



**Kiplagat v Masit & 6 others (Environment & Land Case
930 of 2012) [2022] KEELC 2596 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2596 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 930 OF 2012**

A OMBWAYO, J

JULY 8, 2022

BETWEEN

LORNAH JEBIWOTT KIPLAGAT PLAINTIFF

AND

**RHODA MASIT (AS TRUSTEE OF MOSOP MARICHOR GROUP OF
CHEPKORIO) 1ST DEFENDANT**

**ESTHER CHERUIYOT (AS TRUSTEE OF MOSOP MARICHOR GROUP OF
CHEPKORIO) 2ND DEFENDANT**

**WINNIE KIBISACH (AS TRUSTEE OF MOSOP MARICHOR GROUP OF
CHEPKORIO) 3RD DEFENDANT**

J. W. ODUOR 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

COMMISSIONER OF LANDS 6TH DEFENDANT

ATTORNEY GENERAL 7TH DEFENDANT

JUDGMENT

a. Pleadings

i. Plaintiffs Case

1. Lornah Jebiwott Lagat, (hereinafter referred to as the plaintiff) instituted this suit vide plaint dated 19th April 2005 and which was consequently amended severally with a last amendment of 4th May 2010 in which the plaintiff sought a declaratory order against Rhoda Masit, Esther Cheruiyot, Winnie Kibisach (As Trustees of Mosop Marichor Group of Chepkorio) J. W. Duor, The Chief Land Registrar, The Commissioner Of Lands and the Attorney General that the plaintiff is the bona-fide lawful



and registered lessee of Eldoret / Municipality Block 7/150 and a permanent injunction against the defendants restraining them from entering and transferring or dealing in any manner whatsoever with parcel No. Eldoret / Municipality Block 7/150. Moreover, a permanent injunction to issue to restrain the defendants jointly and severally from trespassing into and or interfering with plaintiffs use and enjoyment of the entire parcel known as Eldoret/ Municipality Block 7/150. Furthermore, a declaration that the plaintiff be reinstated as the bonafide leasehold title holder of all that parcel referred to as Eldoret / Municipality Block 7/150. Lastly, a declaratory order to issue declaring the title issued in favour of the 1st 2nd, and 3rd defendants to be null and void and that the 5th, 6th and 7th defendants to jointly and severally cancel the said title on their record. Ultimately, the plaintiff sought to be paid Damages, costs and interest of the suit.

ii. 2nd and 3rd Defendants' Case.

2. The 2nd and 3rd defendants filed their defense and subsequently amended correspondingly to the plaintiffs' amended pleadings and in answer to the plaintiff's claims. In their defense to further amended plaint² filed on the 4th May 2010 the defendants pleaded that, they are bona fide title owners and were legally registered as holders of leasehold interest of the subject parcel of land pursuant to an allotment issued to them from 1st May 1981. Their lease was never terminated by the commissioner of lands at all, and the land was not available for re – allocation. The subject parcel of land is still owned by the Government of Kenya which has leased the same to the defendants. The defendants are the 1st registered owners of the Suitland, have been rightfully and legally in possession and have every right to exercise their leasehold rights over their land.
3. According to the defendants, the issuance of the certificate of lease to the defendants was within the law and pursuant to the statutory duty of the registrar. The plaintiff has no legal interest on the suit land and did not acquire any as the alleged seller to the plaintiff did not have any valid title capable of any transfer.
4. The 1st to 3rd defendants further pleaded that the certificate of lease and transfer between the plaintiff and the purported seller was and is invalid. According to the defendants, the lease pursuant to which the title was sought is a forgery and the documents used to process the lease did not emanate from the Commissioner of Lands. The said defendants claim that the plaintiff's purported certificate of lease is not genuine and that the plaintiff has no legal interest on the Suitland and the defendants as registered owners cannot be prevented from using their land. The plaintiff is not in possession of the suit land, and no one stays thereon as it has no residential premises. The suit land was never alienated from the plaintiff and 4th and 5th defendants did not alter the registration status of the Suitland. The plaintiff has not suffered any damage and relief sought are untenable and unfounded in law and equity. The defendant prays that the plaintiff's suit be dismissed with costs.

iii. The 4th, 5th, 6th and 7th Defendants' Case.

5. The 4th, 5th, 6th and 7th defendants also filed their defense through the 7th defendant who vehemently deny the plaintiff's allegations and defended the 4th and 5th actions and averred the certificates of lease was rightfully, procedurally, and legally issued to the 1st, 2nd and 3rd defendants. During the proceedings the 1st and 4th defendants passed on.

b. Evidence

6. When the matter came up for hearing, the plaintiff's 1st witness Syllas Kiprof Limo testified that the plaintiff acquired the suit property by way of purchase and payment of consideration to the seller. That she entered into agreement on or about 24th December 2003, the plaintiff agreed to buy from M/



s Donata Amani Ltd, the then seller of the subject parcel namely Eldoret/ Municipality Block 7/150 at a consideration of Kshs 4,800,000/= (Kenya shillings Four Million Eight Hundred Thousand) and produced the agreement as EXG 2 and which agreement was drawn by M/s Kigen & Co. Advocates. The sale agreement was made on the 20th day of December 2003 between Donata Amani Ltd, a limited liability Co. duly registered and represented of the one part And Lorna Jebiwott Kiplagat of post office Box 693 Eldoret hereinafter to as the “Purchaser”. The import of the agreement was that the vendor was ready and willing to dispose the aforesaid portion and that the agreed consideration for the aforesaid plot was kshs 1,500,000/- (Kenya Shillings One Million Eight hundred Thousand) and that a sum of Kshs 1,500,000/- (Kenya Shillings One Million Five Hunderd Thousand) was paid at the execution of the agreement and the balance of Kshs 3,000,300/- (Kenya Shillings three million three hundred thousand) was to be paid on or before 29th December 2003. The purchaser was to assume vacant and physical possession upon payment of the consideration full. Both parties agreed that the vendor was to pay the outstanding rates and rent on the said property as on 29th December 2003 and any queries as to rightful acquisition of the said property was to be directed to the vendor. Both parties agreed that for the purposes of interpretation of the agreement the law society conditions of the sale were to apply. The agreement was signed by Signed by Johana Kipchumba Tarus as director for the Vendor, Donata Amani Ltd on 24//th December 2003. and also Signed by the PURCHASER Lorna Jebiwott Kiplagat Id NO 211376549 and Witnessed by Sylus K. Limo of ID No. 4638705. The same was drawn and filed by Kigen & Co. Advocates Zul Arcade Building, Going Odinga Street, P.O. Box 6738, Eldoret. The agreement also had a handwritten acknowledgement of payment of balance of kshs 3,300,000/= (Kenya shillings Three Million Three Hundred Thousand) paid on 24//th March 2004.

7. According to Sylus Kipkogei Limo aforementioned, the plaintiff who is his sister and an athlete and can be out of the country most of the times gave him the Power of Attorney to pursue the conveyance on her behalf in respect of land parcel number Eldoret Municipality Block 7/150 and hence he participated from the time of sale up to obtaining the certificate of lease issued on 30th October 2003 produced PEXH 1. That he took over the management and collection of rent from the tenants and paid for rate but was evicted on 24th July 2007 by which time the case was already in court, and that the court subsequently issued an order that the status quo prevailing be maintained. Sylus Kipro Limbo further stated that he was later summoned by the Land Registrar and notified that a certificate of lease had been issued to the 1st, 2nd, 3rd defendants. The witness confirmed seeing the said document issued in the names of Mosop / Marichor women group and consequently brought the instant suit and that at the time of obtaining their certificate of lease the same showed that the plaintiff's ownership was registered as entry No. 5 where the initial owner was one Dinus Simon Mbuya. The witness further testified that when he took possession of the suit-land he found some structures which he maintained and constructed more and leased all to jua kali artisans. He paid rates to the Municipal Council of Eldoret he produced the rates receipts and the rent clearance certificate. He produced the rates statement for the year 2003 and 2004. He was collecting rent from the artisans until he was evicted on the 24th of July 2007. He states that before the defendants were issued with their title, they were called by the Land Registrar and informed that the Registrar intended to issue the defendants with a title which was subsequently issued on 12th April 2005. The suit was instituted on the 19th of April 2005. He placed a caution on the Suitland on the 20th of April 2005. The title to the plaintiff had been issued earlier on the 30th of October 2003. The two titles are in respect of the same parcel of land.
8. On cross examination by M/S Kipsei, learned counsel for the 1st 2nd and 3rd defendants, he states that he did not meet any representatives of Donata Amani limited but when he went to the advocates office, the agreement had been prepared and signed. That he only signed the last part of the agreement. He took possession in early 2004. He did not have the details of the transaction between Dinus Simon Mbuya and Donata Amani Ltd but insists that the plaintiff acquired the land in the right way.



