Whether the deceased had a proprietary interest in the suit property.
 2. Whether the suit property was lawfully acquired by the Government of Kenya compulsorily.
 3. Whether the suit property was lawfully allocated to the 2nd Defendant by the 1st Defendant.
 4. Whether the 3rd Defendant acquired the suit property lawfully from the 2nd Defendant.
 5. Whether the 4th to 76th Defendants have lawful titles in respect of the portions of the suit property that were allocated to them by the 3rd Defendant.
 6. Whether the Plaintiff's suit is time-barred.
 7. Whether the Plaintiff is entitled to the reliefs sought in the further further amended plaint.
 8. Who is liable for the costs of the suit?

Whether the deceased had a proprietary interest in the suit property

36. The Plaintiff's case is that the deceased held an interest in the suit property under customary law. The Plaintiff averred that the suit property was ancestral land and that the deceased inherited the same from his father, Ogola Bonyo.
37. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court stated as follows:

“(37) Both exponents of colonial land policy and jurisprudence, either completely disregarded, or did not fully appreciate, the nature, scope, and complexity of African land relations. Land in a traditional African setting, is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit. Several rights of the members could be inferior to, or co-terminus with, or indeed superior to the sum total of the rights of a group. Hence, customary law does not vest “ownership”, in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as “ownership.” (Bennett 1995:3 and Cocker 1966: 30-33).”



38. From the evidence on record, I am satisfied that the deceased occupied a parcel of land at Konya Sub-Location in Kajulu Location within the defunct Kisumu Municipality in the former Kisumu District. The land was not registered at the material time and was held by the deceased under customary land tenure.
39. Before the enactment of *the Constitution* of Kenya 2010, land was classified primarily as, Government land, Trust land and Private land. Government land was regulated and administered under the Government Lands Act, Chapter 280 Laws of Kenya (now repealed) while trust land was primarily regulated and administered under the Trust *Land Act*, Chapter 288, Laws of Kenya (now repealed). Private land was administered under several pieces of legislation. The cited statutes were applied in addition to the repealed Constitution.
40. Section 115 (1) of the repealed Constitution of Kenya vested all trust land in the County Councils in whose jurisdiction such land was situated. The parcel of land that was occupied by the deceased was trust land. The repealed Constitution of Kenya and the Trust *Land Act* both recognised customary land rights.
41. Section 69 of the Trust *Land Act* provides as follows:
- In respect of the occupation, use, control, inheritance, succession and disposal of any Trust land, every tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications thereof, in so far as such rights are not repugnant to any of the provisions of this Act, or to any rules made thereunder, or to the provisions of any other law for the time being in force.
42. Customary land tenure is recognised also under *the Constitution* of Kenya 2010 and the land laws enacted after the promulgation of the said Constitution. Articles 61 of *the Constitution* of Kenya 2010 provides as follows:
- (1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.
- (2) Land in Kenya is classified as public, community or private.
43. Community land is defined in Article 63 of *the Constitution* of Kenya 2010 as follows:
- (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
- (2) Community land consists of—
- (a) land lawfully registered in the name of group representatives under the provisions of any law;
- (b) land lawfully transferred to a specific community by any process of law;
- (c) any other land declared to be community land by an Act of Parliament; and
- (d) land that is—
- (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
- (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or



- (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).
- (3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.
 - (4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.
 - (5) Parliament shall enact legislation to give effect to this Article.
44. Section 5 of the *Land Act*, 2012 provides as follows:
- (1) There shall be the following forms of land tenure—
 - (a) freehold;
 - (b) leasehold;
 - (c) such forms of partial interest as may be defined under this Act and other laws, including but not limited to easements; and
 - (d) customary land rights, where consistent with *the Constitution*.
 - (2) There shall be equal recognition and enforcement of land rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems.
 - (3) Save as provided for in *the Constitution*, a registered proprietor shall not, for the purposes of obtaining planning permission, be obliged to surrender the freehold interest in exchange for leasehold.
45. It is my finding from the foregoing that the deceased had a proprietary interest in the parcel of land that he occupied at Konya in Kajulu Location. The land was however not adjudicated or surveyed. The measurement of the of the land was therefore not certain.

Whether the suit property was lawfully acquired by the Government of Kenya compulsorily

46. Section 117 of the repealed Constitution of Kenya empowered the County Councils to set apart an area of trust land within their jurisdiction for use and occupation by any person for a purpose which in the opinion of the County Council is likely to benefit the residents of the area. It provided as follows:
- 117.(1) Subject to this section, an Act of Parliament may empower a county council to set apart an area of Trust land vested in that county council for use and occupation -
- (a) by a public body or authority for public purposes; or
 - (b) for the purpose of the prospecting for or the extraction of minerals or mineral oils; or
 - (c) by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof, and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.



