



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Opar v Odhiambo & 4 others (Environment and Land Case Civil Suit  
174 of 2016) [2024] KEELC 5075 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5075 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 174 OF 2016**

**SO OKONG'O, J**

**JULY 4, 2024**

**BETWEEN**

**EZRA ODONDI OPAR ..... PLAINTIFF**

**AND**

**GRACE AKINYI ODHIAMBO ..... 1<sup>ST</sup> DEFENDANT**

**MARGARET WOIGO ..... 2<sup>ND</sup> DEFENDANT**

**KCB BANK KENYA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR-KISUMU ..... 4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 19<sup>th</sup> July 2016. The plaint was amended on 26<sup>th</sup> February 2020 to add the 3<sup>rd</sup> Defendant to the suit. In his amended plaint dated 24<sup>th</sup> February 2020, the Plaintiff sought the following orders;
  - a. A declaration that the Plaintiff is the absolute owner of all that parcel of land known as Kisumu/Municipality/Block 10/328 (hereinafter referred to only as “the suit property”).
  - b. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves or through their servants and/or employees from trespassing onto, developing, alienating, disposing of, or in any other way interfering with the Plaintiff’s quiet and peaceful use and occupation of the suit property.
  - c. An order of eviction of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from the suit property.
  - d. The costs of the suit.



2. The Plaintiff averred that he was the registered proprietor of the suit property which he charged to the 3<sup>rd</sup> Defendant to secure a loan that was advanced to him by the 3<sup>rd</sup> Defendant. The Plaintiff averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had laid an unlawful claim over the suit property. The Plaintiff averred that he purchased the suit property from a company known as Kidiruban Housing Cooperative Society Limited which was the previous registered owner thereof. The Plaintiff averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' claim over the suit property had no basis in law and fact. The Plaintiff averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had on numerous occasions trespassed on the suit property and attempted to develop the same.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a statement of defence and a counter-claim against the Plaintiff on 17<sup>th</sup> November 2017. Following the amendment of the plaint, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed an amended statement of defence and an amended counter-claim on 10<sup>th</sup> March 2020. In their amended defence, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the creation of a charge over the suit property by the Plaintiff in favour of the 3<sup>rd</sup> Defendant was malicious since the charge was created during the pendency of the suit. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied that the Plaintiff was the registered owner of the suit property.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that they purchased the suit property from one Erick Hongo who was allotted the property by the Municipality Council of Kisumu. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that if indeed the Plaintiff had a title to the suit property, such title was issued fraudulently. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied that their claim over the suit property had no basis. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that they were the ones in possession of the suit property at the time of the institution of the suit. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that they had occupied the suit property since 11<sup>th</sup> August 2008.
5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that they were aware of a court case that was pending between Kidiruban Housing Cooperative Society (Kidiruban) and 42 individuals which concerned several parcels of land including the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that given the said suit, it was doubtful whether Kidiruban had a good title to the suit property that it could pass to the Plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that they could not trespass on their land. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the Plaintiff was not entitled to any of the reliefs sought in the amended plaint.
6. In their counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants reiterated the contents of their statement of defence and averred that the alleged title to the suit property held by the Plaintiff was obtained fraudulently with the aim of dispossessing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of the suit property which they acquired lawfully. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the Plaintiff colluded with the 3<sup>rd</sup> Defendant to defraud the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of the suit property by illegally creating a charge over the same.
7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought judgment against the Plaintiff and the 3<sup>rd</sup> Defendant for;
  - a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the bona fide owners of the suit property.
  - b. An order compelling the Plaintiff to surrender the fraudulent title held by him in respect of the suit property for cancellation.
  - c. An order for the discharge of charge registered against the suit property.
  - d. Costs of the counter-claim.
8. The 3<sup>rd</sup> Defendant filed a reply to the amended plaint and a defence to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counter-claim on 30<sup>th</sup> September 2020. The 3<sup>rd</sup> Defendant admitted that it charged the suit property to secure a loan of Kshs. 4,000,000/- and an overdraft facility of Kshs. 500,000/- that it advanced to



