



Ruto & another v Yego (Sued as the Legal Representative of the Estate of Sally Cherutich) & 4 others (Environment & Land Case 322 of 2018) [2023] KEELC 17755 (KLR) (6 June 2023) (Judgment)

Neutral citation: [2023] KEELC 17755 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 322 OF 2018**

FM NJOROGE, J

JUNE 6, 2023

BETWEEN

LINDA CHEPKORIR RUTO 1ST PLAINTIFF

MUNYAO SILA 2ND PLAINTIFF

AND

JOSEPH YEGO (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SALLY CHERUTICH) 1ST DEFENDANT

PETER ONDANDE 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

THE NAKURU DISTRICT LAND REGISTRAR 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. The plaintiff in this case was amended twice. In the further amended plaintiff filed on 6/5/2022 the plaintiffs averred that they are the owners of the leasehold property comprised in the land parcel known as Nakuru Municipality Block 23/728 situate within Nakuru Town having purchased it for value from the previous owner and having become registered as proprietors in the year 2010. A certificate of lease was issued to them on 2/12/2010 and they have been in quiet and exclusive possession of the suit property since then. They fenced the land with posts and barbed wire which became dilapidated with age. They also deposited building materials in readiness for the erection of a permanent perimeter wall around the premises. However, on 8/10/2018 while on a routine check of the suit property, they found two persons preparing to fence the land and the two identified the 2nd defendant as the person who instructed them. When the plaintiffs met with the 2nd defendant upon request, the latter



produced a lease and a certificate of lease in the name of the 1st defendant and stated that he was in the process of purchasing the suit land and its neighbouring plot Nakuru Municipality Block 23/729 from the 1st defendant and acknowledged having sending the two workmen. The plaintiffs aver that the title in the name of the 1st defendant, and later the 2nd defendant was procured through fraud and/or misrepresentation on the part of the 1st to 4th defendants. The particulars of fraud are contained at paragraph 16 of the further amended plaint. They are that the defendants procured a fake lease and a certificate of lease and its registration in the Nakuru land registry when they knew that the land is already owned by the plaintiffs; that they prepared a certificate of lease in favour of the 1st defendant while there was already a proper certificate of lease in the names of the plaintiffs; uttering false documents purporting to be documents of title and falsifying or illegally and criminally tampering with genuine records in respect of the suit land, and subsequently issuing forged title documents to the 1st defendant. The plaintiffs also claim that the defendants caused the disappearance of the genuine parcel file containing the record of the plaintiffs' title. The plaintiffs contend that the defendants' actions amount to gross violation of the plaintiffs' constitutional as well as property rights. They also aver that at the Nakuru Land Registry which is under the 4th defendant's supervision, caused the mysterious disappearance of the genuine land parcel file and falsified and/or replaced it with fraudulent records purportedly held by the 1st defendant. The plaintiffs claim to have suffered and they are likely to suffer more irreparable loss and damage; that the 3rd and 4th defendants' actions call for an award of exemplary damages for betrayal of public trust imposed upon them. The plaintiffs therefore claim full indemnity against the 3rd, 4th and 5th defendants to the extent of the value of the land at the time of judgment in this suit or that in the alternative should they lose the land owing to the matters of omission or commission by the 3rd, 4th and 5th defendants, then those defendants should compensate them in full to the extent of the value of the land as at the time of judgment. The full raft of the prayers sought by the plaintiffs are as follows, verbatim:

- a. A declaration that the plaintiffs are the true and genuine owners and/or proprietors of the leasehold title comprised in the land parcel Nakuru Municipality/Block 23/728 and a further declaration that any purported title held by the 1st and/or 2nd defendants is a fraudulent title.
- b. An order that the 1st defendant purported title under which the 2nd defendant claims a beneficial interest be nullified and/or cancelled alongside any records held by the 3rd and 4th defendants in connection with the said title of the 1st defendant.
- c. An order that the genuine land parcel file and the register containing the plaintiffs' records of title be reconstructed and restored.
- d. A permanent injunction to restrain the 1st and 2nd defendants from trespassing, entering, remaining, utilizing, selling, alienating, charging or howsoever interfering and/or dealing with the land parcel Nakuru Municipality/Block 23/728.
- e. General damages for trespass and exemplary damages.
- f. In alternative, that the 3rd, 4th and 5th defendants do indemnify and or compensate the plaintiffs to the full extent of the value of the suit land as at the time of judgment.
- g. Costs of this suit.
- h. Interest at court rates.
- i. Any other or further relief that this Honourable Court may deem fit and just to grant.



1st And 2nd Defendants' Further Statement Of Defence And Counterclaim

2. The 1st and 2nd defendants filed a further amended defence and counterclaim dated 23/5/2022. These defendants' further statement of defence and counterclaim was filed on 17/6/2022. The defendants denied the claim and averred that the 1st defendant is the registered owner of the suit land and that the 2nd defendant is a beneficial owner who purchased it. It is denied that the plaintiffs have been in possession of the land. Fraud is denied. It is stated that the 1st defendant acquired the title to the suit property through legal means and correct procedure. It is also stated that their ownership is genuine and that a report to the Criminal Investigation Department was made and investigated and that office arrived at the finding that the plaintiffs' documents that were purported to be of the suit land were not in existence in the 3rd and 4th defendants' record. They were therefore fakes which should be nullified. Accordingly, no constitutional or property rights of the plaintiffs have crystalized so as to be capable of protection or violation. It is claimed that the plaintiffs are victims of fraud or that they were privy to fraud originating from transfer of documents executed by Peter Njuguna Gitau and Samuel Kiplagat to give rise to the plaintiffs' impugned lease document and the said couple ought to have been sued. It is also averred that in the circumstances that compensation or indemnity cannot be awarded.
3. In the counterclaim the 1st and 2nd defendants reiterated all the contents in the defence and averred that the suit land was allocated to the 1st defendant in the year 1997 by the Department of Lands which she subsequently sold to the 2nd defendant for the consideration of Kshs.2,500,000/= on 3/9/2019; the 2nd defendant took immediate possession only to be stopped by the 2nd plaintiff who claimed to be owner and who immediately leased it to a third party thus depriving the 2nd defendant of possession. The 1st and 2nd defendants seek the following prayers in their counterclaim:
 - a. A declaration that the 1st & 2nd defendants now 1st and 2nd plaintiffs are proper, beneficial and legal owner to all that parcel of land known as Nakuru/Municipality Block 23/728.
 - b. That 1st and 2nd plaintiffs now 1st and 2nd defendants do pay the mesne profits and rent accruing from the tenant in occupation since the month of October 2018 till the time of judgment and vacant possession to all that parcel of land known as Nakuru/Municipality Block 23/728 and that any title documents of ownership possessed by the 1st and 2nd plaintiffs now 1st and 2nd defendants be declared null and void and cancelled forthwith.
 - c. The 1st and 2nd plaintiffs now 1st and 2nd defendants to meet the costs of this suit and to counterclaim.
 - d. Any other relief as this Honourable court may deem fit to grant the circumstances.
4. Pending the hearing and determination of the suit this court enjoined the defendants from any further dealings with the suit property.

3rd, 4th And 5th Defendants' Statement Of Defence

5. These defendants filed their defence on 26/8/2019 denying the plaintiffs' claim. They denied the particulars of fraud and misrepresentation. They averred that all material times their offices conducted registration with respect to the suit land with due diligence and based on the properly executed documents presented for registration. They aver that according to the Land Registry records, the suit land was registered in the name of the 1st defendant and on 6/9/2018, that a certificate of lease was issued in her name and that the 1st defendant is the rightful proprietor of the suit land. It is denied that the plaintiffs hold a genuine certificate of title, that defendants caused a mysterious disappearance or falsification of the land records at the Nakuru Registry. In the alternative it is stated that if the



plaintiffs hold any certificate of lease, the same was procured illegally or through fraud of forgery. Loss and damage are also denied. Demand and notice of intention to sue were denied. The suit was heard on various dates between 27/10/2020 and 6/12/2022. The plaintiffs called one witness and the defendants called 3 witnesses.