9. On cross examination by Mbiyu, Chief Litigation Counsel he states he was donated a valid Power of Attorney by the plaintiff to file suit and collect rent and he collected rent between 2003 and 2007 but did not have the records to show how much rent was collected. On the issue of the title, he states that the register was opened on 1st July 1996 and the plaintiff became registered on 30th October 2003 wherein the lessor is the Government of Kenya and the lessee is Dinus Simon Mbuya, the plaintiff is entry number 5. He identified the certificate of lease issued to the 1st to 3rd defendants dated 12th April 2005 whose edition was opened in the year 2005 wherein the lessor is the Government of Kenya and the lessees are the 1st to 3rd defendants.
10. The plaintiff further called PW2 Lina Jepkengei Kebenei Kigen an advocate of the High Court of Kenya who testified that the plaintiff and the 1st to 3rd defendants have title to the suit property and that he was contracted to convey the property and he did the conveyance as the plaintiff was his client. He did the sale agreement dated 24th December 2003 and that the plaintiff purchased the land for a consideration of Ksh 4.8 million that was paid in full. She did the transaction until the land was registered in the plaintiff's name. She personally collected the title from the late Thomas Oduor and passed it to the plaintiff. She was not aware that the land had been allocated to Mosop Marichor Women Group of Chepkorio.
11. PW3, Lorna Jebiwott Kiplagat, the plaintiff herself relied on her written statement and further testified that she bought the suit property and went through the due process and was registered as the proprietor on 30th October 2003. The purchase price was 4.8 million which she paid in 2 instalments of 1.5 million and later 3.3 million. The sale agreement was executed before an advocate known as Lina Kigen and witnessed by Silas Kiprop Limo. She donated to Silas Kipriop Limo a Power of Attorney to take care of the property and receive the rents and ensure that the rates were paid. He informed her later that the Land Registrar intended to revoke the certificate of lease and cancel the registration. She was later evicted by the 1st to 3rd defendants in the year 2007 and placed a caution in July 2007. On cross examination by /S Kipseii learned counsel for the 1st to 3rd defendants, she states that she met the owner of the land through an agent called Kibos and that the agreement was done on 24th December 2003 whereby the purchase price was 4.8 million and that the owner of the parcel of land received the purchase price and ultimately the parcel of land was transferred into her name and the title was issued on 30th October 2003. The plaintiff stated that there was no fraud committed by herself in obtaining title and that though she did not remember paying stamp duty as the transactions were carried out by her lawyer.
12. On cross examination by Mr Odongo Senior Litigation Counsel for the 4th to 7th defendants, she states that she did the search before buying the property but did not remember the date of the search. When she did the search the property was registered in the name of Donata Amani Ltd. The agreement was done on 24th December 2003 and the property was registered in her name on 30th October 2003. She did not remember signing a transfer of lease as all her documents are with her lawyer.
13. The 1st to 3rd defendants called DW1, Winnie Chepkorir Kibisach of Nyaru Elgeyo Marakwet County, a retired teacher and defendant number 2, who relied on her statement which was adopted as evidence in chief. She states that the suit property belonged to Mosop Marichor Women Group of Chepkorio where she is the treasurer and the chairperson was Rhoda Masit who is deceased. The land in question belongs to the women group and not the plaintiff. On cross examination by Mr Odongo Senior Litigation Counsel, she states that the group was registered between 1978 and 1979 as a self-help group and has a registration certificate. They were allocated the plot in 1981 as an award from the President of Kenya but she did not see the letter of allotment. On cross examination by Mr Katwa she states that they were issued with a lease which they all signed but she was not involved in the paper work.



14. DW2, Esther Cheruiyot, a retired teacher and currently a farmer and helping the women group also relied on the recorded statement which was adopted as evidence in chief. According to the witness the suit title belongs to the 1st to 3rd defendants. The women group entertained the president and therefore were awarded the parcel of land. They paid for the lease, land rates, stamp duty, they were issued with the certificate of lease and occupied the parcel of land and that when they took the parcel of land there was nothing on it. When they took possession they constructed on the said land and leased the structures to tenants who now pay rent. The allotment letter was never terminated. On cross examination by Mr Odongo, she states that they were allocated un-surveyed plot no 4 they accepted the offer and made the payment in 1983 and the delay in obtaining title was due to organization problems.
15. On cross examination by Mr Katwa for the plaintiff she states that the late honorable Biwott paid for them the initial years and that the land was properly allocated to them and the title issued on 12th April 2005.
16. DW3 Joseph Kipkogei Ruto of Chepkorio In Elgeyo Marakwet, a farmer and businessman did not initially know so much about the dispute but came to learn of the same later. He reiterated that the land belonged to the 1st to 3rd defendants and that due process was followed in the allocation of the land to the defendants.
17. On cross examination by Mr Katwa for the plaintiff, the witness stated that the group registered was Mosop Marichor Women Group but the names in the receipts are Mosop Women Organization and trustees of Mosop Marichor Women Group. The property is in the names of Rhoda Masit and Esther as trustees. The letter of allotment shows that the land was allocated to Mosop Women Organization.
18. The 5th, 6th and 7th defendants called Sarah Chelimo Maina the principal Land Registrar at Uasin Gishu who stated that she had the records for the suit-land that has a leasehold interest from the Government of Kenya. The government planning on the part development plan could be identified. She did not have the lease to Dinus Simon Mbuya but checked the record and found the white cards in the names of Dinus Simon Mbuya that were registered on the 2nd October 2003 but the register was not opened on the same date. The white card shows that the lease was registered on the 2nd day of October 2003 as per the white card opened on the 1st of July 1996 and that it indicated the presentation date as 2nd October 2003 but there was no evidence of presentation of the lease for registration. The white cards were cancelled but there was no date of cancellation. According to the witness, the white card indicated that there was a transfer to Donata Amani on the 2nd day of October 2003 and a certificate of lease issued. The witness did not see the original transfer document. On the other hand, the witness had the lease document in respect of the 1st, 2nd and 3rd defendants signed by the Commissioner of Land on the 15th February 2005. She had a letter forwarding the lease dated 9th of March 2005. The lease document was presented on 12th April 2005 for registration and the lease was registered on 12th April 2005 and the certificate of lease was issued on the same date. The plaintiff applied for caution which was entered by the land register on the 20th of April 2005. On cross examination by the counsel for the plaintiff, the witness testified that she took office in 2018 approximately 13 years after the transactions when the registrar was someone else. Her testimony was based on the records at the lands office. According to the witness Mr Oduor investigated the existence of the company Known as Donata Amani Limited in 2003. The white card showed that the plaintiff was registered on 30th October 2003. The title for plaintiff is dated earlier than the title issued to the 1st to 3rd defendants however the plaintiff's title was cancelled but she did not have the decision for cancellation and there is no entry for cancellation in the register. There is no evidence that the parties were summoned for cancellation and that there are no proceedings for cancellation.