- the Plaintiff. The 3<sup>rd</sup> Defendant averred that when the suit property was charged in its favour to secure the said facilities, there were no restrictions or cautions registered against the title of the property.
9. In its defence to the counter-claim, the 3<sup>rd</sup> Defendant denied that the charge in its favour was created maliciously and fraudulently with the intention of dispossession the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of the suit property. The 3<sup>rd</sup> Defendant averred that at the time the charge in its favour was created and registered, it was not aware of the existence of this suit. The 3<sup>rd</sup> Defendant urged the court to dismiss the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counter-claim with costs.
  10. On 1<sup>st</sup> February 2022, the court ordered that the Land Registrar, Kisumu County and the Attorney General be added to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counter-claim as the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants amended their counter-claim further on 1<sup>st</sup> February 2022 to add the Land Registrar and the Attorney General to the counter-claim. The joinder of the Land Registrar and the Attorney General who were not parties to the original suit, to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counter-claim was not done procedurally. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants should have added a heading for the counter-claim after the defence in which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should have been the Plaintiffs in the counter-claim and, the Plaintiff and the 3<sup>rd</sup> Defendant in the original suit and, the Land Registrar and the Attorney General should have been the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the counter-claim respectively. While the 1<sup>st</sup> and 2<sup>nd</sup> Defendants added a heading to their counter-claim, they put the Plaintiff in the original suit as the Plaintiff in the counter-claim and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the 3<sup>rd</sup> Defendant, and the Land Registrar and the Attorney General as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively.
  11. The Land Registrar and the Attorney General (hereinafter referred to only as "the 4<sup>th</sup> and 5<sup>th</sup> Defendants") filed their statement of defence to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counter-claim on 3<sup>rd</sup> March 2022. The 4<sup>th</sup> and 5<sup>th</sup> Defendants denied the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' claim in its entirety. The 4<sup>th</sup> and 5<sup>th</sup> Defendants denied having been involved in any acts of fraud in the transfer and registration of the suit property in the name of the Plaintiff. The 4<sup>th</sup> and 5<sup>th</sup> Defendants averred that if any transfer was effected by the 4<sup>th</sup> Defendant, the same was lawful and procedural and was done in good faith upon presentation of the requisite documents. The 4<sup>th</sup> and 5<sup>th</sup> Defendants urged the court to dismiss the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counter-claim against them with costs.
  12. At the trial, the Plaintiff who gave evidence as PW1 adopted his witness statement dated 18<sup>th</sup> July 2016 as part of his evidence in chief. PW1 produced the documents attached to his list of documents filed on 19<sup>th</sup> July 2016 as P.EXH.1 to 14 respectively and the documents attached to his further list of documents dated 31<sup>st</sup> August 2020 as P.EXH. 15, 16, 17 and 18. PW1 stated that he was the owner of the suit property. He stated that he was a member of Kidiruban and was allocated the suit property by Kidiruban. He stated that the suit property was registered in the name of Kidiruban when it was allocated to him in 2016. He stated that he carried out a search that showed that the property was registered in the name of Kidiruban. PW1 stated that he entered into an agreement for sale dated 11<sup>th</sup> March 2016 with Kidiruban. He stated that he was issued with a title for the suit property on 3<sup>rd</sup> May 2016 after which he took possession immediately.
  13. PW1 stated that when he took possession of the suit property, he found a temporary structure on the property. He stated that a young man who was occupying the property chased him away. He stated that the man who was occupying the property informed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of his claim over the property and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants prevented him from commencing development on the property. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants claimed to be the owners of the suit property. He stated that he took a loan using the suit property as security that he was still paying. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had put up a structure on the suit property. He stated that the said structure



was not on the property when the property was transferred to him. He stated that although the court had issued an interim order stopping any activity on the land, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants continued with construction. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant were found in contempt of court and were fined. He stated that after that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stopped all activities on the land although the structure that they were constructing remained thereon. He prayed that the orders sought in his amended plaint be granted.