Evidence

6. PW1 – Munyao Sila, 2nd plaintiff and husband to the 1st plaintiff, testified on 27/10/2020 and adopted his written witness statement filed on 17/12/2018 as his evidence-in-chief in this case. His evidence is that he jointly owns land known as Nakuru Municipality Block 23/728 with the 1st plaintiff. They came to court because a second title was issued in the name of the 1st defendant while their title was still subsisting, so that the court can declare them as the legitimate proprietors and for an order of cancellation of the lease issued to the 1st defendant. He relied on the list of documents dated 17/12/2018 and a supplementary list of documents dated 18/5/2020. The said documents demonstrate the history of the plot and how the plaintiffs acquired the suit land. According to him, the documents were acquired during due diligence. Upon purchase of the land from the previous owner, it was transferred to the plaintiffs' names and they were issued with a Certificate of Lease on 2/12/2010 the original of which PW1 had carried to court at the time of hearing; they purchased the land from Samuel Kiplangat Cheruiyot through a sale agreement dated 2/7/2010 the original of which he also carried to court. According to him the plaintiffs conducted due diligence before entering into the agreement by obtaining copies of documents from the land registry demonstrating the history of the land and also a certificate of official search dated 20/4/2010, the original of which he too carried to court. He also obtained copies of the documents on the history of the land. The vendor gave them the requisite clearance certificates from the Ministry of Lands and the local authority. Through the due diligence, they obtained items No. 1 to 5 listed in their list of documents therein. Item No. 1 on the list is a letter dated 3/2/2003 from the Commissioner of Lands to District Land Registrar Nakuru forwarding a lease. The letter is written to the 4th defendant and through the 3rd defendant. The lease that was forwarded was in favour of Teresia Wanjiku and a Certificate of Lease dated 19/11/2003 was issued. Among the plaintiffs' exhibits is a payment receipt issued to Teresiah Wanjiku for registration of her lease and a rent clearance certificate which was issued by the Commissioner of Lands. Consent to transfer was also obtained from the Commissioner of Lands by the seller after he had made the payment for consent to transfer and it too was exhibited. He testified that rates were payable for the property and Mr. Cheruiyot made the said payments. He had arrears of rates which shows that the property had been rateable under his name for many years. He had to pay the rates, the arrears, the penalty and clearance certificate. Payment receipts were availed by PW1, including those for land rates and clearance certificate. Valuation for stamp duty was done on 12/10/2010 and stamp duty paid using a Kenya Revenue Authority (KRA) declaration slip. They applied for registration of the transfer document through the normal application form and paid for registration through a receipt dated 18/11/2010. The transfer was registered on 22/11/2010 and a certificate of lease dated 2/12/2010 was issued to them. They took immediate possession of the land in 2010 and fenced it off with posts and barbed wire in early 2011. By the time they purchased the land, the owner had already dug a pit latrine since he wanted to develop it. They covered the pit as it was a risk to the public. On 7/10/2018, as they were coming back to Nakuru from somewhere, they decided to pay a routine visit to the land. They found 2 men who had started digging holes to put up poles for fencing. They had just dug the second hole and they told the 2nd plaintiff that they had been sent by the 2nd defendant. The 2nd plaintiff then told them that the land belonged to him. He asked them for 2nd defendant's phone number and they gave it to him. He called him and he claimed to have purchased the land. He came to the land and showed PW1 the second title in the name of Sally Cherutich. PW1 then realized that the land office had fraudulently issued a second title to the suit land and the plaintiffs wrote a detailed demand letter



dated 15/10/2018 to the 3rd defendant and copied it to 4th and 5th defendants. There was no response. A copy of the presentation book kept by the 4th defendant was exhibited. It shows at entry No. 270 that the lease to Teresiah Wanjiku was registered in 2003. It shows the receipt number 530159 which is the same number in the receipt produced in evidence. The plaintiffs maintained that the 4th defendant cannot claim that no lease was registered earlier on. The certificate of lease in favour of the 1st defendant was issued on 6/9/2018, more than 15 years since the first lease was registered in favour of Teresiah Wanjiku. The plaintiffs became proprietors of the land in 2010, 8 years before the 2nd defendant got her title. The land therefore has a history of ownership dating 15 years prior to issuance of title in favour of 1st defendant. It has had 3 owners before the 1st defendant appeared. PW1 stated that Item No. 7 in 1st and 2nd defendants' list of documents is a sale agreement dated 3/9/2018, which is a date before the 1st defendant obtained a certificate of lease. It shows that the 1st defendant was quickly getting rid of the property and that she knew that her title was fraudulent. Her lease is dated 9/8/2018 and she sold the property within 3 weeks of the issuance thereof, even before her certificate of lease was issued and no explanation is given as to why she sold it so quickly. The 2nd defendant is the one who gave the 2nd plaintiff a copy of the 1st defendant's lease and certificate of lease. The 2nd defendant has never been in possession of the land. He tried to take possession in 2018 but PW1 confronted him. PW1 produced the documents in plaintiff's list dated 17/12/2018 as PExh.1 to 21 respectively and the document in the plaintiff's supplementary list of documents is marked PExh.22.

7. PW1 denied having ever sold the suit land to anyone since purchase and added that the plaintiffs still hold the original certificate of lease. To PW1's knowledge, the land has also never been compulsorily acquired by the government and they have never been compensated for any such acquisition. He maintained that it is not possible to have two titles to the same land and that one of them has to be fraudulent; that the plaintiffs obtained their documents from the government through the land registry and that the registry demonstrated that Mr. Kiplangat had owned the land. He prayed for judgment as per the plaint.
8. While under cross-examination by Mr. Wambeyi PW1 stated that they reported the parallel title to the police on 8/10/2018 and that PW1 recorded a statement with the police; that the matter is still pending under police investigations. The 2nd defendant was summoned by the police but PW1 is not aware whether she recorded a statement with the police.
9. PW1 stated that PExh.1 has a reference number 197888; on the letter dated 5/12/2018 which states that file No. 197888 is missing or non-existent, PW1 disagreed with its contents. He also disagreed that the 1st defendant's lease is the correct one and averred that the land registry is the custodian of land records. He stated that when he reported the matter to the Directorate of Criminal Investigations (DCI), he expected the DCI to prosecute the criminals. It is the Commissioner of Lands who gave instructions for the plaintiffs' lease to be registered yet it is the same lands office that later claimed through the Chief Land Registrar that the plaintiffs' lease is non-existent. The presentation book is stamped and signed with the original stamp and signature of the Land Registrar but it does not state that it is a certified copy of the original. It does not have the number or name of the Registrar who signed it. His PExh.1 to 6 are not certified copies of originals. He did not have any written request from Mr. Kiplangat to the Land Registrar to supply the documents. PW1 sought the documents through his then law firm. He tasked his conveyancing clerk to obtain them and he believed that his clerk had no interest in lying to him. PExh.6 does not state who applied for the search. The back of the document was not filled. They had 3 conveyancing clerks and he does not remember which of them applied for the search. The advocate in his office who handled the transaction was a Mr. Kennedy Ochieng. He does not have any sale agreement between Teresiah and Kiplangat. In PExh.3 the date of attestation is not indicated. PW1 stated that he had confirmed that the 1st defendant's lease is not genuine since



there is already an existing lease in their name. The 1st and 2nd defendants participated in a criminal, fraudulent or corrupt process. He does not have a certified copy of his title because the entire file is missing from the land registry.

10. Under cross-examination by Mr. Weche PW1 stated that he bought the land from the second registered proprietor after doing due diligence before purchase. As and when they went to the land office, the said office gave the plaintiffs all the documents that they needed. That is how they got the documents that they have produced. The property was transferred to them on 2/12/2010 and paragraph 3 of PW1's witness statement has an error on the date. He reiterated that the transaction was handled by his then law firm and that the police have not of late briefed him on the outcome or progress of their investigations. According to him the investigations are not complete and no charges have so far been preferred against anyone. His PExh.1 is dated 3/2/2003. His PExh.3 was also dated 3/1/2003 and was registered on 19/11/2003. His PExh.5 shows that the property was registered in Kiplangat's name on 5/7/2004. They did all that the acquisition process demanded, from valuation and payment of stamp duty through the land office at Nakuru.
11. Upon re-examination by Mr. Matiri PW1 stated that they obtained the documents produced as PExh.1 to 6 in the year 2010. He did not have any court case in mind at that point. The Land Registrar effected registration in their favour and duly issued the plaintiffs with a certificate of lease. The lands office has never given the plaintiffs any communication stating that their title is not genuine.
12. With the close of PW1's evidence the plaintiff's case was marked as closed and the defence hearing began with the evidence of DW1, Gildine Gatwiri Karani, Principal Land Registration Officer based at the Chief Land Registrar's office, Ardhi House, Nairobi. Her evidence is that she is aware of a lease dated 9/8/2018 in respect of Nakuru Municipality Block 23/728. It originated from their office. Normally, when a lease is ready for registration, the Chief Land Registrar forwards it through a forwarding letter. The said lease is registered in favour of Sally Cherutich ID No. 10704473. The correspondence file number is CF308230. The lease was registered on 6/9/2018. A copy of the lease was produced as (DExh.1). It was forwarded from the Land Administration Department for onward transmission to Land Registrar Nakuru through letter dated 9/8/2018 under Reference No. 308230. She produced a copy of the forwarding letter (DExh.2) dated 9/8/2018. A second letter dated 9/8/2018 under Reference: CLR/FL Vol.11/24 (DExh.3) was issued by the Chief Land Registrar. Her colleague wrote a letter dated 5/12/2018 under reference No. 308230 (DExh.4) to the District Land Registrar Nakuru. The letter stated that the correct lease originates from file No. 308230. She produced a copy of the said letter dated 5/12/2018
13. Under cross-examination by Mr. Wambeyi, she stated that each file at the Chief Land Registrar's office has details of how a plot originated from allocation to issuance of title and she is not aware whether any plot can have two file reference numbers.
14. Under cross-examination by Mr. Matiri she stated that she did not bring the correspondence file in respect of the property; that the author of the correspondence file is the Land Administration Department; that the copies of the letters that she produced are in the custody of the Land Administration Department, a department different from hers; that the said department is not under the Chief Land Registrar but is under the Ministry of Lands; that the Chief Land Registrar's office merely forwarded the lease; that the Chief Land Registrar's office does not create leases but just forwards them; that she is not familiar with the process of creation or issuance of leases; that a Land Officer is the right person to shed light on creation of leases; that she did not have a chance to peruse the file in respect of the lease at the Land Administration Department as the witness summons were served on her on the eve of the hearing; that the letter which she produced is supposed to be in the correspondence file which she however had not seen or read the correspondence file before



coming to testify; that the reference numbers for the correspondence files are issued at the Land Administration Department; that she does not know if they are issued consecutively; that she is not aware of the nature of the dispute in this matter; that it is usual for files to go missing in the Land Administration Department; that when Mr. F. N. Orare wrote DExh.4, he was in a sub-department known as Conveyancing sub-department within the said Land Administration Department; that she is not aware whether the Land Administration Department looked for file No. 197888; that from the contents of DExh.4, there is a possibility that file No. 197888 was not missing or non-existent; that she was aware that restrictions were registered against the suit property on 11/10/2018 and on 16/10/2018 on account of suspected fraud. When DExh.4 was written, there was already suspected fraud; that she was not aware of any efforts that were made to trace file No. 197888 and if there was a properly issued lease then the first lease would take priority.