- (2) Where a county council has set apart an area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.
 - (3) Where a county council has set apart an area of land in pursuance of this section, it may, subject to any law, make grants or dispositions of any estate, interest or right in or over that land or any part of it to any person or authority for whose use and occupation it was set apart.
 - (4) No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart takes place for the prompt payment of full compensation to any resident of the land set apart who -
 - (a) under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land; or
 - (b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.
 - (5) No right, interest or other benefit under African customary law shall have effect for the purposes of subsection (4) so far as it is repugnant to any written law.
47. Section 118 of the repealed Constitution provided for the setting apart of land by the County Councils for Government use. It provided as follows:
- 118.(1) Where the President is satisfied that the use and occupation of an area of Trust land is required for any of the purposes specified in subsection (2), he may, after consultation with the county council in which the land is vested, give written notice to that county council that the land is required to be set apart for use and occupation for those purposes; and the land shall then be set apart accordingly and there shall be vested in the Government of Kenya or in such other person or authority referred to in subsection (2) as may be specified in the written notice, such estates, interests or rights in or over that land or any part of it as may be specified in the written notice.
- (2) The purposes for which Trust land may be set apart under this section are -
 - (a) the purposes of the Government of Kenya;
 - (b) the purposes of a body corporate established for public purposes by an Act of Parliament;
 - (c) the purposes of a company registered under the law relating to companies in which shares are held by or on behalf of the Government of Kenya;
 - (d) the purpose of the prospecting for or the extraction of minerals or mineral oils.
 - (3) This section shall apply to land that has already been set apart in pursuance of section 117 as it applies to other land, and in that case a setting apart under this section shall extinguish any estate, interest or right in or over the land or any part thereof that may be vested in any person or authority in consequence of the setting apart under that section, but section 75 shall apply in relation to the setting apart under this section as if it were a compulsory acquisition by the Government of Kenya under an Act of Parliament of the estate, interest or right so extinguished.
 - (2) ...
 - (3) ...



- (4) Where land is set apart under this section -
 - (a) any rights, interests or other benefits in respect of that land that were previously vested in any tribe, group, family or individual under African customary law shall be extinguished; and
 - (b) the Government of Kenya shall make prompt payment of full compensation for the setting apart to such persons as under section 117 (4) are entitled to compensation when land is set apart in pursuance of that section.
- (5) Subject to this section, Parliament may prescribe the manner in which and the conditions subject to which a setting apart under this section shall be effected.

48. Section 7(1) of the Trust [Land Act](#) provided as follows:

- (1) Where written notice is given to a council, under subsection (1) of section 118 of [the Constitution](#), that an area of Trust land is required to be set apart for use and occupation for any of the purposes specified in subsection
- (2) of that section, the council shall give notice of the requirement and cause the notice to be published in the Gazette.

49. Section 8(1) of the said Act provided as follows:

- (1) Where land is set apart under section 7 of this Act, full compensation shall be promptly paid by the Government to any resident of the area of land set apart who—
 - (a) a) under African customary law for the time being in force and applicable to the land has any right to occupy any part thereof; or
 - (b) b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.

50. It is common ground that land in South Kajulu was among several parcels of land that were set apart for the Government of Kenya by the County Council of Kisumu through Gazette Notice No. 3400 of 6th November 1976 published in the Kenya Gazette of 19th November 1976. It is also common ground that the land that was occupied by the deceased formed part of the land in Kajulu that was so set apart. It is common ground that the deceased was entitled to compensation for his land that was taken by the Government which in essence was compulsorily acquired. The Plaintiff's case is that the setting apart of the deceased's land by the County Council of Kisumu for the Government was not completed because he was not fully compensated for the land. The Plaintiff contended that the deceased was paid Kshs. 2,149/- only for some of the developments he had on the suit property. According to the deceased's letter to the District Commissioner, Kisumu District dated 18th May 1979, the deceased was not compensated for land measuring 9½ acres together with other developments mentioned in the letter. The Plaintiff contended that the deceased pursued compensation with the relevant institutions without success until he died on 1st March 2008. The Plaintiff contended that since the Government did not pay for the suit property, the Government acquired no interest in the same. The Plaintiff contended that the property remained trust land with the deceased customary rights of ownership thereof intact.