14. The Plaintiff called one witness, Godwine Jowi Bengo (PW2). PW2 told the court that he was the chairman of Kidiruban. He stated that the Plaintiff was their member. He stated that the Plaintiff became a member of Kidiruban in 2016 after purchasing shares. PW2 stated that the suit property was allocated to Kidiruban by the Commissioner of Lands and that the same was registered in the name of Kidiruban on 19<sup>th</sup> April 2016. He stated that Kidiruban allocated the suit property to the Plaintiff around 11<sup>th</sup> March 2016 and that the Plaintiff complied with all the terms of the allotment. He stated that the property was subsequently transferred to the Plaintiff on 19<sup>th</sup> April 2016.
15. PW2 adopted his witness statement dated 31<sup>st</sup> August 2020 filed on 1<sup>st</sup> September 2020 as his further evidence in chief. He stated that when the suit property was allocated to the Plaintiff, the same was not developed. He stated that he visited the property with the Plaintiff before and after the allocation. He stated that the suit property belonged to Kidiruban before the same was acquired by the Plaintiff and that Kidiruban had no dispute with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants over the property.
16. The 1<sup>st</sup> Defendant (DW1) gave evidence on her behalf and on behalf of the 2<sup>nd</sup> Defendant. DW1 told the court that the 2<sup>nd</sup> Defendant was her daughter and that the suit property belonged to them. DW1 adopted her witness statement dated 28<sup>th</sup> September 2020 as her evidence in chief and produced the documents attached to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' list of documents dated 28<sup>th</sup> September 2020 as D.EXH.1. She urged the court to grant the reliefs sought in their counter-claim.
17. The last witness was Willy Kimutai Cheruiyot (DW2). DW2 told the court that he was the 3<sup>rd</sup> Defendant's Credit Manager. He adopted his witness statement filed in court on 30<sup>th</sup> September 2020 as his evidence in chief and produced the documents that were attached to the 3<sup>rd</sup> Defendant's list of documents dated 28<sup>th</sup> September 2020 as D.EXH.2.
18. After the close of evidence, the parties were directed to make closing submissions in writing. The Plaintiff filed submissions dated 1<sup>st</sup> March 2024. The Plaintiff submitted that the suit property was originally owned by Kidiruban who held a lawful leasehold interest in the same. The Plaintiff submitted that he tendered evidence showing that he acquired the suit property from a party who lawfully owned the same. The Plaintiff submitted that he demonstrated that at the time of sale of the suit property to him, the title that was held by Kidiruban had not been revoked neither was there any encumbrance registered against the same.
19. The Plaintiff submitted that on their part, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants claimed to have acquired the suit property from a party who did not hold a legitimate interest in the property. The Plaintiff submitted that the original agreement of sale produced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants showed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants purchased a property that was not related to the suit property. The Plaintiff submitted that in order to create some nexus between the said property which they purchased and the suit property, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants alluded to the swapping of the said property with the suit property. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to demonstrate sufficiently how they ended up on the suit property.
20. The Plaintiff submitted that the two persons from whom the 1<sup>st</sup> and 2<sup>nd</sup> Defendants claimed to have derived their title to the suit property had no titles to the suit property which they could pass to the