15. Under re-examination by Mr. Ondieki, she stated that she had a copy of white card for the suit property which shows the first entry was on 6/9/2018 in favour of Sally Cherutich. There is no other entry showing ownership. The documents that she produced in her evidence-in-chief were retrieved from their office and she had not left behind any document. The white card originated from Nakuru and not their Nairobi office. It is the duty of the owner of any purported missing document to trigger a search for it. Besides the documents she produced, there are no other documents showing that the property was leased to someone else.
16. DW2 – Raymond Gitonga Kubai, Land Registrar, Nakuru adopted his witness statement that was filed on 26/8/2019 as part of his evidence. According to him, the land office received a lease from Nairobi in respect of Nakuru Municipality Block 23/728 in triplicate through a forwarding letter dated 9/8/2018, Ref 308230. The lease was in the name of Sally Cherutich. The lease document had the same reference number. The lease was booked for registration on 6/9/2018 and was registered on 6/9/2018. A certificate of lease was issued on the same day in favour of Sally Cherutich. DW2 produced a copy of the white card (DExh.5) in respect of the property. It was opened on 6/9/2018. Entry No. 3 is a restriction placed by the District Land Registrar on 11/10/2018. It was placed after the District Land Registrar received a complaint from the plaintiffs who claimed that they owned the land and that they had a title for the land. He believes that some documents were forwarded to the Directorate of Criminal Investigations. He does not however know how far the investigations have gone. Regarding the allegations of fraud against the lands office, he stated that they only registered documents that were forwarded to them from Nairobi and he was am not aware of any member of their office who was charged with fraud in connection with the property. They did the registration in good faith and as per the documents that were forwarded to them. He was also not aware of any other record which contradicts the registration in favour of the 1st Defendant. When the allegations of fraud arose, the lands office at Nakuru wrote to the Chief Land Registrar on 16/10/2018 seeking confirmation of authenticity. They received a response dated 5/12/2018. They were advised that the correct lease emanated from file No. 308230 in the name of Sally Cherutich. They were advised to proceed with registration. They have so far not received any contrary information that can challenge the registration. All the leases that they register come from Nairobi and they only register them as instructed.
17. Under cross-examination by Mr. Wambeyi DW2 stated that they do not have any other file or white card at the land registry relating to the suit property and the copy of a certificate of lease dated 6/9/2018 in favour of the 1st defendant tallies with the details in DExh.5. He was not aware of any other lease for the suit property in the name of any other person besides the 1st defendant. He had a folder with copies of documents that were provided by the plaintiffs to prove ownership of the land and which were the basis upon which the restrictions under entry No.3 in the white card was made. He reiterated that upon placing the restrictions, they wrote to the Chief Land Registrar seeking confirmation of authenticity of the plaintiff's documents. The Chief Land Registrar advised them to proceed to register



the 1st defendant's lease. He is not aware if the plaintiffs came back to the lands office to ascertain the response from the Chief Land Registrar. It is not supposed to be the case that two white cards or green cards would exist in different names of properties over a single parcel of land. In this case, he was not aware of any other white card or green card for the same property. If any other party has a title to the suit property, he could not confirm if it originated from DW2's office but the white card that he produced came from their office.

18. Upon cross-examination by Mr. Matiri DW2 stated that besides being Land Registrar, he was an advocate of the High Court of Kenya familiar with land registration issues and he was aware of cases of fraud. He has encountered quite a number of land fraud cases and there have been cases of lost files and missing registers. The leases are not usually prepared by the local land offices. They are prepared by the Land Administration Department. In this case, there was a government lease. Normally, a person applies for allocation of land and they are then given an allotment letter which has certain conditions. Item No. 3B in 1st and 2nd defendant's bundle of documents is a letter of allotment dated 8/2/1997. A letter of allotment is an offer which has to be accepted. The allottee has to pay the stand premium as indicated in the letter of allotment so that the land is allocated to him. The letter of allotment dated 8/2/1997 required the 1st defendant to pay Kshs. 18,235. Item No. 4 in the 1st and 2nd defendant's aforesaid list is a bankers' cheque dated 9/5/2018, some 21 years after the letter of offer. The condition was that they pay within 30 days from 8/2/1997. The lease document of the 1st defendant was created by the Land administration Department and submitted to the Chief Land Registrar who then forwarded it to Nakuru. The land registry Nakuru had no other role to play apart from registration of the lease. The 1st defendant was registered as owner on 6/9/2018. The plaintiffs brought to the Land Registrar inter alia a copy of a certificate of lease in their name, transfer from previous owners, rent clearance certificate, a lease registered on 19/11/2003 in the name of Teresiah Wanjiku. The lease was signed by one Sammy Mwaita who was Commissioner of Lands then. The plaintiffs also submitted a copy of certificate of lease dated 19/11/2003 in the name of Teresiah Wanjiku, a copy of transfer dated 27/10/2010 from Samuel Kiplangat to the plaintiffs, a copy of certificate of search dated 20/4/2010 showing Samuel Kiplangat Cheruiyot as owner, a copy of a sale agreement dated 2/7/2010 between Samuel Kiplangat and the plaintiff. They also gave the lands office a copy of a letter of consent dated 1/7/2010 from Commissioner of Lands allowing Samuel Kiplangat to sell the land. They also gave copies of various receipts including for payment of stamp duty and rates. All these documents pre-date the lease of the 1st Defendant by decades. PExh.2 is a receipt with serial No. F530159. If all these copies which the plaintiffs gave them were availed prior to issuance of the 1st defendant's certificate of lease, they would not have registered her lease or issued a certificate of lease to her. A presentation book is one of the documents that we keep at the land registry. PExb.22 is a copy of presentation book. It is signed and stamped by the Land Registrar Nakuru. Entry No. 270 in it is in the name of Teresiah Wanjiku and is in respect to the suit property herein. The entry No. 270 is dated 19/11/2003. The entry has a receipt number 530159. It is the same number as that in PExb.2. A presentation book is the register kept in the registry showing all documents presented for registration. It is numbered consecutively. He did not have the original Presentation Book for the year 2003 with him here in court as he was not informed that it was required in court. It may be difficult to retrieve a register of 2003. If he had the presentation book, he would have confirmed that a lease was presented in 2003. Prior to registration of the 1st defendant's lease, there was no white card for the suit property in anyone's name. Since he is not the maker of the 1st defendant's lease, the forwarding letter and the white card, he is unable to say that they are fraudulent. He reiterated a third time that it is not supposed to be the case that one parcel of land has 2 certificates of lease in the names of 2 different people. If there are 2 titles, there must be fraud involved. If there is no register, then one cannot transfer land. There must be a white card or green card for a parcel before transfers can be effected on



any land. He had not seen any of the plaintiffs' original documents and he could not therefore tell that they had a register. If they transacted on the land, then there must have been a register in their favour. The letter dated 16/10/2018 from the Nakuru lands office to the Chief Land Registrar was written following plaintiffs' complaint. File number 197888 is mentioned in the said letter. He has not seen file NO. 197888. It is a Nairobi file and he does not know if its contents would have invalidated the 1st defendant's lease. He is not familiar with how the file numbers are generated. Mathematically, number 308230 comes after number 197888. In DExh.4, the author did not state that file number 197888 belongs to someone else other than the plaintiffs. By the time DExh.4 was written, the 1st defendant's lease had been registered on 6/9/2018. The certificate of lease was issued the same day the lease was registered. The date of presentation is usually the date of registration and the certificate of lease is dated the same date. Normally for one to do search, one must present a copy of the title. It was not possible to conduct a search on the suit property on 5/9/2018 since the title had not been issued.