51. I agree with the 3rd to 76th Defendants that the deceased's complaints over the years were about compensation. The deceased did not complain about the legality of the setting apart of the suit property. It is common ground that the deceased made an application for compensation pursuant to



the Gazette Notice No. 3400 dated 6th November 1976. It is also common ground that the deceased was awarded compensation and was paid the amount that was awarded to him. The deceased's complaint according to his letter to the District Commissioner Kisumu District dated 18th May 1979 was that his land measuring 9 ½ acres and some of the developments on the land were either not valued for compensation or were improperly valued.

52. Trust *Land Act* had elaborate mechanisms for dealing with disputes over the setting apart of land for use by the County Councils or the Government and compensation for such land. Sections 10 and 12 of the Trust *Land Act* provided as follows:

10. (1) Any person who is dissatisfied with the rejection of his application for compensation under section 9 of this Act, or with the amount of the award, may, within thirty days after being notified of the award or rejection, as the case may be, appeal in writing through the District Commissioner to the Provincial Agricultural Board of the province in which the land to be set apart is situate, and that Board shall hear and determine the appeal and shall notify the appellant in writing of its decision.
- (2) If the Commissioner of Lands is dissatisfied with the making of an award, or with the amount of an award, he may appeal in like manner to the Provincial Agricultural Board, who shall hear and determine the matter accordingly.
- (3) The Minister may make regulations to provide for the practice and procedure to be followed in respect of appeals to a Provincial Agricultural Board under this section.
- (4) Any party to an appeal to a Provincial Agricultural Board who is dissatisfied with the decision of that Board may appeal to the Resident Magistrate's Court.
- (5) Any party to an appeal to the Resident Magistrate's Court who is dissatisfied with the decision may appeal to the High Court whose decision shall be final.

SUBPARA 12.

Notwithstanding anything in this Act, any person claiming a right or interest in land set apart under this Act shall have access to the High Court for—

- (a) a) the determination of the legality of the setting apart; and
- (b) b) the purpose of obtaining prompt payment of any compensation awarded.

53. From the foregoing provisions of the Trust *Land Act*, the deceased had remedies for the failure if at all by the Government to pay full compensation for his land that was acquired by the Government. The deceased could appeal against the award that was made to him. The deceased also had a right to file a suit in the High Court to obtain prompt payment of the award. As correctly submitted by the 3rd to 76th Defendants, no evidence was placed before the court showing that the deceased appealed against the award of compensation that was made to him as provided in the Trust *Land Act* or that he moved the High Court to challenge the setting apart of his land or for prompt payment of compensation. In the absence of an appeal or proceedings in the High Court challenging the setting apart of the land or for prompt payment, it cannot be said as claimed by the Plaintiff that the acquisition of the suit property by the Government was incomplete for non-payment of compensation. In the absence of a formal appeal against the award of compensation, it is presumed that the deceased was satisfied with the same. From the evidence placed before me by the Plaintiff, I am not persuaded that the setting apart of the suit property was illegal or unconstitutional. It is therefore my finding that the Government of Kenya acquired the suit property through setting apart pursuant to Section 118 of the repealed Constitution and Sections 7 and 8 of the Trust *Land Act*.



Whether the suit property was lawfully allocated to the 2nd Defendant by the 1st Defendant.

54. In *Town Council of Awendo v. Nelson O. Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties)* [2019] eKLR, the Supreme Court stated as follows:

“(61) On the basis of the foregoing analysis, we hereby issue the following guiding principles:

General Principles

1. Where the Government, pursuant to the relevant constitutional and legal provisions, compulsorily acquires land, such land, shall only be used for the purpose for which it was compulsorily acquired.
2. The allocation of compulsorily acquired land, to private individuals or entities, for their private benefit, in total disregard of the public purpose or interest for which it was compulsorily acquired, shall be incapable of conferring title to that land in favour of the allottees.
3. A person whose land has been compulsorily acquired in accordance with the relevant constitutional and legal provisions does not retain any reversionary interest in the said land.
4. Un-utilized portions of compulsorily acquired land may be used for a different public purpose, or in furtherance of a different public interest, including the allocation of such portions to private individuals or entities, at the market price, in furtherance of such public interest.”