- 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff submitted that the explanation that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants gave of how they acquired the suit property did not make sense. The Plaintiff submitted that instead of attacking the Plaintiff's title, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should have concentrated on establishing their title to the suit property.
21. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants produced no document to prove that the persons they claimed to have acquired the suit property from had any title to the suit property. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' claim over the suit property had no legal foundation or justification. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants also failed to impeach the title that was held by Kidiruban which was the original owner of the suit property. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not demonstrate any nexus between this suit and the other suit pending before this court involving Kidiruban. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not demonstrate that the suit property was in issue in that suit or that the Plaintiffs were parties to the said suit. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed in their attempt to create the impression that the title that Kidiruban passed to the Plaintiff was questionable. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants placed no evidence before the court in proof of the fraud alleged against the Plaintiff.
  22. The Plaintiff submitted that he demonstrated that he acquired the suit property lawfully and that he had a lawful title to the property. The Plaintiff submitted that the basis of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' claim over the suit property was unclear and as such the same was unlawful. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were unfairly frustrating the Plaintiff's efforts to exercise and assert his rights and interests on the property. The Plaintiff submitted that he had made a case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the required standard and as such judgment should be entered in his favour as prayed. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counter-claim had no merit and should be dismissed with costs.
  23. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed submissions dated 7<sup>th</sup> February 2024 in which they framed three issues for determination by the court. The first issue was whether the Plaintiff held a good title to the suit property. On this issue, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the suit property was not capable of being allocated in 2008 by the Commissioner of Lands to Kidiruban from which the Plaintiff allegedly acquired the same because the property had already been alienated at the time. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the suit property was repossessed by the Municipal Council of Kisumu from Kidiruban in 2007 and as such the land was public land owned by the Municipal Council of Kisumu. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the suit property was not available for alienation to Kidiruban in 2008 as it was not unalienated government land. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants cited several authorities in support of this submission that I have perused.
  24. The second issue framed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was whether the lease between the Government of Kenya and Kidiruban was registered and as such conferred an interest in the suit property upon Kidiruban. On this issue, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that PW2 confirmed that the said lease was not registered and that a perusal of the lease also shows on its face that the same was not registered. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that an unregistered lease does not confer interest in land and as such the purported lease did not confer any interest upon Kidiruban which it could pass to the Plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that since the said lease was not registered, a certificate of lease could not be issued in respect thereof. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the purported certificates of lease issued to Kidiruban and the Plaintiff were fraudulent.



25. The next issue was whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had a legitimate claim and lawful interest in the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that they had a lawful interest in the suit property for various reasons. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the Municipal Council of Kisumu repossessed the suit property and another parcel of land, Kisumu Municipality/Block 10/391(Plot No. 391) from Kidiruban for non-payment of land rates. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the Municipal Council of Kisumu (hereinafter referred to only as “the Council”) re-allocated the suit property and Plot No. 391 to Erick Hongo and Alice Njoki Wairi respectively.
26. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that they purchased Plot No. 391 from Alice Njoki on 28<sup>th</sup> November 2008. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that due to the challenges that arose when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants went to take possession of Plot No. 391, it was agreed that Erick Hongo transfers the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which he did. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that they took possession of the suit property immediately and that it was not until 7 years later in 2016 that the Plaintiff came forward claiming that he had acquired the property from Kidiruban. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the repossession of the suit property by the Council extinguished any interest that Kidiruban had in the suit property and that the property was thereafter re-allocated by the Council to Erick Hongo who transferred the same to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
27. The last issue was whether the Plaintiff and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants acted fraudulently. On this issue, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that, upon the repossession of the suit property by the Council, Kidiruban sued the Council in Kisumu High Court Civil Suit No. 152 of 2007(now ELC No. 804 of 2015) challenging the said repossession. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that while that suit was pending, Kidiruban proceeded fraudulently to process a certificate of lease for the suit property in its name in 2008 before its lease was registered and sold the property to the Plaintiff in 2016 during the pendency of this suit. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the suit property was repossessed on account of the failure by Kidiruban to pay land rates to the Council. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that there was no evidence that Kidiruban cleared the said land rates to be in a position to transfer the property to the Plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the fact that the transfer was effected without rates clearance certificate from the Council was a pointer to the fraud complained of. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that by charging the suit property to the 3<sup>rd</sup> Defendant to secure a loan after fraudulently obtaining the title in respect thereof, the Plaintiff was intent on benefiting from the fraud. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the 3<sup>rd</sup> Defendant participated in the said fraud by its failure to conduct due diligence.
28. In conclusion, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the Plaintiff did not hold a good title to the suit property and that it was the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who had a legitimate claim and lawful interest in the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants reiterated that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were fraudulent in their dealings with the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants urged the court to dismiss the Plaintiff’s suit and to allow the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ counter-claim with costs.
29. I have not seen on record the submissions by the 3<sup>rd</sup> Defendant. The 4<sup>th</sup> and 5<sup>th</sup> Defendants filed submissions dated 6<sup>th</sup> February 2024. The 4<sup>th</sup> and 5<sup>th</sup> Defendants (hereinafter together referred to only as “the AG”) framed two issues for determination by the court namely; whether the 4<sup>th</sup> Defendant was involved in fraudulent acts, and whether the 4<sup>th</sup> Defendant acted in good faith in transferring the suit property to the Plaintiff. The AG submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not prove that the 4<sup>th</sup> Defendant took part in any fraudulent activity in relation to the suit property. The AG submitted that the 4<sup>th</sup> Defendant was a public servant charged with specific duties and responsibilities. The AG submitted that the 4<sup>th</sup> Defendant had no reason to favour any of the parties. The AG submitted that