19. Under re-examination by Mr. Ondieki PW2 stated that it is possible for people who claim land to manufacture fraudulent documents. The Chief Land Registrar confirmed to them that there was no contrary information and so they should proceed. Every Registrar has an individual number. He cannot confirm if the presentation book in respect of PExh.22 exists in their office.
20. At that juncture the respective cases of the 3rd, 4th and 5th defendants were marked as closed.
21. DW3 – Peter Obure Ondande adopted his witness statement filed on 11/9/2019 as his evidence-in-chief. He stated that he is a property agent trading as Sakawa Enterprises Ltd; he purchased Nakuru Municipality Block 23/728. He also relied on the 1st and 2nd Defendants' List of documents dated 6/9/2019 and filed on 11/9/2019. He produced the documents listed as number 1, 3, 8 and 9 in the said list as exhibits.
22. DW3 stated that the Plaintiffs had stopped him from fencing the plot and then it was agreed that none of the parties should do anything on the land. He met the 2nd Plaintiff on the property on 5/10/2018. They agreed to meet the next day at the Land Registry in Nakuru. He prayed that he be given back the suit plot and for costs.
23. Under cross-examination by Mr. Leting, DW3 stated that he personally signed the documents that he had produced at the hearing earlier and lodged them at the Land Registry. The 2nd Plaintiff has never shown him any document showing that he owns the suit property. According to him the 4th defendant has not done anything contrary to the law but acted on the basis of the documents which DW3 provided.
24. Under cross-examination by Mr. Matiri DW3 stated that he has been a property agent for more than 20 years engaged in the business of buying, subdividing and selling plots and he has experience regarding plots. The suit property is in Naka, an area with many disputes on ownership of plots. According to him, there are fake titles that are prepared at River Road then registered without any corresponding records at the office of the Commissioner of Lands. He first saw the plot when he developed interest in it. That was in 2018. He does not remember the month. His sale agreement was executed in September 2018. He got interested in the property before September 2018 when the seller was processing the lease documents. The lease document is dated 9/8/2018 and signed by the Land Registrar on 6/9/2018. The 1st defendant's certificate of lease is dated 6/9/2018 while DW3's sale agreement is date 3/9/2018. The 1st defendant kept telling him that the title was being processed. That was before they did the sale agreement. He conducted a search on 24/9/2018. He however did not conduct any official search prior to entering into the agreement. Normally one needs a photocopy of title, copy of ID and KRA PIN conduct a search. As at 3/9/2018 when he entered into the agreement, he could not conduct any search since there was no title. He knows the importance of search and due diligence. Without



the due diligence he could not know if there were any adverse claims. He established the status of the land by going to the headquarters of the Ministry of Lands prior to entering into the agreement. He went to check in Nairobi in June 2018 before the lease was signed and dispatched. When he went to Nairobi, he saw evidence in a file that a lease had been drafted but still not signed; he saw an allotment letter and evidence of payment. That letter of allotment is in the defendant's list of documents. The 1st defendant was to pay the amount in the letter if allotment within 30 days from 8/2/1997. The 1st defendant paid 10 years later. He inspected the plot many times prior to purchasing it. When referred to paragraph 4 of his sale agreement he stated that he did not foresee any repossession. The term was an ordinary term of an agreement. As indicated at Clause 9, he had inspected the property and was buying it with full knowledge. As per Clause 8, he was to take possession immediately and it was started that the property had a two storeyed building. The two storey building referred to is what he intended to construct upon purchase. However, at the time of purchase, there was no two storey building on the plot and it was vacant. He signed the agreement and paid Kshs.1,320,000/= upon execution of the agreement. He was to take possession upon paying the deposit. He went to fence on 4/9/2018, the day after execution of the sale agreement. He did not continue fencing after the 2nd Plaintiff came to the site. Currently, the 2nd Plaintiff's cousin is running a hardware on the property. He has been doing so immediately after he met the 2nd Plaintiff on the site. He was in possession from the time of his sale agreement to two days after the agreement. Since then, the Plaintiffs have been in possession. The balance of Kshs.800,000/= as per Clause 1(b) of the sale agreement was paid on 31/12/2018. The Kshs.380,000/= as per Clause 1 (c) was paid on 2/1/2019. By the time DW3 was paying the balance, the 2nd Plaintiff had stopped him from constructing the fence. DW3 got the documents listed as item No. 10, 11 and 12 in his list of documents from the Criminal Investigations Department, even before he paid the balance of the purchase price. He was confident that the Plaintiff's documents were fake. That is why he paid the balance of the purchase price. He has not gone to the Land Registry in Nakuru to verify if the presentation book that the Plaintiffs produced as PExb.22 is genuine. It is not true that he is the one who processed and followed up the 1st defendant's title documents.

25. Under re-examination by Mr. Wambeyi, he stated that the 2nd Plaintiff did not show DW3 his document of title when they met on site. That regarding the Plaintiffs' documents which DW3 has included in his list of documents, he obtained them from the CID. When they met on site they agreed that they would both keep off the site. The plot was vacant when he went to fence it. He transacted freely with the 1st defendant and paid according to the sale agreement. When he did his due diligence at the Ministry Headquarters, he confirmed that the 1st Defendant's allotment had not been cancelled. Apart from the 1st Defendant, there was no other allottee. He does not know if the Plaintiffs' documents of title were plucked from the parcel file. After meeting the 2nd Plaintiff on site, he went to the lands office to check if the 2nd Plaintiff's documents were genuine. He discovered that they were not genuine.
26. DW4 Joseph Yego, testified and stated that he was the husband to late Sally Cherutich, whom he married in September 1983 and was the Administrator to her Estate named in the Limited Grant issued to him. DW4 adopted his witness statement filed on 17/6/2022 recorded on 23/5/2022.
27. DW4 also relied on the documents listed in the list dated 6/9/2019. LR No. Nakuru Municipality Block 23/728 belongs to Sally Cherutich. He went with Sally to Nairobi with an allotment letter she was given in 1997. Sally was a nursing officer at Provincial General Hospital Nakuru with the Ministry of Health. Sally had received a letter of allotment. They went to the Ministry of Lands and were told to wait for one day to establish if the land was still available. They went the next day and were told the land was still available and Sally paid Kshs. 18,235/=. Then they went back home. Sally was by then in Moi Referral Hospital in Eldoret. DW4 followed up the matter until they were given a lease. Sally was



- given a letter to come to Nakuru Land Registry. After 3 days DW1 came for the certificate of lease. By that time, Sally's health had deteriorated. They thought of selling and sold the land to Peter Omande the 2nd defendant for funds for medication. They sold it at Kshs. 2,500,000/=. DW4 took Mr. Omande to the site where the land was and he told him to take over. That was in 2018. During that time the land was vacant. The next day he went to fence and a person came to stop him from fencing and they went to the CID Office, Nakuru to report the matter where he submitted the documents DW1 had given him.
28. DW4 denied the contents of the Further Amended Plaintiff alleging that there was fraud on Sally's part. He and Sally were not aware the plaintiffs had already procured title to the land by the time they got the lease. DW4 was not aware of any tampering with the records at the lands office. They did not cause disappearance of the records of the plaintiffs to title. There was no criminality. He is not aware of any Criminal charges preferred against Sally in respect of the suit land. They were in occupation by the time of selling it. His prayer is that the plaintiffs' case be dismissed with costs and the land be reverted to the defendants.
29. Upon cross-examination by Mr. Matiri DW4 stated that he would not have been a witness in this case but for the demise of his wife; that DExh.6 is dated 3/9/2018 and Mr. Omande must have done a search on the property. He admitted that one cannot conduct an official search without a certificate of lease. DExh.7 dated 6/9/2019 came after the agreement. By time of the sale of the land, they were in the process of registration. DW4 had visited the land several times before it was sold. It was vacant.
30. When referred to paragraph 8 of the sale agreement, he stated that his wife was not selling a two storey building and one can not miss a 2 storey building; that Paragraph 9 states that the purchaser had inspected the property. DW4 took Peter Omande to the suit land. He sold him a vacant parcel of land. Sally sold the land while she never had the certificate of lease. They had approached Mr. Omande seeking to sell the suit land for medical reasons. He took Mr. Omande to Nairobi. The plot is in Naka Estate, Nakuru but the records of land are in Nairobi. If one was to search, he would go to both Nairobi and Nakuru. When shown paragraph 4 of agreement DW4 stated that he was there when his wife was signing the agreement. Sally was given a letter of allotment in 1997. DW4 has never worked for the Ministry of Lands. When referred to paragraph 2 of the letter of allotment he admitted that his wife was to pay the Kshs.18,235/= within 30 days and that payment was not done within 30 days, but on 9/5/2018, more than 11 years after the issuance of the letter. His wife used to visit the land. DW4 never found anyone on the land. Now someone has put up a carwash and there is a hardware on the premises. He can see the plot from the highway. There are water tanks. Those people moved there after he sold the land in 2018.
31. DW4 took Mr. Omande to Nairobi, maybe a week before the agreement. They indicated he could take possession immediately. He was almost completing payment. When shown paragraph 6 of the counterclaim, DW4 stated that somebody came after they sold the land. The day after he showed Peter Omande the land, he went to fence the land and in the process of fencing, someone came to claim ownership of the land. He called DW4 while he was at Eldoret. DW4 sold the suit property on 3/9/2018. There was no other agreement before.
32. When shown agreement – DExh.6, he stated that Peter was to take possession immediately upon payment even if there was a balance. They received the balance in December. By the time the payment of the balance was made someone had told Peter that he owned the land. He had never met that person.
33. When shown DExh.7, DW4 stated that the plaintiffs' certificate of lease is dated 2/12/2020. The plaintiffs had a sale agreement with a Mr. Samuel Kiplangat Cheruiyot. He admitted that the plaintiffs' documents are all in respect of plot Nakuru Municipality Block 23/728 including a letter dated 3/2/2003 from the Commissioner of Lands purportedly forwarding the lease of Teresiah Wanjiku and



a certificate of lease and they relate to the period before his lease. He did not have any records in the Lands office before his lease was issued. He can not say that theirs is the only true record. It is not true that he is the one who in cahoots with others plucked out the plaintiffs' land records from the Lands office. He does not know why paragraph 4 of DExh.6 was included in the agreement. The suit land is prime land. There are maisonettes, bungalows, flats. There can be plots at Naka still having no certificate of lease. The certificate of lease was still in preparation. The lease was signed on 9/8/2018 in Nairobi. His wife signed the lease on 6/9/2018. She got a certificate of lease the same day. The certificate is dated 6/9/2018. On the lease there is a place for certification. There is no date. There is no certification. On the same day it was registered the certificate was issued. When DW4 went to Nairobi he was told to wait for one day to check whether the land was still available.