(C) Rival Submissions

i. The Plaintiff's Submissions

19. Mr Katwa Kigen, learned Counsel on behalf of the plaintiff submits that the title obtained by the plaintiff on 30th October 2003 being the first title as compared to the title obtained by the 2nd and 3rd defendants obtained on 12 April 2005 enjoys legal Sanctity and superiority. That the expired letter of allotment produced by the 2nd and 3rd defendants could not give the 2nd and 3rd defendants any rights or entitlements to the parcel as at 30th October 2003 when the plaintiff was registered as the proprietor of the parcel of land and given her certificate of title. The plaintiff submits that the 2nd and 3rd defendants lost legal rights over parcel LR 7/150 by reason of expired letter of allotment and for failure to comply with conditions imposed in the allotment letter. According to the plaintiff's counsel, the plaintiff is entitled to order of recognition and judgment as the bonafide registered owner of parcel.
20. The plaintiff submits that as a fact, from evidence adduced and exhibits produced by parties including the 4th and 7th Defendants and precisely the white card, the register confirms that the parcel of land belonged to the plaintiff. The registration of the Donata Amani Limited as proprietor of the suit land, gave him absolute proprietor of the suit land. The plaintiff relies on the provision of section 27 and 28 of the Registered Land Act Cap. 300, laws of Kenya which though repealed, governed the land transaction herein state that the right of registered proprietor of land registered under the act are absolute and indefeasible and are only subject to right and encumbrance noted on the register or overriding interest which were set out in section 30 of the Act.
21. The plaintiff submits that the root of her title is traceable to the previous registered owner Donata Amani Limited. Donata Amani Limited had in turn obtained the title from One Dinus Simon Mbunya who had a certificate of lease dated 2nd October 2002. The Plaintiff prays herein for the court to hold that she has a good title to the property which title has not been cancelled and or revoked.
22. The plaintiff submits that there was no notice and there was no obvious evidence that the title held by Donata Amani Ltd was tainted with fraud. Therefore, the Court should take it that the plaintiff acquired a good title. The plaintiff submits that having checked and confirmed that Donata Amani Ltd was the registered owner of the suit property as at 2nd October 2003. Then she had no reason to question how Donata Amani Ltd acquired the land. The plaintiff had no reason or cause to investigate the title. With the searches done including those dated 25th October 2003 and 17th February 2005, all done before the purchase and exhibited to court, and all showing the previous owner, as registered owner the plaintiff was entitled to presume a good title she was acquiring. The plaintiff relies on Section 39(1) of the repealed Registered Land Act that states: -

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- “(1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned. (a) to inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor was registered: or (b) to see to the application of any consideration or any part thereof: or (c) to search any register kept under the Land registration (special areas) Act, the Government Lands Act, the land Titles Act or the registration of Titles Act.



She further relies on the the Court of Appeal decision in *Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority & 4 Others* (2019) eKLR holding that:-

“In Kenya, in *Charles Karatbe Kiarie & 2 Others vs. Administrators of the Estate of John Wallace Mathare (deceased) & 5 others* (2013) eKLR this Court affirmed the principles of Torrens System of titles namely: (a) the Government, as a keeper of records guarantees indefeasibility of titles against entire world: (b) If anyone suffers loss, the Government compensates; (c) the buyer is not concerned about past irregularities and illegality and (d) a bona fide buyer notwithstanding infirmity of the vendor’s title, acquires indefeasible title.

The plaintiff relies on the case of case of *David Peterson Kiengo & 2 Others... vs ... Kariuki Thuo Machakos* HCC No. 180 of 2011, where the Court held that:-

“ The registered lands Act is based on the Torrens System. Under this system, Indefeasibility of Title is the basis for land Registration. The state maintains a Central register of Land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interest in land to go beyond the register to establish ownership. The person whose name is recorded on the register hold guaranteed title to the property. Since the state guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of the past dealings with the land in question before an interest

23. The Plaintiff submits that though the Defendants alleged fraud on her part and that of her predecessors, the defendant failed to discharge its duty through its witnesses. To show any fraud, or otherwise any fraud that contaminates her title. That the defendants therefore failed to discharge its duty as provided by Section 107 and Section 109 of the [Evidence Act](#).

a) Section 107, [Evidence Act](#) provide that:

- “1. Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

24. The plaintiff submits that the allegations of fraud being grave ought to have been strictly proved. The prove needed to be above balance of probabilities but not reach the level of beyond reasonable doubt.

25. The plaintiff submits that she is the bona fide owner for value, without notice who is entitled to protection and guarantees of Torrens’ land Registration System and the Provisions of Section 143 (2) [RLA](#), Cap 300. She was assured of good title on account of inert – alia:-The search she did before purchase that showed the vendor, Donata Amani Limited was the registered owner, who could therefore lawfully pass title to Plaintiff. The predecessor Donata Amani Limited had actual physical title / lease certificate from lands. The transfer from Donata Amani Limited was accepted for purposes of transfers to plaintiff. Plaintiff was given title / certificate of lease by lands. Fees and payments for search and the transfer the transfers were accepted for purposes of transfer to Plaintiff. Plaintiff paid for the purchase of the parcel. There is no act of omission that can be attributed to the plaintiff to suggest any notice of defect of title and or fraud on her part. The plaintiff submits that this Honorable Court should consequently come to a conclusion that the plaintiff’s title herein is absolute and indefeasible.



26. On rectification of the title and register, and or revocation of the title and register, the plaintiff submits that the failed, still born, aborted attempt to cancel the title under Section 143, Registration of Land Act cap 300, (repealed, but in para material with Section 26 and 86 A of the registered land Act No. 3 of 2012 is also an acknowledgement of the said title. This is because it could not be possible to seek to cancel the title if it had not been issued and did not exist in the first instance.
27. The plaintiff submits that it is false for the Land Registrar to purport that that he summoned Donata Amani Limited after he noticed the suit parcel was registered in their favour but with some concerns. This purported summons would be presumably on the basis of the provisions of Section 143, Cap 300, RLA.
28. The District Land Registrar Uasin Gishu purported that he summoned the Managing Director Donata Amani Limited vide a summon letter dated 11th December 2003.
29. The plaintiff submits that there was no cancellation of the plaintiff's title by the 5th, 6th and 7th Defendants. That otherwise due process for of any cancellation of the title was followed for any of cancellation to become effective. Any purport of any cancellation of the plaintiff's title is null and void and of no effect. The plaintiff state that the land registrar could not in law act in excess of his jurisdiction and purport to cancel the plaintiff's title. That the land registrar had no power to do so and such act in excess would be ultra vires and of no legal effect.
30. In support of her submission, that the title the plaintiff could not, and has not been cancelled, the plaintiff relies inter alia on:

Section 143 of registered Land Act CAP 300 state: -

- “(1) subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended Notice and effect of restriction. Removal and variation restrictions. Rectification by registrar. Rectification by court. Where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) the Register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or change for valuable consideration, unless such proprietor had knowledge of the omission fraud or mistake in consequence of which the rectification is sought, or caused such omission , fraud or mistake or substantially contribute to it by his act, neglect or default

31. Justice D. Musinga in Kuria Greens Limited v Registrar of Titles & another (2011) eKLR opined that:

“In Gazette Notice No. 15584 vide which the 1st respondent purported to revoke the petitioner's title to the suit land he did not indicate the provisions of law that invoked as the basis for his decision. Was that an omission? I do not think of titles Act or any other Act that bestows on the 1st respondent or the Commissioner of lands or the Government has the power to revoke a registered title in the absence of Court order to that effect. I have carefully searched the Land Titles Act, the Registration of Titles Act the india Transfer of Property Act, the Registered Land Act and the Land control Act and I did not come across any provision that grants power to Registrar of Tiles or the commissioner of Land to arbitrarily revoke a valid land title.