the fact that the Council had repossessed the suit property was not brought to the attention of the 4<sup>th</sup> Defendant. The AG submitted that the 4<sup>th</sup> Defendant was absolved from liability for acts done in good faith. The AG submitted that in this case, the 4<sup>th</sup> Defendant acted in good faith and as such it was not liable to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

### **Analysis and determination**

30. I have considered the pleadings, the evidence tendered and the written submissions by the advocates for the parties. The parties did not agree on the issues for determination by the court. Each party framed its issues. In my view, the issues arising for determination in the main suit and the counter-claim are as follows;
- a. As between the Plaintiff and, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who is the lawful owner of the suit property.
  - b. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.
  - c. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to the reliefs sought in their amended counter-claim.
  - d. Who is liable for the costs of the suit and the counter-claim?
31. I will consider these issues one after the other. In *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others*[2016] eKLR, the court stated as follows:
- “A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain... Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”
32. In *Adan Abdirahani Hassan & 2 others v. Registrar of Tiles & 2 others* [2013] eKLR, the court stated as follows:
- “20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that *the Constitution* protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by *the Constitution*, he must show that he has followed the due process in acquiring that which he wants to be protected.”



33. In *Samuel Kamere v. Land Registrar Kajiado, Nairobi Court of Appeal, Civil Appeal No. 28 of 2005*, the court addressing the issue of competing titles stated that:

“It is evident that there are two competing claims over the suit property, and we have said that the plaintiff’s proprietary interest is already established. Since the appellant’s title is under challenge, in order to be considered a bona fide purchaser for value, he 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 a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”

34. The suit property was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered *Land Act* provide as follows:

27. Subject to this Act -

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

25. The Registered *Land Act*, Chapter 300 Laws of Kenya was repealed by the *Land Registration Act* 2012. Sections 24, 25, 26 and 80 of the *Land Registration Act* 2012 provide as follows:

24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.



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

26.

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

80.

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

26. The Plaintiff's case is that he was the registered owner of the suit property and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who had no valid interest in the property trespassed on the suit property and prevented the Plaintiff from enjoying his proprietary rights in the property. The Plaintiff averred that he was a member of Kidiruban which was the owner of the suit property and that Kidiruban allocated the suit property to him. The Plaintiff produced in evidence among others; a certificate of lease in respect of the suit property in the name of Kidiruban dated 19<sup>th</sup> April 2016, a copy of certificate of registration of Kidiruban dated 24<sup>th</sup> March 1976, a copy of a membership agreement dated 11<sup>th</sup> March 2016 pursuant to which the suit property was allocated to the Plaintiff, a copy of the instrument of Transfer of Lease dated 3<sup>rd</sup> May 2016, Consent to transfer issued by the Commissioner of Lands dated 26<sup>th</sup> April 2016, a copy of the valuation requisition for Stamp Duty, a copy of the application for registration of transfer