34. Upon re-examination by Mr. Wambeyi DW4 stated that he was present when his wife was signing the lease. He was not aware of any interest by the plaintiff. In Nairobi, he saw the plaintiffs' documents in their bundle way after. He does not know the originality of the plaintiffs' rates payment receipts and other documents.
35. They were never brought to his attention or his wife's attention while they were pursuing the lease. He did not push for payment of the balance of consideration by the 2nd defendant with any ulterior motive. He did not doubt their lease. They went with Peter Odande to Nairobi and he read the files there and he was satisfied. They went to the Ministry of Lands. There is an allocation file No. 30884. There would be a stroke according to one's letter of allotment. Theirs was No.36884/XXIV. There was no other letter of allotment for plot No. Block 23/728. The Lands Office never told DW4 that there was any other file for the suit land. He had possession. There was no-one else on the land until the day DW4 took Peter Odande there.
36. When referred to the lease certificates for Sally Cherutich and the one for Munyao Sila and Linda Chepkorir Ruto DW4 stated that Sally's lease was for 99 years from 1/2/1997 and Munyao's was for 99 years from 1/2/1998.
37. DW4's evidence marked the close of the 1st and 2nd defendants case.
38. The Plaintiffs were ordered to file and serve their submissions within 21 days and the defendants to file and serve their written submissions within 21 days from the date of service of the plaintiffs' submissions upon them.

Submissions

Plaintiffs' Submissions

39. In their submissions the plaintiffs recapped the evidence given at the hearing and identified the issues for determination as follows: whether the plaintiffs have proved the existence of prior proprietorship of the land before the 1st defendant's lease; whether the plaintiffs have proved fraud and whether the plaintiffs are entitled to the prayers sought in the plaint.
40. Regarding the first issue, the plaintiffs answered it by stating that they produced an host of unrebutted documents including the presentation book which established that it was impossible for Samuel Kiplangat Cheruiyot and Teresia Wanjiku to have transacted as they did unless there were records at the lands office showing them as proprietors of the lease. They also submitted that it was evident that the said records must have been tampered with and removed or destroyed much later after 2010, and that new records were created in August 2018 showing that the 1st defendant was the first lessee. Further the plaintiff had possession all through and the 2nd defendant's attempt to take possession was immediately thwarted on day one. The plaintiff faults the dramatic registration of the 1st defendant as proprietor



stating that in less than 3 weeks from the start of the process, her title had already been issued. In an office which is laden with delays and inefficiency, the plaintiffs view this as an impossible feat, and as a pointer to the lack of propriety in the process; that DW4's evidence was that within one day the offer was confirmed to be still existing and the letter of allotment was immediately paid for by way of a bankers cheque; Further, within a short while, the plaintiff had already disposed of the land even before certificate of title was issued to her and even before the 2nd defendant had conducted any official search. The letter of allotment was void for non-compliance with the terms therein and had lapsed. The plaintiff relied on *Ali Mohamed Dagane Vs Hakar Abshir & Another Garissa ELC Case NO 65 Of 2017 [2021] eKLR*. *Bubaki Investment Co Ltd Vs National Land Commission & 2 Others 2015 eKLR*) *Joyce Kilonzo V Attorney General & 3 Others [2022] eKLR*; no application for extension of time was produced and there can be no basis upon which to state that the 1st defendant had complied with the 1997 terms of offer. The case of *Malindi ELC Petition No E015 of 2020 Wycliff Tembo & Another V Vipingo Development Ltd & Others (unreported)* was relied on.

41. The plaintiffs asserted that they had proved fraud. They reiterated the issues pointed out above and added that two certificates of title ipso facto depicted a case of fraud as in *Warson Ltd v Richard Mwangi Wachira & 5 others 2019 eKLR*; that the plaintiff's records held by the 4th defendant were destroyed and later new documents showing the 1st defendant as owner were created. The Land Registrar is said to be mute on the investigations regarding the two titles and that is an indicator that the land registry must have been involved in the fraud. *Joseph Kiprotich Bor V Tabutany Chepkopech Chebusit [2021] eKLR* was cited by the plaintiff where court stated that an older title had to be cancelled before a new one could be issued.

1st and 2nd Defendants' Submissions

42. The 1st and 2nd defendants averred that the plaintiffs never discharged their burden of proof of fraud was against them as required by Sections 107, 109 and 112 of the Cap 80 and stated that it is indeed the plaintiffs who were guilty of fraud. In the very same breath, they aver that as the police charged nobody with any criminal offence in the dispute, no misrepresentation or fraud or criminality had crystallized. They relied on *Joseph Karisa Mutsonga V Johnson Nyati 1985 eKLR* and *Gladys Wanjiru Ngacha v Teresa chepsaat & 4 others 2013 eKLR* for the proposition that charges of fraud should not be lightly made or considered. They also relied on the cases of *Edward Mwangi Irungu v Chief Land Registrar & others 2018 eKLR* and *Elizabeth Wanjiru Evans v Richard Kipdilaat & 2 others 2019 eKLR* that where there are 2 titles, the court will need independently assess the genuineness of each title based on the evidence that both parties have presented; *Baruthi Bundi v Demitila Obala Ouma & 2 others* was relied on for the proposition that the Land Registrar's evidence is too important to be ignored, especially regarding his evidence on the alleged suspect nature of PExh.22, and they averred that the court should find that document to be of no probative evidential value.
43. The defendants charge that the plaintiffs rushed to court without serious investigations having been concluded; that they failed to apply for certified copies at the registry; that they did not declare which Land Registrar gave them the Presentation Book or when the same was sought by them; that it is a strong indicator that when the plaintiffs wrote the only letter a restriction was registered against the title; that, relying on *Ibrahim Onyinkwa & 2 others v Royal Media services Ltd 2013 eKLR*, the defendants submitted that the plaintiffs have failed to take all measures to ensure that the makers of the documents they produced were availed to court to produce them, yet the defendants had ensured that all the makers of their documents were availed; that the plaintiff failed to account for non-production of the originals of his documents so as to satisfy Section 68 of the *Evidence Act* yet according to the decision of *In The Estate of Charles Ndegwa Kiragu 2016 eKLR* probative value does not lie in mere copies; that the 1st and 2nd defendants have demonstrated how they obtained title while the plaintiff's



documents remained unverified, questionable and without basis. The defendants averred that it is the duty of any landowner whose documents are missing to trigger a search. They questioned why Teresia and Kiplangat, the plaintiffs' successive predecessors in title were not called to testify, and advanced the theory that the plaintiffs were not "hands-on" in the acquisition process and so they were deceived by their conveyancing clerks; that the original lease PExh.3 lacks a date and could not be registered; that Sally's offer has never been revoked withdrawn or assigned to another person; that with the State favouring the defendants, the offer of allocation was still valid. They rely on the case of Philemon Wambia V Gaitano Lusitsa Mukofu & 2 Others 2019 eKLR in which the court observed that the documents of the defendants were questionable and no one from the head office where they were allegedly obtained had been called to give evidence, and if the documents were genuine he could have called those who gave him the documents.