32. In my view therefore, the Registrar of Titles exceeded his power and thus acted ultra vires in purporting to revoke the petitioner title. There can be no dispute that an ultra vires act by a public authority is unlawful.
33. The plaintiff submit that this court should in fairness hold that the 5th, 6th, and 7th Defendant did not cancel the plaintiff root/ parent title and could not do any cancellation without following the due process . Further, that the court should declare that the certificate of Title to the plaintiff in respect to the suit land is conclusive evidence of ownership thereof and the plaintiff is the absolute and indefeasible owner plaintiff of the suit land.
34. The plaintiff submits that the 2nd and the 3rd defendant were issued with a letter of allotment of 1st may 1981. They however, did not process title as required by the conditions outlined in the letter of allotment. Subsequently, they lost their legal rights over LR No. 7/150. The 2nd and 3rd defendants, did not apply to the Commissioner of Lands for re – allocation as advised. Irregularly the 2nd and the 3rd defendants were issued with a certificate of lease on 12th April 2005 irregularly, parallel to the plaintiff's title Without cancelling the Plaintiff's first while the Plaintiff's file was in existence showing the Plaintiff was owner. The Plaintiff submits that having been issued with genuine lease by the 6th and 7th defendants on 30th October 2003, then her title should take precedence over the over the one issued to the 2nd and 3rd Defendants on 12th April 2005. In conclusion, the plaintiff submits that she has proved her case to the standard of probabilities as required that she is the first registered owner, hence is the bona-fide owner as to the two (2) titles on trial. She got her title on 30th October 2003. The 2nd and 3rd Defendants obtained their title on 12th April 2005. She is an innocent purchaser, for value without notice of any defect on the title sold to her. She was encouraged and process endorsed by land, who under Torrens Land Law System protect and guarantees her title
35. The plaintiff was not party to, and was not aware of any fraud on the root title yielding her title. No fraud was proved against her and the root of her title. In view of all the above the plaintiff prays for judgment as prayed in the plaint. More especially for declaration that she is the owner of the parcel Eldoret Municipality / Block 7/159 and for permanent injunction against the Defendants jointly and severally restraining them from interfering with her title, and her, and her enjoyment of the suit parcel.

Submissions by the 2nd and 3rd Defendants

36. The 2nd and 3rd defendants submit that the plaintiff and her alleged acquisition of title on 30th October 2003 was fraudulent and illegal. The same was founded on questionable documents as the sale agreement dated 24th December 2003 produced herein as PEXH2 was purported to have been signed by the plaintiff and witnessed by her witness PW1 Sylus Limo on a different date. According to the defendants, at cross examination, the witness deeply gave contradicting statements regarding the preparation and attestation of the agreement whereas the plaintiff case, PW2 Lorna Kiplagat was that agreement was prepared and executed in her presence and in the presence of PW1 (Sylus Limo), PW1 testimony was that the same was done while he was away and only coming to sign much later.
37. It is the defense case that the same activities were done during the fraudulent activities by the plaintiff. The defendants argue that the title documents namely certificate of lease was obtained on 30th October 2003 over 2 Months ahead of the preparation of the agreement of sale on 24th December 2003 and thus diminishing all the terms of the agreement thereof including the plaintiff's right of possession but after full payment of consideration and execution of the documents to give the purchaser a good title and payment of all rates and rents due as of 29th December 2003 by the vendor. All these terms are deemed to have been overtaken by the issuance of title before he execution of the documents. It is the defense case that certificate of lease held by the plaintiff was obtained fraudulently. The payment of the balance



of Kshs. 3,300,000/= (Kenya shillings Three Million Three Hundred Thousand) was purported to have been made on 24th October 2004 long after the certificate of lease had been issued against demonstrating fraud on part of the plaintiff. The defendants argue that the vendor Donata Ltd is described at the preamble of the sale agreement dated 24th December 2003 as limited liability company duly registered under the *Companies Act*. The agreement is however not sealed by company seal but is executed by agent called Johana Kipchumba Tarus I/d No. 8714513 which was also questioned by the defendants as non – existent and not belonging to him. It is defence case that Donata Amani ltd were not owners of the title and since they did not have any registered interest on the subject parcel they could not dispose that which they don't have. The execution by the alleged Director is illegal and fraudulent. The plaintiff did not pay Stamp Duty for the registration of the agreement as required by law and the same is therefore inadmissible in evidence. It is the defendant's case that the plaintiff did not acquire any interest to the subject parcel and the certificate of lease in possession of the plaintiff was acquired through fraud and illegal.

38. The defendants rely on the case of *Kisumu ELC 708 of 2015 KACC vs Enterprises Ltd & 4 others* where Hon. M.A. Odenyo observed that: “..... To determine the question whether the lease held by the 1st defendant is valid. It must be demonstrated that it was properly acquired. It is not enough that one waves a lease or certificate of lease. Where there is contention that or certificate of lease held by an individual was improperly acquired. Then the holder thereof, must demonstrate, through evidence that the lease or certificate of lease that he holds. Was properly acquired. The acquisition of the title cannot be construed only in the need result. The process of acquisition is material and important especially when there are doubts to the regarding the process..... the law is clear that, the Certificate of Title issued by registrar upon registration shall be taken all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedural or through a corrupt scheme.”
39. The defendants also relied on the case of *Arthi Highway developers Limited Vs West End Butchery Limited & others* (2015) eKLR stated that : “It was common knowledge and well documented at time. That the land market in Kenya was a mine field and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provision of the new constitution 2010 and the *Land Registration Act*, 2012 will have a positive impact for land investors in future it should be noted that at one-time history of Kenya there was unprecedented land grabbing which is known in other parlance as large scale land based investment depending on which side you are in, meant to sanitize the illegal act. The courts had to stamp their authority to root out this vice to protect the public interest and individual who would otherwise lose their land through these schemes.....”
40. The defendants further relied on the case of *Republic vs Minister for Transport & Communication & 5 Others Ex. Parte Waa Ship garbage Collector & 15 Others* Mombasa HCMCA No. 617 of 2003 (2006) 1 KLR (E&L) 563 Maraga, J (now retired chief Justice expressed himself as follows: “Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead principle of the indefeasibility of title deed.....it is quite evidence that should a constitutional challenge succeed either under the trust land provision of *the Constitution* or under section I and IA of *the constitution* or under the doctrine of public trust a title would have to be nullified because *the constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society hold public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of *the Constitution*.”