- dated 29<sup>th</sup> April 2016, a copy of the receipt for payment of registration fees and certificate of title, a copy of customer transaction receipt for payment of Stamp Duty dated 29<sup>th</sup> April 2016, and a copy of a certificate of lease in respect of the suit property in favour of the Plaintiff dated 3<sup>rd</sup> May 2016. From the evidence adduced by the Plaintiff, the Plaintiff acquired the suit property from Kidiruban at a consideration of Kshs. 2,000,000/- and the same was registered in his name on 3<sup>rd</sup> May 2016.
27. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have admitted that the suit property was initially owned by Kidiruban. See paragraphs 2, 3, and 4 of the 1<sup>st</sup> Defendant's witness statement dated 28<sup>th</sup> September 2020. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case is that the suit property among others was allocated to Kidiruban by the Municipal Council of Kisumu (the Council). The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that Kidiruban failed to pay land rates to the Council for the suit property and other parcels of land that were allocated to Kidiruban by the Council. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that as a result of this default by Kidiruban, the Council on 14<sup>th</sup> September 2007 "repossessed" the suit property among others that had been allocated to Kidiruban after a demand notice had been issued to Kidiruban and other rate defaulters to pay the outstanding rates through Gazette Notice dated 12<sup>th</sup> April 2007 published on 18<sup>th</sup> May 2007. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the Council thereafter "re-allocated" the suit property to one Erick Hongo. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that another parcel of land that was repossessed by the Council from Kidiruban was Kisumu Municipality/ Block 10/391(Plot No. 391). The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that Plot No. 391 was re-allocated by the Council to one Alice Njoki Wairi.
28. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that following the repossession of the suit property and Plot No. 391 by the Council on 14<sup>th</sup> September 2007, Kidiruban's proprietary interest in the two parcels of land became extinguished and as such Kidiruban had no title in the suit property that it could sell and transfer to the Plaintiff in 2016. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant contended that on 28<sup>th</sup> November 2008, they purchased Kidiruban's repossessed Plot No. 391 from Alice Njoki Wairi to whom it was re-allocated by the Council on 28<sup>th</sup> September 2007. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that they had difficulty in taking possession of Plot No. 391 which they purchased from Alice Njoki. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that due to this challenge with possession of Plot No. 391, Eric Hongo who had been re-allocated the suit property by the Council agreed to transfer the suit property to them. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants produced in evidence at the trial among others; a copy of Gazette Notice No. 4597 dated 12<sup>th</sup> April 2007 by the Council published in the Kenya Gazette of 18<sup>th</sup> May 2007, a copy of the Public Notice that was issued by the Council on 14<sup>th</sup> September 2007, a copy of the Minutes of the Council's Special Town Planning Committee meeting held on 16<sup>th</sup> August 2007, a list containing names of the persons to whom the land repossessed by the Council were re-allocated, a letter of offer of Plot No. 391 by the Council to Alice Njoki Wairi dated 28<sup>th</sup> September 2007, a copy of the letter of acceptance of the offer by Alice Njoki Wairi dated 20<sup>th</sup> December 2007, a copy of an agreement of sale between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and Alice Njoki Wairi dated 28<sup>th</sup> November 2008, a copy of the agreement for the transfer of the suit property by Eric Hongo to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants dated 11<sup>th</sup> August 2009, a copy of the letter of consent by the Council to the transfer dated 12<sup>th</sup> August 2009, copies of rates payment requests and demand notices by the Council to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and, copies of some of the pleadings in Kisumu HCCC No. 152 of 2007, Kidiruban Housing Cooperative Society Limited v. Municipal Council of Kisumu.
29. I agree with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that if indeed the Council had lawfully acquired or re-acquired ownership of the suit property from Kidiruban in 2007, Kidiruban would have had no proprietary interest in the suit property that it could transfer to the Plaintiff. The Plaintiff in my view established by evidence that Kidiruban was the registered owner of the suit property at the time the said property



was sold and transferred to the Plaintiff. The burden was on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whose title had its roots on the Council's alleged ownership of the suit property to demonstrate that the Council was the lawful owner of the suit property at the time it purportedly allocated the same to Eric Hongo who transferred the same to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