Determination

44. Having analyzed the parties' pleadings, evidence and the filed submissions this court is of the view the main issue that arises for determination is which between the plaintiffs' and the 1st defendant's leases should be upheld.
45. The plaintiffs' case is that the defendants whilst knowing that the plaintiffs owned the land, procured a fake lease in the name of the 1st defendant and had it registered at the land registry in Nakuru notwithstanding the existence of plaintiffs' lease in respect of the suit land, and that the defendants also caused the disappearance of the genuine parcel file containing the record of the plaintiffs' title at the land registry.
46. The defendants on the other hand deny the plaintiffs' claim and, while raising a counterclaim against them, aver that the 1st defendant was the bona fide owner of the suit property having been allocated the same in the year 1997 and that she had vacant possession of the same.
47. Upon a first impression, both the plaintiffs' and the defendants' respective cases appeared weak and it was not until the wholistic evaluation of the conduct of the parties herein was carried out that the truth began to emerge. This was so because some of the documents that the plaintiffs have produced in evidence are said to have been issued by the Nakuru Lands Registry which documents could not be traced while on the other hand, the expedition with which the 1st defendant's certificate of lease was procured left doubt regarding the propriety of the process. Besides, the haste with which the 1st defendant sold the land to the second defendant on 06/09/2018 which was before she was issued with a certificate of lease added to the misgivings regarding the bona fides of her actions with regard to the land. Further, since the root of the subject titles was being challenged, and none of the parties called evidence from the Land Administration Department both seemed doomed to fail.
48. With progressive consideration of the evidence in this case some rather vital admissions from both sides in the present dispute are to be noted. It is also noted that the materiality of the omissions to bring certified copies of documents on the part of the plaintiff and the omission to call officers from the Land Administration Department affected the plaintiffs and the 1st defendants' cases in very different ways. However, it is to be noted that the defendant's "open and shut case" that the plaintiffs' document can not be found at the registry and are therefore invalid and fraudulent renders this judgment to focus less the matters of the plaintiffs' case and almost disproportionately, but rightly so, rivet the greater focus on the defendants' case.
49. First, it is admitted that the 2nd defendant was restrained from fencing the suit land on the very first day. Other than plead that he had possession the 2nd defendant has not brought evidence to demonstrate how so, and has failed to also explain how the plaintiffs who stopped his fencing of the property on



the first day of that exercise could be said not to have had possession before he purported to acquire it. Therefore, this court is of the view that the plaintiffs, whose evidence that they had earlier fenced the land and deposited building materials on the premises was uncontroverted, had possession of the suit land long before the 2nd defendant came onto the scene; This court is persuaded that the plaintiffs had possession since the year 2008 when according to them they purchased the suit land from one Kiplangat.

50. Secondly, it is also admitted by both parties that the 1st defendant's certificate of title, whatever the means employed to obtain it, emanated from the lands office at Nakuru while the certainty of the place of origin of the plaintiffs' certificate of title has been left open to deduction on the basis of the evidence adduced by the parties, for the plaintiffs aver that the land registry records which would have otherwise been evidence of the existence of their certificate of lease simply disappeared and the defendants aver that they are non-existent.
51. Apparently, the 1st and 2nd defendants' greatest basis for rejoicing in the present case is that their documents passed through the Land Registry and were recognized by the 3rd and 4th defendants and the evidence of the 3rd and 4th defendants in their favour. However, it is not the mere act of obtaining the documents through the Lands Office or their recognition by the Land Registrar that can make this court unquestioningly uphold the said documents, for other factors have to be considered. Obviously, were that the most important factor then the contest with the 1st and 2nd plaintiffs would have been over even before the suit was instituted, for the plaintiffs' plea is that their documents were abstracted from the Land Registry to an unknown destination and there is simply nothing against which the copies they obtained at the due diligence stage can be verified, yet at the time of purchase and for long after that, they had never anticipated any litigation, which normally requires strict proof.
52. In this court's view, the defendants' reliance on the proposition, as supported in the Philemon L. Wambia case (supra) that documents are questionable because of absence of their records among the Land Office Records and by reason of the plaintiffs' failing to call witnesses from the Head Office which was alleged to be their source, presupposes an ideal situation where the person required to so summon those Head Office witnesses actually dealt with them during the processing of the lease. However, the plaintiffs' case herein is different, for from the evidence presented, the only office which they can be presumed to have had contact with is the local Land Registry at Nakuru which has already disowned the documents.
53. When all the evidence of the parties is weighed, there are some lingering inconsistencies in the defendants' evidence. First, they fault the plaintiff's documents as lacking any certification to show they emanated from the lands office; then they state that they have established that the 1st defendant's documents went through the lands office yet the actual authors of those documents were also not called as witnesses in proof. For instance, DW 3 is not the person who registered the lease or authored the certificate of title of the 1st defendant: one C. W. Sunguti did so on 6/9/2018 yet he was not called to testify; neither was F.N. Orare, the author of the 1st defendant's lease called to testify. The defence never indicated whether these very pertinent witnesses were still in the service or not, yet they were the persons most apt to answer questions regarding the documents that DW1 produced. The irony is that the said omission places the defendants' evidence in the same category as the plaintiffs' for none of them called the authors of their respective documents, and this court has to bear that in mind as it now seeks to establish if there was fraud or which title is better than the other.
54. In a case such as the present, one can not help but ask very pertinent and vexing questions e.g. by the time the 1st defendant was registered there were already all the hallmarks of a very serious dispute in the offing yet the 3rd and the 4th defendants never halted the process that gave the 1st defendant her lease;



- also, the 4th defendant never produced the original Presentation Book despite notice to produce having been issued on the plaintiff's behalf that the same required to be so produced. There was not even an attempt to bring a copy that could show that the entries that the plaintiff relied on to assert that Teresia's lease had been registered in the Nakuru Land Registry were false; further, time for acceptance of the offer to the 1st defendant had expired and there was no extension thereof either expressly sought or given; there was also palpable expedition in the issuance of lease to the 1st defendant and disposal of the land. In addition, the 4th defendant appeared not too keen to pursue investigations into matters that necessarily involved his office and he was also not aware of the outcome of police investigations into it.
55. It would be surprising for the 3rd and 4th defendants to expect the police to do all the primary work of establishing which document between the plaintiffs' certificate of lease and the defendant's certificate of lease is genuine without any serious input from the 3rd and 4th defendants. No matter what decision the police arrived at upon investigations into the matter, the same would have been very much reliant on the evidence collected by the 3rd and 4th defendants and the conclusion of their own internal investigations. Without these for guidance the police could do nothing of any help in the matter. It therefore does not help the 1st and 2nd defendants' submissions even for a moment to state that the plaintiffs never followed up keenly with the police for a conclusion of police investigations. It should be much to be regretted that from the 3rd and 4th defendants' offices, a detailed process of establishing the truth in the dispute commencing with the summoning of the parties and their witnesses, critical examination of documents and drawing of concrete conclusions thereon, and formal communication of the outcome to the concerned parties, and finally the making of relevant recommendations to the police was not demonstrated by the 3rd and 4th defendants.
56. The 1st and 2nd defendants revel in the evidence of the Lands Ministry officials whose testimony favoured their case. However, this court rejects the proposition that proof of fraud is entirely predicated upon whether the 3rd and 4th defendants have testified for or against any title owner. This court also rejects as repugnant to justice the proposal that any litigants' legal battle with the 3rd and 4th defendants should inevitably end up in victory for those land offices upon their mere declaration that the plaintiff's documents do not exist in the Land Registry for that sort of approach has potential to unwittingly appoint them referees in their own case. In addition, even while rejecting the foregoing proposal, I must also posit as a matter of caution that the court ought to conduct an objective evaluation on a case-by-case basis to avoid abuse of the process by unscrupulous plaintiffs. If one examines the evidence in this case wholistically, they will not fail to note the haste with which the 1st defendant's title was prepared and also the haste with which the 1st defendant sold the land to the 2nd defendant, the absence of any request for extension of the 30 days' period stated in the letter of allotment and the fact that there is absolutely no doubt that the plaintiff was already in possession of the plot and holding title documents by the time the 1st defendant's lease was registered. These features have necessitated this court to accord minute scrutiny to the 1st - 4th defendants' evidence.
57. The 1st and 2nd defendants rely on the fact that they had a letter of allotment which gave birth to the 1st defendant's certificate of lease upon compliance with the terms stipulated therein. It should be noted that the letter of allotment relied on by the 1st and 2nd defendants was dated 8/02/1997 and the copy produced before court is devoid of any attachment in the form of a Part Development Plan (PDP). This lack of a PDP is in itself a major flaw but since it has not been addressed by the parties I will not delve deeply into the omission, but I will examine if the allotment's terms were complied with. Among the allotment letter's terms was the payment of Kshs. 18,235 within thirty (30) days. It is not disputed that the said payments were made on 9/08/2018 which was 21 years later. The term as to payment within 30 days of allotment were not observed in the present case. This court agrees with the case of Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf



of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR where it was held as follows:

“In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] eKLR

“I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff.”

58. This was also the holding in the case of Bubaki Investment Company Ltd v National Land Commission & 2 others [2015] eKLR. In that case the letter of allotment was issued on 30/5/1997 and the payment was done on 8/9/1997. The Commissioner of Lands expressly wrote to the first allottee to say that no other grant could be processed hence it was explicit that the allocation had been cancelled as the land was already in a third party's name. The Hon Justice Mutungi held as follows:

“However, where an offer has a specified time within which it has to be accepted, no communication of the revocation would be necessary as it simply would stand revoked on the expiry of the specified period. A time extension and/or a fresh offer would be necessary to reactivate the offer....

Having held that the petitioner did not comply with the terms and conditions of the letter of allotment it follows that the petitioner could not and did not acquire any proprietary interest in the suit property notwithstanding the payment it made. The offer extended through the letter of allotment having lapsed by effluxion of time, there was no offer to accept at the time the petitioner made the payment. The petitioner ought to have sought and obtained a renewal of the offer and/or extension of the period within which to accept the offer...