41. The defendants further relied on the dictum of Nyamu, J. (as he then was) in *Mureithi & 2 others (For Mbari Ya Murathimi Clan) vs Attorney general & 5 others* Nairobi HCMCA No. 158 of 2005 (2006) 1 KLR 443 held: “Should the Land Acquisition Act give shelter to land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forest” How for instance are the Courts going to deal with the land, grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of indefeasibility of title” Are the Courts going to stay away and refuse to rise to greater call of unraveling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of *the Constitution*. I venture to suggest that such titles ought to be nullified on this ground and thrown into the dustbins.....”
42. The defense submission is that the plaintiff could not have been registered based on the shortcomings demonstrated in the testimonies herein and any purported registration of lease was fraudulent. The plaintiff case that she is the registered owner and her allegations that her title documents emanated from the land’s offices have been denied and strongly challenged. The 4th defendant who had been sued and blamed for cancellation of entries in the register swore affidavit and filed in the proceedings herein critically explains the circumstances of the land register and entries thereto confirmed that the alleged entries for the plaintiff were fraudulent and procedurally canceled as per procedure. Further, the testimony of the land registrar herein Mrs. Sarah Maina demonstrated that the plaintiff’s claims were not supported by the records held at the land’s office to. The lands office and registrar are the custodians of land documents and all instruments of transfer, and any records thereof must have been duly entered in the register. The certificate of lease produced by plaintiff did not emanate from their records or their registry. There was no transfer of lease registered nor was there any document in the lands presentation book to support any registration of any instrument in favour of the plaintiff’s title. The plaintiff did not acquire any interest over the subject parcel. The green card exhibited by the plaintiff did not emanate from lands office and any event are not applicable to lessees. The White card purported to have been issued were duly and procedurally cancelled after parties had been summoned as required by law. The plaintiff did not pay rates. The receipts purported to proof payment of rates did not emanate from the issuing office. The certificate of lease purported to have been issued to plaintiff on 30th October 2003 was obtained long before the purported payment of rates on 7th June 2004 and is therefore a nullity. The Vendor who purported to sell the land to the purported registration and issuance of title on 30th October 2004 (over 3 Months later) The vendor who purported to sell the land to plaintiff Donata Amani Ltd was a nonexistent body and were not registered as the owners. There was no entry in the lands office and presentation book support their registration. Donata Amani Ltd had no interest on the land to pass to plaintiff.
43. The ownership of Dinus Mbuya who purportedly sold the land to Donata Amani was not contained in the land registry office and were never captured anywhere at all. Dinus Mbuya had no interest at all to pass to Donata Amani Ltd and consequently to the plaintiff. There was no entry made for the transfer from Dinus Mbuya to Donata Amani and subsequently to plaintiff. The purported sellers above name did not have any title to transfer and therefore any alleged transfer between the parties to the plaintiff is therefore invalid.
44. The defendants argue that the plaintiff cannot afford herself the defense of a bonafide purchaser for value without notice. For a person to rely on this doctrine, he must prove the following ingredients



as was enunciated in the case of *Katende v Haridar & Company Limited* (2008) 2 E.A 173* where the court of Appeal in Uganda

“....For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine.... (he) must prove that:

- a) He holds a certificate of title.
- b) He purchased the property in good faith
- c) He had no knowledge of the fraud
- d) He purchased for valuable consideration
- e) The vendors had apparent valid title
- f) He purchased without notice of any fraud.
- g) He was not party to any fraud

45. The defendants argue that the 1st to 4th defendants therefore do not qualify as innocent purchaser for value without notice as the 5th defendant had to alienate the land. He could therefore not pass a good title to the defendants. If they have any claim for the land then their remedy lies elsewhere. Moreso at the doorstep of the persons who purportedly sold to them land which they did not have title to.....”
46. The assertion of defendants that they were innocent purchasers who were not aware of fraudulent transaction does not hold water in this case as the purpose of section 26 is to protect the real title holders from the unscrupulous person.
47. The defendants rely on the case of *Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedural
48. The defendants argue that the land was allocated to the 2nd and 3rd defendants and the lease issued to them is valid certificate. The defendants argue that Section 26 of *land registration act* provides that the certificate of title issued by the Registrar upon register, or to a purchaser of land upon a transfer or transmission by the proprietor of the land is the absolute and indefeasible owner, it also provides that such title can be impeached on the ground of having been acquired fraudulently, through misrepresentation or illegally unprocedurally.
49. The defendant relies on the case of *Dr. Joseph Arap Ngok vs Justice Moiwo ole keiwua & 5 other* civil Appeal no. nai.60 of 1997 the court started thus that:

“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subjected to challenge on ground of fraud or misrepresentation to which the owner is proved to the party. such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and entire system in relation to ownership of property in Kenya would be placed in jeopardy”



50. The 2nd and 3rd defendants presented their testimonies and evidence in court and proved their ownership of the suit parcel. they produced the original certificate of lease and receipts for payment of all dues thereto. The defendant's ownership is also fully supported by the evidence of the land registrar and records which demonstrate that the certificate of lease issued to 2nd and 3rd defendants is genuine. The 2nd and 3rd defendants were issued with the letter of allotment on 1st May 1981 and are bonafide holders thereof. They paid all rates and rent due to the government and complied with the conditions. The process of their registration and registration of their instruments were properly entered and documented. They paid all rate due, and their acquisition and ownership is supported by document from Eldoret municipal council. They are the registered holders of the leasehold interest and certificate of lease was duly and procedurally issued to them. Their lease has never been cancelled and or terminated. The defendants having been allotted and registered with the subject parcel; it was not available for reallocation. The subject parcel has never been alienated from the defendants. The subject parcel has never been alienated from the defendant. The 5th and 6th defendants never altered the registration status of the suit land.
51. The plaintiff's ownership has been challenged and demonstration led to show that the same was acquired fraudulently. The document did not emanate from the land's office. The fraudulent activities reported for criminal investigation and the cancellation of illegal entries in the registry demonstrated that the plaintiff did not acquire any title on other hand the 2nd and 3rd plaintiffs title is evidently demonstrated by the record
52. The 1st and 2nd defendants argue that they have demonstrated that they were issued with an allotment letter of 1st May 1981 they paid all dues as required of them by the Government and complied with the law. They were validly and procedurally registered as owner and a certificate of lease issued. The 2nd and 3rd defendants have been in actual possession and use of the subject parcel, they have been in actual possession and use of the subject parcel, they have been utilizing the same for their benefit. The defendants are the bonafide holder of the leasehold interest. It has been clearly demonstrated from the defendants' defences, pleadings, and testimonies that the plaintiff did not acquire any title to the subject parcel and that the documents produced in attempt to prove ownership were fraudulently acquired. The 2nd and 3rd defendants pray that the suit be dismissed with costs.

5th, 6th and 7th Defendants Submissions

53. The Attorney General filed submissions whose gravamen is that the plaintiff and 2nd and 3rd defendants claim to be leasehold proprietors of a parcel of land described as Eldoret Municipality Block 7/150. They hold what they believe to be genuine certificates of lease issued by the Land Registrar in respect of the suit land. Therefore, under section 26 of the *Land Registration Act*, 2012 and relying on the concept of Indefeasibility of title they are seeking the court's protection as they claim to have acquired their respective titles lawfully.
54. According to the Attorney General, the matter of procedure of acquiring title is so important that it was revisited by the Court of Appeal in *Henry Muthee Kathurima – versus Commissioner of Lands & another* (2015) eKLR in which the Judge held as follows:

On our part, we find no good reasons to fault the trial court's finding that the appellant unlawfully acquired title to the suit property. The appellant's certificate of lease is under challenge; the procedure that the appellant followed that led him to be registered as proprietor of the appellant followed that led him to be registered as proprietor of the suit property, which is a public utility land, is a fact within the peculiar and special knowledge of the appellant. The respondent's case is that the procedure for alienating the suit property



as a public land was not followed: under the provisions of section 112 of the Evidence Act. It is incumbent upon the appellant to demonstrate the procedure he followed to get public land registered in his name..... He had to demonstrate that provisions of the Government Land Act were followed in alienating the suit property and the subsequent registration in his name..... Further. It is our view that Governments title to an un- alienated public land stems from the concept of radical title or eminent domain. Based on radical title, the government has superior title to all un – alienated public land.....