30. I am not determining the case that is pending between Kidiruban and the Council over the alleged repossession in 2007 of the parcels of land that were owned by the former. Whatever I say here is for the purposes of these proceedings only and whatever finding that I make would be based on the facts as presented to me by the parties to this suit. The court that would be considering the said pending case would not be bound by the said findings. I have two issues of concern regarding the claim by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that the Council "repossessed" the suit property. First, the evidence before me shows that the suit property is leasehold and that the lessor was at all material times the Government of Kenya. There is no evidence that the suit property was at any time owned by the Council. The Council could not therefore "repossess" and re-allocate what was not owned by it. The suit property from the material on record was allocated to Kidiruban by the Commissioner of Lands on behalf of the Government of Kenya. The suit property was not allocated to Kiduruban by the Council. Since the lease was between the Government of Kenya and Kidiruban, in the event of non-compliance with any of the terms of the lease, it was for the Government of Kenya to seek forfeiture of the lease and not the Council. The Council could not therefore purport to repossess the suit property and allocate it to any other person. The property belonged to the Government of Kenya which was the freehold owner thereof. The council could not just assume ownership of the property through the act of "repossession".
31. Secondly, I know that the Council has a right to levy rates on all properties within its jurisdiction unless exempted. That right does not however entitle the Council to "repossess" a ratable property in case of a default in the payment of rates. Section 17 of the *Rating Act*, Chapter 267 Law of Kenya pursuant to which the Council is said to have issued Gazette Notice No. 4597 published in the Kenya Gazette of 18<sup>th</sup> May 2007 provides as follows:

" 17.

- (1) If, after the time fixed for the payment of any rate any person fails to pay any such rate due from him and any interest on any such unpaid rate as provided in section 16, the rating authority may cause a written demand to be made upon such person to pay, within fourteen days after service thereof on him, the rate due by such person and interest thereon calculated in accordance with section 16 (13) which demand shall be in the appropriate form in the Second Schedule.
- (2) If any person who has had such demand served upon him makes default, the rating authority may take proceedings in a subordinate court of the first class to secure the payment of such rate and interest in the manner hereinafter prescribed.
- (3) Every plaint in such proceedings shall set forth the particulars of the land on which the rate was levied, of the rate so due and demanded and of any interest payable thereon.
- (4) Every summons issued in proceedings taken under this section shall order the defendant to appear and answer the claim on a day to be therein specified, and the summons may be served—



- (a) by post; or
  - (b) by fixing it on or to some conspicuous part of the land; or
  - (c) by any mode of service authorized by any rules made under the *Civil Procedure Act*.
- (5) Where judgment is given in favour of the rating authority suing for recovery of rates, the decree of the court shall be in the appropriate form in the Second Schedule.
- (6) A decree granted by a subordinate court in favour of the rating authority plaintiff under this section may be enforced by any mode of execution authorized by any rules made under the *Civil Procedure Act* and, if the sum due under the decree is secured by a charge over the land by virtue of section 19, the decree-holder may apply to the High Court by originating summons to order the sale of such land in enforcement of such charge, and the High Court may make an order directing the sale of such land subject to such conditions and with all such directions usual to the nature of such a summons as the justice of the case may require and such summons and any notice or document relating thereto may be served in the manner provided by subsection (4).”