This was not done and thus there is no basis upon which the petitioner can be taken to have complied with the terms of the offer of 30th May 1997. The Commissioner of Lands in my view was entitled after the expiry of 30 days from the date of the letter of allotment and provided there was no acceptance of the offer from the petitioner to treat the allotment as having lapsed and could re-allocate the property to any other person. Payment of the charges alone cannot connote acceptance of the terms of the allotment as a written acceptance was required under the letter of allotment.”

59. It is this court's view that it would go against good sense to have past allottees suddenly emerge from long periods of slumber and be deemed to have regularized their interest simply by making payments to the Ministry of Lands cash office long after the time provided for in the letter of allotment has lapsed. It is the worse when third parties have by the time of such regularization obtained title to the same land. I think it calls for deliberate and positive action not on the part of the cashier, but on the part of the land officers charged with allocation duties to take action that could be deemed to have regularized an allocation after time has lapsed. It is only those officers who are well placed to know whether a letter of allotment has been cancelled and if, after cancellation, another offer has been made to or accepted by a third party. In the event an offer has been issued to and accepted by another party, it would then



mean that the land is not available to the original allottee, and any purported renewal of the letter of allotment would not work in that initial allottee's favour. It is this court's finding that the purported compliance with the terms of allotment 21 long years after the expiry of the 30-day limit placed by the allotment letter did not confer any proprietary or other interest in the 1st defendant.

60. I will now address in detail the issue of the Presentation Book, copy an extract of which was produced as P.Exh 22. The averment by DW2 that it is difficult to find a presentation book for the year 2004 does not augur well for record keeping in a land registry that has title records dating back to the 1960s. how is it possible that a presentation book, a permanent record of whether any document was ever received for registration in the land registry, be said not to be found or capable of being found in the very office which is legally charged with its custody while a very bitter dispute is raging around the issue as to whether the plaintiff's documents were or were not lodged through it? How in those circumstances would disputes be resolved between citizens? How can the issue of whether the present plaintiffs' documents were or were not received and registered or fraudulent be handled midstream while the potential source of proof, the presentation book, has been plugged shut?
61. It is also not the correct position as urged by the defendants that the plaintiffs unjustly shifted the burden of proof of fraud to the defendants. What the plaintiffs did by their notice to produce inter alia the original Presentation Book was to obtain clarification from the 3rd and 4th defendants on a very important piece of record – a Presentation Book which was the key to the whole issue of the validity or otherwise of the plaintiffs' documents- and they failed to supply the original Presentation Book. In this court's view, it ought to have been source of considerable celebration on the part of the 1st and 2nd defendant if they were keen on the truth of the matter, had the 3rd and 4th defendants taken up the search for the original Presentation Book and availed it to court, for it could have instantly absolved all defendants by possibly establishing that the entire PExh.22 was false or that the specific entries relating to the registration of the lease in the name of Teresia as claimed by the plaintiffs were not genuine. This court takes the view that the wisdom of the 3rd and 4th defendants of not producing such a vital piece of evidence lies in the fact that the production of such a record, had it verified the entries in favour of Teresia, would have spelt immediate doom to all the defendants' respective defences in this matter. They therefore stuck to their defence that the plaintiffs' documents could not be traced at the registry. It is pursuant to the above observations that the 1st and 2nd defendants' vibrant submissions that the plaintiffs' documents are not certified by the lands office and that they do not exist in the Nakuru Land Registry must be taken with a pinch of salt. This court is capable then of drawing an adverse inference from the 3rd and 4th defendants' default in producing the original Presentation Book which could only have been within their custody especially in the light of their evidence in support of the 1st and 2nd defendants.
62. This court agrees with the findings of the court in the case of Kenya Akiba Microfinance Ltd v Ezekiel Chebii & 14 Others [2012] that was relied on by the plaintiffs where it was held as follows:
- “Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence is produced, it would be adverse to such a party”
63. This was also the holding of the court in the case of Republic v Sammy Kipkoech Kitur & another [2005] eKLR where it stated as follows;
- “No reason has been given for the failure by the prosecution to call any of those witnesses. The prosecution may elect not to call a material witness but they do so at the risk of their own case. (See the case of Ng'ang'a –vs- R. [1981] KLR 483). In our present case, the failure



of the prosecution to call independent witnesses who witnessed the beating at Chuliat Centre raises the presumption that the evidence of those witnesses would be adverse to the prosecution case.”

64. The Court of Appeal in the case of *Nguku v Republic* [1985] eKLR also held as follows;

“After considering the case of *Kingi v Republic*, and *Bukenya & Others v Uganda*, both appearing in 1972 volume of the East African Law Reports at pages 280 and 549 respectively, we accept that the presumption that the evidence, if produced, would be unfavourable to the party concerned is not confined to oral testimony, but can also apply to evidence of a tape recording which is withheld. We consider that there was a misdirection by the learned judge of the High Court when they said that it was a different proposition to relate the presumption to an inanimate object “about which the evidence is that it was incapable of assisting the court.”

65. Conflating the overreliance by the defendants on the non-availability of the plaintiff’s documents at the registry with their monochromatic chorus that defence witnesses have confirmed that there are fake titles that are “prepared at River Road and then registered without any corresponding records at the Lands Office of the Commissioner of Lands” would have cooked the plaintiffs’ goose. However, it is not lost upon objective scrutiny as stated hereinbefore, that though the defendants’ own documents were alleged to have been obtained from the Lands Office Headquarters, none of the persons who actually processed them were called by the defendants to testify; the defendants’ witnesses who gave evidence were not from the Land Administration Department that purportedly processed the 1st defendant’s title. The documents they produced could not be traced back to their very source, but only to an intermediary, the Chief Land Registrar whose only task was to dispatch them to the 4th defendant. Indeed, DW1 stated that a copy of the lease (DExh.1) was forwarded to them from the Land Administration Department for onward transmission to Land Registrar Nakuru. DW1 did not however produce the original correspondence file in respect of the property. The defendants’ is the proverbial case of a pot calling the kettle black. Under cross-examination by Mr. Matiri, DW1’s evidence went as follows in part:

“The copies of the letters that I have produced are in the custody of a different department from my department. They are in the custody of the Land Administration Department. The said department is not under the Chief Land Registrar but is under the Ministry of Lands. Our offices i.e. the Chief Land Registrar’s office, forwarded the lease. We do not create leases but we just forward them. I am not familiar with the process of creation or issuance of leases. A land officer is the right person to shed light on creation of leases. I did not have a chance to look at the file in respect of the lease at the land administration department.”

66. When further pressed by Mr. Matiri in cross-examination, DW1 stated as follows:

“The letters which I have produced are supposed to be in the correspondence file. I have however not seen or read the correspondence file before coming to testify. The reference numbers for the correspondence files are issued at the Land Administration Department. I do not know if they are issued consecutively. I am not aware of the nature of the dispute in this matter. It is usual for files to go missing in the Lands Department. When Mr. F. N. Orare wrote DExh.4, he was in the Land Administration Department. he was in a sub-department known as conveyancing sub-department within the said Land Administration Department. I am not aware whether the Land Administration Department looked for file



No. 197888. From the contents of DExb.4, there is a possibility that file No. 197888 was not missing or not non-existent.”

67. Analysis of the evidence therefore shows that upon cross-examination by Mr. Matiri, DW1 admitted the possibility that the plaintiffs’ file No.197888 was not missing or non-existent in the Land Administration Department, and that she was not aware of any serious efforts to trace that file, and, in her opinion if there was a lease properly issued before the 1st defendant’s, then it should take priority. DW2 on his part, when pressed by Mr. Matiri in cross-examination, disclosed that had all the plaintiffs’ documents been availed prior to the issuance of the 1st defendant’s certificate of lease, then his office would not have registered her lease or issued a certificate of lease to her. What has been consistently kept away from the light by the defendants is the fact that the plaintiffs availed the 4th defendant copies of the documents now produced in this case, and upon his dispatch thereof to the 3rd defendant, the latter wrote back instructing that the process of registration of the 1st defendant’s lease should proceed. The question that arises is why such an approach was taken at all.
68. From the foregoing, it would appear to me that the defendants jointly and severally knew even as at the registration of the 1st defendant of the existence of the plaintiffs’ records somewhere in the Land Registry but nevertheless hurriedly processed the 1st defendant’s title with the full knowledge that with the disappearance of the plaintiffs’ records from the Lands office, the latter would not be in a position to establish before any forum their claim that these records had ever existed. I agree with the plaintiffs that the defendants can not validly claim that no lease had ever been registered prior to the 1st defendant’s lease or that the suit land had 3 previous owners by the time the 1st defendant’s lease was issued or that the 1st defendant purported to dispose of the suit land while she had not yet obtained any certificate of title to it. Besides, there was no explanation as to why the 1st defendant never took possession of the land for about two decades if at all she had been holding a valid letter of allotment to it. The conduct and evidence of the defendants at the hearing smells of fraud; their very strong averments and overreliance on the non-certification of the plaintiffs’ documents reeks of more suspicion of even greater fraud.
69. However, in the midst of all these events, the most astonishing thing is that no witness statement of the original 1st defendant was filed in this case and DW4 would never have testified in the present case had the original 1st defendant who was his wife not died, yet later on he appeared to be the person with purported considerable knowledge of the process by which his wife acquired title to the suit land.
70. DW4, despite his claim that he was deeply involved in the pursuit of the title to the suit land, was never considered a witness in the case during his wife’s lifetime and was joined only to the present suit as administrator to her estate upon her demise. Again, upon the realization that the deceased herself never filed any witness statement in the case while she was alive this court at one point during the hearing remarked on that point when DW4’s ad libbing of evidence by way of going off the written details on the filed exhibits appeared likely to prejudice the plaintiffs, who already closed their case.
71. Consequently, DW4, the prime witness for the 1st defendant never produced any documentary evidence in the case he so much professed to have knowledge of, and it would appear that all the defence documents were produced by the other witnesses. DW4’s ad hoc oral evidence lacked creditworthiness due to factors set out herein before.
72. In total, the defendants’ evidence contrasted sharply with the 2nd plaintiff’s averment that the plaintiffs had been in possession of the suit land and title documents thereof without anyone’s query for 10 years prior to the 2nd defendant’s coming, and that at the time of purchase and due diligence he never expected any litigation. It is therefore no surprise that PW1 had not secured certified copies of all the documents he produced. In my view, any production of certified copies of all those documents, as