55. The Attorney General is opined that it is the duty of this court to review and evaluate the evidence on record to ascertain that the due process was followed in acquiring the titles under challenge. It is under legal obligation to lead evidence that concisely demonstrates how the title was acquired lest the title is declared a nullity.
56. In Henry Muthee Kathurima – versus – Commissioner of Lands & another, (supra) the Court of Appeal faulted the indefeasibility of title under section 26 of the land registration Act, 2012 (equivalent of section 143 of the repealed registered land Act) to the extent that section 26 cannot be invoked to defeat the spirit and intent of Article 40(6) of the Constitution. In cancelling the appellant’s title. The Court held:
- We have considered the provisions of section 26 of the Land registration Act of the provisions of Article 40(6) of the Constitution. Guided by the provisions of article 40(6) of the Constitution, we hold that the concept of Indefeasibility or conclusive nature of title is inapplicable to the extent the title to the property was unlawfully acquired.
57. According to the Attorney General, the plaintiff failed to demonstrate how she acquired her title. The Origin of her certificate of lease is suspicious to the extent that she did not explain how the land registry could issue such a title in the absence of a lease. She did not call evidence from the land registry to dispel the suspicion or prove the intention of the Government. According to the plaintiff, she purchased the suit land from Donata Amani Limited who was said to have purchased it from one Dinus Simon Mbunya. Neither Donata Amani Limited nor Dinus Simon Mbunya were called to testify on how they acquired their title in view of the evidence of the Land. The land Registrar testified that there were no records to support the plaintiff’s title or titles previously held by Dinus Mbunya and Donata Amani Limited. Firstly, the plaintiff did not lead evidence to show that the suit property was leased to Dinus Mbunya. No letter of allotment or lease instrument was tendered in evidence. In the premises, the plaintiff did not prove that the said Dinus Mbunya had any good title to pass to Donata Amani Limited. The Land registrar who is custodian of Land records was categorical that she did not have records to support title held by Donato Amani Limited or Dinus Mbunya.
58. The plaintiff also failed to prove that she purchased a good title from Donata Amani Limited. To start with, the plaintiff failed to prove that Donata Amani Limited was an existent entity or that it had capacity to own property. Moreover, she failed to provide a sale agreement between Donata Amani Limited and Dinus Mbunya. Finally, the plaintiff failed to prove that there was a transfer of lease between Donata Amani Limited and Dinus Mbunya or that the transfer was lodged for registration or that it was ever registered at Lands Office upon which a certificate of lease could be issued.
59. The evidence of Registrar that the title held by Donata Amani Limited was not supported by her records remained uncontroverted even on cross –examination. The Registrar was categorical that it was on that premise that she had summoned the directors of Donata Amani Limited to shed light on the circumstances under which its title was acquired. It is on record that Donata Amani limited neither heeded to the said invitation nor provided justification under which its title to the suit property. The Attorney General submits that what the plaintiff has done is to wave her certificate of lease and



invite the court to uphold it. The various queries surrounding its origin and basis notwithstanding. In a nutshell, the plaintiff failed to prove that the suit property was allocated to Dinus Mbunya. Secondly, she failed to prove that the said Dinus Mbunya transferred the suit property to Donata Amani Limited. Finally, the plaintiff failed to prove that Donata Amani Limited actually transferred the suit land to the plaintiff. On contrary, the Land registrar testified that she did not have records to support the plaintiff's title and that the presentation books in her custody did not have entries in favour of the plaintiff or any of her predecessors in title. The Attorney General is opined that the plaintiff failed to prove that she holds a valid and lawful title and this court should uphold it.

60. On the part of the 2nd and 3rd defendants, the Attorney General submits that they were allocated the suit property and that they complied with the conditions of allocation including acceptance and payments of stand premium, albeit out of the time limited in the letter of allotment. Nonetheless, the allocation was ratified when the Commissioner of Lands accepted the payments and the Chief Land Registrar forwarded a lease in their favour for registration at Eldoret registry.
61. The witness who testified on behalf of defendants explained how the 2nd and 3rd defendants applied for allocation of the suit property: that they were then allocated the suit property through a Women's Group; that they paid for the said registered in their favour and certificate of lease issued. In particular, DW3 elaborated with documentary evidence how payments were effected and how the lease was issued and subsequently registered in favour of the Women Group.
62. This evidence was corroborated by the land registrar who confirmed that from her records, the only title that was duly, lawfully and procedurally registered was the one that was issued to the 2nd and 3rd defendants. The land registrar produced all records including the presentation books which showed the root of the 2nd and 3rd defendant's title to the suit property. She also availed a Lease duly executed, franked and was forwarded for registration. She further produced evidence to show that the Lease was received by her office and was dully registered. Unfortunately, the plaintiff laid no such evidence.
62. The Attorney General relied on the Court Appeal case of *Munyu Maina – versus – Hiram Gathiha Maina*, Civil Appeal number 239 of 2009 held as follows :

We state that when a registered proprietor's root of title is under challenge: it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that it is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register. (Emphasis Added)

63. And also In *Sammy Mwangangi & 10 Others – versus- Commissioner of Lands & 3 others* (2018) eKLR the Court of Appeal expressed itself as follows:
 47. It is thus our considered view that the respondents have successfully shown how they acquired their title by produce all the documents that must be in place a Grant could be issued and registered in their favour.
 48. the 3rd and the 4th respondent have sufficient evidence to prove that they acquired the suit property lawfully. Indeed, we agree with the learned judge that no evidence was called by the appellants to show the 3rd and 4th respondents acquired the titles unlawfully to enable this court order for their cancellation.
 50. having found that the respondents were allocated the suit property lawfully, their titles cannot be impeached. In view of the fact that the appellants failed to prove the allegations of fraud



in the acquisition of the title, consequently they failed to prove their case on a balance of probabilities. For all the foregoing reasons,. Having re – evaluated the evidence before us, we are not persuaded that the learned Judge erred in arriving at the conclusion she made. The judgment now impugned was now based on sound law and evidence, and the same cannot be impeached. (Emphasis added)

64. According to the Attorney General, in applying the above test, the Court of Appeal in *Richard Kipkemei Limo – versus- Hassan Kipkemboi Ngeny & 4 others* (2019) eKLR rightly observed as follows:
65. In the instant appeal, the evidence on record as led by the 1st respondent demonstrates the procedure that he followed that led to his being registered as the proprietor of the suit property. In recap, the evidence is that the 1st respondent by letter dated 28th April 1982 applied to the President of republic for allocation of the suit property; by letter dated 13th August 1982, he was notified by the Commissioner of Lands that the Government had approved his application for allocation of the property; by letter dated 27th January 1983. The commissioner of Lands forwarded to him a letter of allotment; the 1st respondent paid the requisite stand premium which was stipulated; subsequently a certificate of lease was issued to the 1st respondent.....”
66. Ultimately, the Honorable Attorney General submits that the plaintiff did not in any way prove on a balance of probabilities, that she acquired her title lawfully and procedurally. By failing to summon either Dinus Ambunya or Donata Amani Limited when she knew or ought to have known that lawfulness of her part. The plaintiff cannot wave in the face of court the very certificate of lease that is under scrutiny and then expect the court to uphold it without further interrogation of the circumstances under which it was issued.
67. Whether doctrine of double allocation is applicable – first title always, the Attorney General submits, the plaintiff contended that her title to the suit property should take precedence as it was issued first in time. The plaintiff stated that she was registered as the proprietor of the suit property with a certificate of lease on 30- 10- 2003. She contended that. The 2nd and 3rd defendants were issued with a letter of allotment on 1-5-1981 but were only registered as proprietors of the suit property on 12-4-2005. It is therefore the plaintiff’s contention that her title should take precedence over the 2nd and 3rd defendant’s since hers came out first in time. According to the Attorney General, the doctrine of double allocation does not apply in the circumstances of this case. It is trite law that double allocation arises in the circumstance where two or more titles were lawfully and procedurally issued over the same parcel of land to different parties. Ordinarily double allocation arises out of error, mistake or misrepresentation. The evidence tendered must lead to one definite conclusion: that the titles were issued bonafide, lawfully and procedurally. It is then that the equitable maxim of ‘the first in time shall prevail’ may be invoked.
68. The Attorney General relied on the case of In *Gitwany Investment Limited – versus- Tajmal Limited & 3 Others* (2006) eKLR Hon. Isaac Lenaola J. (as he then was) confronted with two genuine titles had this to say

”like equity keeps teaching the first in time prevails so that in the event such as this one where by a mistake that admitted, the Commissioner of Lands issues two titles inn respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity. The Gitwany title fits this



description and in fact up to the end of this case the 3rd party has not sought to cancel it!