55. The Gazette Notice No. 3400 through which the suit property among others was set a part provided as follows:

The Trust *LAND ACT*

(Cap.288)

Setting Apart of Land for the extended areas of the Kisumu Municipality in Kanyakwar, South Kajulu, Manyatta and Nyalenda Pandpieri Sub-location of the Kisumu District

Whereas the County Council of Kisumu was on 18th October, 1976 given a written notice by the President that the area of Trust Land specified in the Schedule hereto is required for the purposes of the Government of Kenya, notice is hereby given for and on behalf of the Kisumu County Council that the said land is required to be set apart for housing and industrial development and for the purposes ancillary thereto, and that all applications for compensation under section 8 of the Trust *Land Act*, should be submitted to the District Commissioner, Kisumu, beginning from 15th November, 1976 up to and including the 15th day of December, 1976.

Schedule

The area of presently unregistered Trust Land situated generally to the north east and south of the old Kisumu Municipality, and as more particularly shown on plans which may be



seen at the offices of the District Commissioner, Kisumu, and at the Department of Lands, Nairobi, or obtained from the Commissioner of Lands, P.O.Box 30089, Nairobi, at the costs of sh. 10 per copy.

Dated at Nairobi this 6th day of November, 1976.

J.R. Njenga

Commissioner of Lands.

56. From the said Gazette Notice, the land that was set apart was for the extended areas of the Kisumu Municipality in Kanyakwar, South Kajulu, Manyatta and Nyalenda Pandpieri Sub-location of the Kisumu District. The land was set apart for, housing, industrial development and related purposes. No direct evidence was given on how the land that was acquired pursuant to the said Gazette Notice was used by the Government. The report by the National Land Commission contained in Gazette Notice No. 6863 published in The Kenya Gazette Vol. CXIX-No. 97 on 17th July 2017 produced by the 3rd to 76th Defendants in evidence as D.EXH. 4 sheds some light on the issue. In the report, the National Land Commission stated as follows in part:

Gazette Notice No. 3400 of 1976 under the Trust Land Act Cap. 288(now repealed) set apart the land for the extension of Kisumu Municipality in Kanyakwar, South Kajulu, Manyatta and Nyalenda Pandpieri sub locations of the Kisumu District...After the land acquisition plan had been prepared, the land was designated mainly for housing and industrial development. It was then allocated to different institutions, state and non-state like SACCOs, Government Departments(offices), Religious Organizations, Educational Institutions, among others, as well as other private developers. This was done under the Registration of Titles Act Cap. 281. Grants were issued on 99 years leases some took possession and have developed over time; others have not.”

57. From the evidence on record, the suit property was allocated to the 2nd Defendant by the 1st Defendant as an unsurveyed residential plot through a letter of allotment dated 12th November 1990. The 2nd Defendant accepted the allotment through a letter dated 10th December 1990 and paid the requisite charges in the sum of Kshs. 929,430/-. The land was surveyed and a Grant No. I.R 61505 was issued in favour of the 2nd Defendant by the 1st Defendant on 14th April 1993 under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) in respect of L.R No. 18040 (the suit property) measuring approximately 6.898 hectares (17.045 acres). The Grant was registered on 17th January 1994 thereby conferring upon the 2nd Defendant the leasehold title over the suit property.
58. At the time the suit property was allocated to the 2nd Defendant by the 1st Defendant, the same was government land having been acquired compulsorily by the Government through setting apart under the repealed Constitution and the Trust Land Act. The land as already mentioned was set apart by the Government for housing and industrial development purposes within the expanded Kisumu Municipality. The Grant issued to the 2nd Defendant provided that the land would be used solely for private residential purposes. I find no irregularity, illegality or fraud in the allocation of the suit property by the 1st Defendant to the 2nd Defendant. It is my finding from the foregoing that the allocation of the suit property by the 1st Defendant to the 2nd Defendant was lawful.



Whether the 3rd Defendant acquired the suit property lawfully from the 2nd Defendant, and whether the 4th to 76th Defendants acquired valid titles from the 3rd Defendant.

59. The 3rd to 76th Defendants produced in evidence the instrument of transfer dated 9th May 2000 through which the suit property was transferred to the 3rd Defendant by the 2nd Defendant at a consideration of Kshs. 6,715,000/-. The transfer was registered on 14th June 2000. The 3rd to 76th Defendants produced in evidence a copy of Grant No. I.R. 61505 for L.R No. 18040 with the 3rd Defendant's name endorsed thereon as the owner of the property. There is no evidence adduced by the Plaintiff showing any irregularity, illegality, fraud or breach of trust in this transaction. The suit property was allocated by the 1st Defendant to the 2nd Defendant lawfully as I have already held. The 2nd Defendant therefore held a valid title to the suit property which it passed to the 3rd Defendant. It follows from the foregoing that the 3rd Defendant acquired a lawful title to the suit property from the 2nd Defendant. The 4th to 76th Defendants who acquired their titles from the 3rd Defendant also obtained valid titles.