32. Section 17 of the *Rating Act* is very clear and elaborate on the process of recovering of rates by the Council from the rate defaulters. There is no procedure for the recovery of rates known as “repossession”. The Council has no right under the *Rating Act* to take possession of or to assume ownership of the property of a rate defaulter. I am therefore not persuaded by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that the Council acquired any proprietary interest in the suit property following the purported repossession thereof by the Council. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not place any evidence before the court showing that pursuant to the purported repossession, the Council got registered as the proprietor of the suit property.
33. In my view, the suit property remained the property of Kidiruban even after the Gazette Notice No. 4597 published in the Kenya Gazette of 18<sup>th</sup> May 2007 unless the same was sold by the Council under Section 17(6) of the *Rating Act*. Since the Council did not put in motion the process of selling the suit property provided under Section 17 of the *Rating Act* aforesaid, the suit property remained the property of Kidiruban which was at liberty to deal with the same as it wished in the exercise of its proprietary rights including selling the same. I did not understand the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ argument that Kidiruban was fraudulently registered as the owner of the suit property. Having admitted that the suit property was owned by Kidiruban and was repossessed from it by the Council, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants cannot at the same time claim that the property was fraudulently registered in the name of Kidiruban. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants cannot approbate and reprobate at the same time. In any event, Kidiruban was not made a party to this suit and the fact that the Plaintiff produced a copy of a lease in its favour that was not registered did not mean that the original lease was not registered. It is my finding that the alleged fraud was not proved.
34. Having held that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not establish that the Council owned the suit property, the foundation of their title to the suit property becomes shaky. The Council which had no proprietary



interest in the suit property could not pass any title in the property to Eric Hongo from whom the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are said to have acquired the property. I wish to add that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not give a convincing explanation how they came to own the suit property having purchased Plot No. 391 from Alice Njoki Wairi. Save for stating that they had challenges in taking possession of Plot No. 391, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not tell the court what these challenges were. I have noted that the agreement that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into with Eric Hongo did not mention an exchange of Plot No. 391 with the suit property. There was also no evidence before the court showing that the suit property was offered to Erick Hongo by the Council and that he accepted the offer and made the required payments.

35. It is my finding from the foregoing that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do not have a valid claim over the suit property. On the other hand, the Plaintiff has demonstrated that his claim over the suit property is legally sound. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have failed to impeach the Plaintiff's title. It is my finding therefore that as between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Plaintiff is the lawful owner of the suit property.
36. On whether the Plaintiff is entitled to the reliefs sought in the amended plaint, I am satisfied that the Plaintiff has proved his case against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on a balance of probabilities. The Plaintiff has demonstrated that he acquired the suit property lawfully from Kidiruban and that he is the registered owner of the property. The Plaintiff has also demonstrated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have no reasonable excuse for being on the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are therefore trespassers on the suit property. The Plaintiff is entitled to all the reliefs sought in his amended plaint.
37. On whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to the reliefs sought in their counter-claim, the answer is in the negative. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not established their interest in the suit property and their claim against the Plaintiff and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. On the issue of costs, the same is at the discretion of the court. The plaintiff has succeeded in his claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff shall have the costs of the suit and the counter-claim. I will deny the 3<sup>rd</sup> Defendant the costs of the counter-claim because the suit property was charged to it while this suit was pending.

## **Conclusion**

38. In conclusion, I hereby enter judgment for the Plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for:
  - a. A declaration that the Plaintiff is the lawful owner of the parcel of land known as Kisumu Municipality/Block 10/ 328.
  - b. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves or through their agents, servants and/or employees from trespassing onto, developing, alienating, disposing of, or in any other way interfering with the Plaintiff's quiet and peaceful use and occupation of the parcel of land known as Kisumu Municipality/Block 10/ 328.
  - c. An order of eviction of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents, servants and/or employees from the parcel of land known as Kisumu Municipality/Block 10/ 328 unless they vacate the property within 30 days from the date hereof.
  - d. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counter-claim is dismissed.
  - e. The Plaintiff shall have the costs of the suit and the counter-claim.
  - f. The 4<sup>th</sup> and 5<sup>th</sup> Defendants shall have the costs of the counter-claim.



g. The 3<sup>rd</sup> Defendant shall bear its own costs.

**DELIVERED AND DATED AT KISUMU ON THIS 4<sup>TH</sup> DAY OF JULY 2024**

**S. OKONG'O**

**JUDGE**

**Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

**N/A for the Plaintiff**

**Mr. Okoth for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**Mr. Bwire for the 3<sup>rd</sup> Defendant**

**Ms. Masaka for the 4<sup>th</sup> and 5<sup>th</sup> Defendants**

**Ms. J. Omondi-Court Assistant**