47. My answer above does not solve the puzzle however, What then happens to the second title issued apparently procedurally but subsequent to an earlier valid title? Again my view is that the answer lies in 23.(1) aforesaid whereas the first title cannot be challenged, the second one can be challenged because whereas it exists and even if procedurally issued, or so it appears, it is not absolute nor indefeasible and is relegated to a level of legal disability and the remedy for party holding it if aggrieved, lies elsewhere I will shortly address."
69. The Attorney General submits that no evidence was led to show that the plaintiff's title was issued lawfully and or procedurally. The land Registrar stated that the root of the plaintiff's title is suspicious hence irregular. The Land registrar confirmed that she even summoned one Donatas Amani Limited to shed light on the circumstances of acquisition. Instead of honouring the summon, Donatas Amani Limited purported to sell and transfer to plaintiff an already impugned title. What plaintiff received was a title that had no foundation. Secondly, besides the unexplained root of her title, the Land registrar testified that she did not have records to show how the plaintiff's title was issued. The Land registrar stated that there was no transfer of lease form and consent from Commissioner of Lands: the transaction was never captured in the presentation book and the certificate of lease predated the sale of land agreement. These are serious anomalies that, more often than not, would vitiate the notion of bonafide acquisition of title. Finally, no evidence was led by the plaintiff or any other witness that the 2nd and 3rd defendant's title was issued by error, mistake or misrepresentation. On the Contrary, the evidence on record demonstrates the government's clear intention in respect of suit property: to allocate and issue title thereto to the 2nd and 3rd defendants. The Attorney General submits that because of this tainted and unexplained origin, the plaintiff's title was not acquired lawfully and procedurally. It follows that from the onset. It was incorrect for the plaintiff to invoke the maxim of equity that the first in time shall prevail
70. On whether the plaintiff as a bonafide purchaser, the Attorney General submits that the duty of innocent purchaser for value without notice is a principle that traverses through our legal system. Indeed, the Court of Appeal in *Suleiman Rabemtulla Omar & another – versus- Musa hersi fabize & 5 others* (2014) eKLR held that the appellant was not a bonafide purchaser for value without notice as he had failed to carry out sufficient due diligence before entering into the land purchase transaction. His title was therefore cancelled.
71. In *Joseph Muriithi – Versus – Mary Wanjiru Njuguna & another* (2018) eKLR the Court of Appeal dealt with the issue of a bonafide purchaser for value without notice as follows:
- 49: In this matter, the 2nd respondent does not hold a certificate of title (lease) secondly, the vendor's title was not valid as it had been fraudently obtained. Thirdly as at March 1997 when she purported to purchase the suit property from the 1st respondent, the city Council as the head lessor did not give any consent to the transaction. The lease hold property could not be sold without written consent of the City Council. A purchaser who does not hold a title to property and who did not exercise due diligence in acquiring a registered property cannot be described as a bon fide purchaser or innocent purchaser.
72. The Attorney General argues that the plaintiff does not merit to be described as an innocent purchaser for value without notice. The plaintiff stated that she did not conduct any historical search. She also stated that she did not know how her title was issued or whether the requisite payments were made as her cousin (PW1) and her lawyer (PW4) were in full control of the process. However, PW4 and



PW1 did not offer any assistance as they blatantly stated that only the Land Registrar could explain how the title plaintiff's title was issued. They also gave very conflicting statements thereby making their testimonies unbelievable.

73. The Attorney General submits that the absence of the consent from Commissioner of Lands as well as clear records showing how the transaction was completed, the plaintiff's title is void ab initio for all intent and purposes. The plaintiff was too casual in the transaction, as if he was buying potatoes at Eldoret market Centre, hence she cannot therefore enjoy the privileges of a bonafide purchaser. The Attorney General finally submits that the plaintiff is not entitled to the reliefs sought.
74. As for damages sought, it is a nonstarter since damages must flow from legitimate damage. The plaintiff failed to show that she acquired legitimate title. She therefore stands to suffer no legitimate damage, if her title was to be cancelled. For the reasons already advance hereinabove, the state is not able to guarantee the legitimacy of the palintiff's title. Therefore, in the event of cancellation, the state cannot be compelled to indemnity the plaintiff as her title was without any iota legitimacy.

Analysis and Determination

75. The court of appeal has observed in the case of *Chief Lands Registrar and 4 others vs Natha Tirop and 4 others*, (2018) eKLR that: -

“Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of *the Constitution* or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with *the Constitution* and Statutory provisions. At the center of the dispute between the parties is the protection of private property as enshrined in Section 75 of the retired Constitution and Article 40 of the 2010 Constitution. “

76. Having carefully read the pleadings and considered the evidence on record and rival submissions, I do find the issue for determination is that between the plaintiff and the defendants number 1 to 3 who is the legally registered proprietor of the suit land and therefore should be protected by section 75 of the retired constitution read with Article 40 of the current constitution and that which orders should the court grant. Section 75(1) of the *retired Constitution of Kenya* stipulate as follows:

“75 (1) No property of any description, shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied: (a) The taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote public benefit; and (b) The necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and (c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.” 4. The protection of private property as guaranteed under Section 75(2) of the retired Constitution is sustained under the provisions of Article 40 of the 2010 Constitution.

Article 40 (2), (3), (4) and (6) provide as follows:

“ 40 (2) Parliament shall not enact a law that permits the State or any person:-



- (a) To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description (3) The State shall not deprive a person of property of any description, or of any interest in, or right over property of any description, unless the deprivation: (a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land, in accordance with Chapter Five, or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:- i. requires prompt payment in full of just compensation to the person, and ii. allows any person who has an interest in, or right over, that property a right of access to a court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

77. Both parties have certificates of title that were issued by the Land Registrar Uasin Gishu in respect of the suit parcel which is government land but leased to private persons. The defendants allege that they were allocated the land in 1981 as a group of dancers. They relied on a letter of allotment issued in 1981. The plot was then un-surveyed land. However, the 1st to 3rd defendants did not produce a part development plan for the parcel of land accompanying the allotment letter. The defendants did not produce an application for the parcel of land to demonstrate that indeed the same was issued by the president of Kenya at that time. There is no letter from the president to the 1st to 3rd defendants indicating that the parcel of land was allocated to the said defendants. There is no letter from the Commissioner of Lands to the defendants forwarding the letter of allotment to the defendants. The process of allocating land to an individual before the promulgation of *the Constitution* of Kenya 2010 began with an application to the president.

78. The question of acquisition requires the court to trace the legal prescriptions for the issuance of an allotment letter. In the case of *Mako Abdi Dolal v Ali Duane & 2 others* [2019] eKLR it was noted that prior to the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the *Government Lands Act* (Repealed). Section 4 of the Act provided as follows:

“All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents neither this Act, made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.”

79. Power to dispose of public land was vested in two entities: The President and the Commissioner of Lands, under Sections 3 and 9 respectively. The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. In the case of *Harison Mwangi Nyota v Naivasha Municipal Council & 20 others* [2019] eKLR, it was held: -

“...The question that the plaintiff seemed to raise is what role the Municipal Council of Naivasha had in the issuance of allotment letters to the defendants in 1992. According to



DW1, an employee of the 1st defendant, the local authority (1st defendant) has to recommend that the land is available for allocation before an allotment letter can issue. DW13 also told the court that the Council oversees all developments in its jurisdiction and allocates land on advisory basis for the Commissioner. It seems that even if the 1st defendant issued the letters dated 1/12/1992, it was mere advisory to the Commissioner of Lands. The allotment of the land had to be ratified by the Commissioner for Lands. It is obvious even from the communication between the Municipal Council and the Office of the Commissioner of Lands that the Council played an important role in identifying what land was available for purposes of alienation.”

80. The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands.

81. In the case of *Nelson Kazungu Chai & 9 Others vs. Pwani University College* (2014) eKLR

“It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.”