Whether the Plaintiff's suit is time-barred.

60. The Plaintiff's suit is a normal civil suit against the Defendants for the recovery of the suit property which he claims to be owned by his deceased father. Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya provides that an action may not be brought to recover land after the end of twelve years from the date on which the right of action accrued. This period may be extended under Section 26 of the said Act where the cause of action is based on fraud or mistake.

61. The suit property was set apart for the Government in 1976. The deceased made an application for compensation and was awarded and paid Kshs. 2,149/- on 6th July 1978. The deceased was not satisfied with the award. He claimed that he had received no compensation for the suit property. From the evidence on record, the deceased's first letter of complaint was written on 18th May 1979. As mentioned earlier, the deceased neither appealed against the award of compensation nor moved the High Court to challenge the setting apart of the land or to seek prompt payment of compensation. From the evidence produced by the Plaintiff, the deceased was informed as early as 11th October 1989 by the Municipality of Kisumu through a letter of the same date that the parcel of land that he was claiming was compulsorily acquired and that he ceased to have any interest in the same. In the same letter, the deceased was informed that the parcels of land in the area were being allocated for various development purposes. On 24th September 1990, the deceased was informed by the Ministry of Lands and Housing, Department of Land Adjudication/ Settlement that the land he was claiming was government land and as such could not be adjudicated in his favour.

62. Through a letter dated 29th October 1992, the deceased through the firm of Ombija, Wasuna & Co. Advocates served the Attorney General with a Notice to Sue the Attorney General in respect of the suit property. The deceased filed some proceedings in the High Court at Kisumu in 1993 in High Court Misc. Civil Application No. 21 of 1993 seeking to compel the Director Land Adjudication and Chief Land Registrar to adjudicate the suit property and have the title in respect thereof issued to him. It is not clear as to what became of those proceedings. I agree with the 3rd to 76th Defendants that the deceased's cause of action against the 1st Defendant accrued in 1978 when the award of compensation was communicated to him. The deceased's claim against the 1st Defendant was time-barred at the time the Plaintiff came to court.

63. The suit property was registered in the name of the 2nd Defendant on 17th January 1994. This suit was filed on 28th May 2008; 14 years later. In his witness statement dated 2nd September 2020 which he adopted as his evidence in chief, the Plaintiff stated in part, "My father occupied the suit land as



proprietor until 1990 when he learnt that a stranger had been registered as the proprietor thereof.” The suit property was allocated to the 2nd Defendant on 12th November 1990 as mentioned earlier and registered in its name on 17th January 1994. I am of the view that with diligence, the deceased could have known through a search that the suit property had been registered in the name of the 2nd Defendant as the owner thereof soon after such registration. The Plaintiff did not establish that the registration of the 2nd Defendant as the owner of the suit property was fraudulent and that the cause of action against the 2nd Defendant was concealed by the 2nd Defendant’s acts of fraud. The suit was also not seeking a relief from a mistake. The Plaintiff’s claim could not therefore be saved under Section 26 of the *Limitation of Actions Act*. The suit against the 2nd Defendant which was filed 14 years after the cause of action arose accrued was time-barred. With no competent claim against the 1st and 2nd Defendants, the deceased’s claim against the 3rd to 76th Defendants who derived their titles from the 1st and 2nd Defendants was unmaintainable.

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

64. From the foregoing findings, the Plaintiff has failed to prove his case against the Defendants to the required standard. The Plaintiff is therefore not entitled to any of the reliefs sought in his further further amended plaint.

Who is liable for the costs of the suit?

65. Under Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. The Plaintiff has failed to prove his claim against the Defendants. The Plaintiff has not given any reason why the Defendants should be denied their costs of the suit. For the foregoing reasons, I will award costs to the 3rd to 76th Defendants who participated in the hearing of the suit.

Conclusion

67. For the reasons given, it is my finding that the Plaintiff’s suit has not been proved to the required standard. The suit is also time-barred. The suit is dismissed with costs to the 3rd to 76th Defendants.

DATED AND DELIVERED AT KISUMU ON THIS 8TH DAY OF FEBRUARY 2024.

S. OKONG’O

JUDGE

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

Mr. Okero for the Plaintiff

Mr. P.D. Onyango for the 3rd to 76th Defendants

Ms. J. Omondi-Court Assistant