insisted on by the defendants would have made me think twice about believing his version that stated that the land records at Nakuru relating to the suit title in the plaintiffs' names had vanished into thin air. PW1 maintained that all the documents he produced were just part of due diligence conducted in 2010 and that then the Land Registry would give the plaintiffs all the documents that they needed them. He was at that time oblivious of the possibility that the matter would end up in a dispute or litigation.

73. In the circumstances if the PW1 was obtaining the documents merely to satisfy himself that the title held by Kiplangat was genuine and recognized by the Land Registrar then no-one can blame the plaintiffs for not being in possession of certified copies of the documents they obtained from the Land Registry and which were produced herein as exhibits. In fact, in the context of this case, the court would have been more surprised, and presumed some craftiness or fraud had the plaintiff availed all certified copies as demanded by the defendants. The defendants' objection that the plaintiffs lack certified copies is hence of no merit. In the end, rather than aid their case, the 1st and the 2nd defendants' argument irredeemably damaged their case, they being the persons who pursued title and obtained it long after the plaintiffs got theirs. In this court's view the 1st and 2nd defendants by their own evidence scored an own goal by overly arranging their own evidence too meticulously by reason of which they unwittingly singled themselves out as candidates for the inevitable conclusion that they were involved fraudulent acts including the mysterious vanishing of the plaintiffs' land records at the Lands office which, if they had been in place, would have been a major stumbling block to issuance of the 1st defendant's certificate of lease according to DW2's evidence.
74. It is in the light of such glaring acts and omissions outlined herein above that the plaintiffs aver, and this court agrees with them entirely, that an adverse presumption can be made to the effect that the Land Registry had something to conceal. In view of (1) the mere act of the 1st defendant obtaining title while knowing that the plaintiffs' title was subsisting and that the plaintiffs were in possession of the suit land, (2) the hasty pace of the 1st defendant's title processing and disposal of the land to the 2nd defendant prior to the securing of the certificate of title, and (3) the 3rd defendant's act of writing to the 4th defendant pressing for the continuance of the registration of the 1st defendant's lease notwithstanding the plaintiff's submission of their documents to the two offices, this court is persuaded that all the defendants were engaged in fraudulent acts that birthed the 1st defendant's title.
75. In the end, it is ironical that the much maligned lack of certification of the plaintiffs' documents promoted their credibility while the direct testimony of the lands officials supporting the 1st defendant's title coupled with other relevant factors made the credibility of the defendants' evidence fizzle out.
76. The upshot of the foregoing is that I find that the plaintiffs' title is the only genuine title to the land and I uphold it. The plaintiffs' claim therefore must succeed and the 1st and 2nd defendants' counterclaim must be dismissed.
77. The plaintiffs seek declarations, an injunction and exemplary damages and I am persuaded they are entitled to those orders. Also, among the prayers sought by the plaintiffs in their Further Amended Plaint is prayer No. (c) which is seeking an order that the parcel file and register containing the plaintiffs' title be reconstructed and restored. Section 33(5) of the *Land Registration Act* provides as follows;

“(5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.”



78. Given the earlier finding of this court that the plaintiffs have sufficiently demonstrated that they are the legal owners of the suit property, it is only fair and just that the land parcel file and the land register for land parcel Nakuru Municipality/Block 23/728 be reconstructed. The law provides for the reconstruction of a parcel file and register as has been set out above. It is clear that the Land Registrar has the statutory duty to reconstruct any lost or destroyed land register upon application. This court is guided by Section 1A, 1B and 3A of the *Civil Procedure Act* which obligates it to facilitate the just and expeditious resolution of disputes and to make orders that may be necessary for the ends of justice and to prevent abuse of the process. In the circumstances of this case and having regard to the aforesaid provisions of the *Civil Procedure Act*, it is in the interest of justice that an order be issued as sought by the plaintiffs directing the Land Registrar to reconstruct the parcel file and register instead of directing the plaintiffs to apply for reconstruction. This will be a sure way to end this litigation once and for all and also be of great convenience of all parties involved.

79. The Plaintiffs in this matter are also seeking for general damages. The court in the case of *Abiero v Thabiti Finance Company Ltd & another* [2001] eKLR held as follows on what constitutes general damages:

“The paragraph in Halsbury’s Laws of England (supra) further states that “special damages” and ‘general damages’ are used in corresponding senses. Thus in personal injury claims, ‘special damages’ refers to past expenses and lost earnings, whilst ‘general damages’ will include anticipated future loss as well as damages for pain and suffering and loss of amenities. In my view special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses.

Therefore, in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of trial and must await the conclusion of the case so that they may be assessed.”

80. It is this court’s view that the award of general damages would not be appropriate in this matter as the plaintiffs have not demonstrated the extent of general damages they suffered. The Plaintiffs are also seeking for exemplary damages. Black’s Law Dictionary 10th Edition terms exemplary damages as punitive damages and gives the definition thereof as follows: -

“Damages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit, damages assessed by way of penalizing the wrongdoer or making an example to others.”

81. The court in the case of *The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo* [2018] eKLR held as follows:

“33. As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, at paragraph 243 of Halsbury’s Laws of England, as follows: -

“Exemplary damages should be awarded only in cases within the following categories: -

- (1) Oppressive, arbitrary or unconstitutional action by servants of government;



- (2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
- (3) Cases in which the payment of exemplary damages is authorized by statute.”

82. This court in the case of Wilfred Keli Ndolo v Jescah Gatakaa Amboka & another [2019] eKLR stated as follows on the assessment of exemplary damages:

“ 20. When it comes to assessment of exemplary damages this court is not bound to evidence such as that required in respect of general damages. All that is being asked of the court by a litigant is that it ought to take note that the conduct of the offending party is so egregious that he requires to be punished by way of an award of damages against him. Exemplary damages are at the discretion of the court.”

83. There is virtually no doubt that the oppressive, unreasonable and illegal conduct of the defendants has occasioned the plaintiffs considerable mental agony over the future of their property. It is this court’s view therefore that the quantum of exemplary damages that can be awarded to the plaintiffs to deter them from according any other litigant the same treatment they have extended to the plaintiff would be Kshs. 2,500,000/= (Kenya Shillings Two Million Five Hundred Thousand only.)

84. For the avoidance of doubt the final orders that I now issue in this case are as follows:

- a. The plaintiffs have established their claim on a balance of probabilities against all the defendants and their claim therefore succeeds;
- b. The 1st and 2nd defendants’ counterclaim lacks merit and it is hereby dismissed with costs;
- c. A declaration is hereby issued declaring that the plaintiffs are the genuine owners and/or legal proprietors of the leasehold title comprised in the land parcel Nakuru Municipality/Block 23/728;
- d. A further declaration is hereby issued declaring that any purported title held by the 1st and/or 2nd defendant’s is a fraudulent title;
- e. The 1st defendant purported title under which the 2nd defendant claims a beneficial interest and all records held by the 3rd and 4th defendants in connection with the said purported title are hereby nullified;
- f. The 3rd defendant shall reconstruct and restore the land parcel file and the Land register in the Nakuru Land Registry containing the plaintiffs’ records of title in respect of land parcel Nakuru Municipality/Block 23/728.
- g. A permanent injunction is hereby issued to restrain the 1st and 2nd defendants from trespassing, entering, remaining, utilizing, selling, alienating, charging or howsoever interfering and/or dealing with the land parcel Nakuru Municipality/Block 23/728.
- h. The claim for general damages is declined as the plaintiffs have not demonstrated the extent of general damages they suffered;
- i. The defendants shall jointly and severally pay to the plaintiffs exemplary damages in the sum of Kshs. 2500,000/= (Two Million Five Hundred Thousand only) for their egregious conduct;



- j. The taxed costs of this suit shall be borne by the defendants jointly and severally;
- k. The sums awarded in orders no. (i) and (j) herein above shall attract interest at court rates from the date of this judgment in respect of exemplary damages and from the date of the certificate of taxation in respect of taxed costs until payment in full.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 6TH DAY OF JUNE 2023.

MWANGI NJOROGE

JUDGE, ENVIRONMENT & LAND COURT, NAKURU.