82. The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the *Government Lands Act (Repealed)*. The matters to be determined include the price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

83. The fourth step would be for the gazettment of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of *the Government Lands Act* (Repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

84. The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).

85. The sixth step would be for the issuance of an allotment letter to the allottee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. The Court of Appeal in their decisions in: *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri); and in *Dr. Joseph N.K. Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others* C.A.60/1997 held as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

86. 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. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law.”

87. The allotment letter also must have attached to it a part development plan (PDP). See the decision in *African Line Transport Co. Ltd Vs The Hon .AG*, Mombasa HCCC No.276 of 2013 where Njagi J held as follows:

“...Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number.”

88. And again, in *Nelson Kazungu Chai & 9 Others vs. Pwani University College* (2014) eKLR

“Worth noting as well is that no Part Development Plan was produced to back the Appellants’ claim that due process had been followed as alleged.”

89. The seventh step, which comes after the allottee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease. *Nelson Kazungu Chai & 9 Others vs. Pwani University College* (2014) eKLR the court held as follows:

‘It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co. Ltd Vs The Hon .AG*, Mombasa HCCC No.276 of 2013 where Njagi J held as follows:

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director



of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.”

90. I have perused the record and do not find evidence of the process of issue of the allotment letter to the 1st to 3rd defendants by the president. It follows that the allotment letter was un-procedurally issued the land in contention being government land. However, it is evident that the 1st to 3rd defendants complied with the terms of the lease more than 20 years after the same had been issued as opposed to the three months given in the allotment letter and unfortunately, after the parcel of land had been transferred to the plaintiff.
91. On the other hand, the plaintiffs title emanates from a transfer of lease from Donata Amani Ltd to the plaintiff. The title shows that the lessee was one Dinus Simon Mbugua for a term of 99 years from 1st July 1996. The parcel of land was transferred to Donata Amani Limited on the 2nd of October 2003 and transferred a certificate of title issued on the same date. The white card shows that the suit property was transferred to the plaintiff on the 30th of October 2003. In the letter by Mr Mudimbia produced as 5th DEX39, he acknowledges that there is a lease executed by Dinus Simon Mbunya and the Commissioner of lands before the Land Registrar and that the same was relied upon to register the parcel of land in the names of Dinus Simon Mbunya. The lease date 19th December 2002 was purportedly registered on 2nd of October 2003. The record shows that the land was registered in the names of Donata Amani Ltd on 2nd of October 2003. There is a memorandum of registration of transfer of lands in respect of the suit parcel presented on 30th October 2003 by Donata Amani Company. The document being presented was a transfer of lease wherein the transferee was the plaintiff whereas the transferor was Donata Amani Company. The plaintiff was ultimately registered as proprietor on the said 30th of October 2003. Thereafter, a complaint was raised by the 1st to 3rd defendants and therefore a restriction was entered however, there is no evidence that investigations were ever done. There is no evidence that the lessee, Dinus Simon Mbunya was ever served with any letter summoning him to appear before the registrar for questioning.
92. On the other hand, the 2nd and 3rd defendants’ produced a lease executed on the fifteenth February 2005 between the defendants and the then commissioner of Lands Judith Okungu. The lease was registered on 12th April 2005 and certificate of lease was issued on the same date. On the 20th of April 2005, the plaintiff caused a caution to be registered and letter on the 15th of Before registering the defendants as proprietors of the suit parcel, the 5th to 7th defendants purported to cancel the plaintiffs title which was an act in nullity view.
93. I agree with the plaintiff that on rectification of the title and register, and or revocation of the title and register, Section 143, Registration of Land Act cap 300, (repealed, but in para material with Section 26 and 86 A of the registered land Act No. 3 of 2012 applies. The plaintiff’s submissions that in purporting to cancel the title was an acknowledgment that the same existed are sound in law. There exists no evidence that the Land Registrar summoned Donata Amani Limited after he noticed the suit parcel was registered in their favour. Moreover, the purported cancellation was an illegality as the Land Registrar did not have the powers to do so. I adopt the dictum of Justice D. Musinga in Kuria Greens Limited v Registrar of Titles & another (2011) eKLR where he found that:

“In Gazette Notice No. 15584 vide which the 1st respondent purported to revoke the petitioner’s title to the suit land he did not indicate the provisions of law that invoked as the basis for his decision. Was that an omission? I do not think of titles Act or any other Act that bestows on the 1st respondent or the Commissioner of lands or the Government has the power to revoke a registered title in the absence of Court order to that effect. I have



carefully searched the Land Titles Act, the Registration of Titles Act the india Transfer of Property Act, the Registered [Land Act](#) and the [Land control Act](#) and I did not come across any provision that grants power to Registrar of Tiles or the commissioner of Land to arbitrarily revoke a valid land title.

94. In my view therefore, the Registrar of Tiles exceeded his power and thus acted ultra vires in purporting to revoke the petitioner title. There can be no dispute that an ultra vires act by a public authority is unlawful. In [Republic vs Kisumu District Lands Officer & another](#), miscellaneous Application No.80 of 2010 (eKLR) the court held that:

“...it is clear that it is only the court that court that cancel or amend a title where the court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where the court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration.”

95. The defendants have alleged fraud on the part of the plaintiff and the previous registered owners. This court notes that the previous lessee and transferees are not party to the suit and were not called by either party. The plaintiff is 3rd in the line having obtained registration after a transfer from Donata Amani Ltd. The plaintiff conducted a search and found that the property was registered in the names of Donata Amani Ltd and therefore went ahead to transact. There was no warning or restriction or caution in the title to give notice to the plaintiff that there was possible fraud. The plaintiff relied on documents kept by the government to enter into the transaction of sale. I do find no evidence of fraud against the plaintiff.

96. The adage in law that he who asserts must prove has never been reviewed and was restated by the Court of Appeal in [Jennifer Nyambura Kamau v Humphrey Mbaka Nandi](#) NYR CA Civil Appeal No. 342 of 2010[2013]eKLR as follows

We have considered the rival submissions on this point and state that section 107 and 109 of the [Evidence Act](#) places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the [Evidence Act](#) provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the [Evidence Act](#) provides, the burden lies on that person who would fail if no evidence at all were given on either side.

97. The documents relied upon by the plaintiff were processed by the ministry of land and cannot be referred to as fake document. The Court of Appeal in [Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority & 4 Others](#) (2019) eKLR holding that: -

“In Kenya, in [Charles Karathe Kiarie & 2 Others vs. Administrators of the Estate of John Wallace Mathare \(deceased\) & 5 others](#) (2013) eKLR this Court affirmed the principles of Torrens System of titles namely: (a) the Government, as a keeper of records guarantees indefeasibility of titles against entire world; (b) If anyone suffers loss, the Government compensates; (c) the buyer is not concerned about past



irregularities and illegality and (d) a bona fide buyer notwithstanding infirmity of the vendor's title, acquires indefeasible title.

98. The upshot of the above is that the plaintiff was an innocent purchaser for value having purchased the parcel of land from Donata Amani Ltd in good faith and without any knowledge of fraud if any, for valuation consideration of Ksh 4,400, 000 and that the vendors had a valid title and that no fraud had been proved against the plaintiff*. The title issued to the 2nd and 3rd defendants was issued irregularly when there existed a title issued to the plaintiff. This court finds that the plaintiff has proved his case on a balance of probabilities and does grant the prayers sought thus:-
1. a declaratory order against Rhoda Masit,(now deceased) Esther Cheruiyot, Innie Kibisach (As Trustees of Mosop Marichor Group of Chepkorio) J. W. Duor,(now deceased) The Chief Land Registrar, The Commissioner Of Lands,(now the National Land Commission) The Attorney General that the plaintiff is the bona-fide lawful and registered lessee of Eldoret / Municipality Block 7/150 and:-
 2. That a permanent injunction is hereby issued against the defendants restraining them from entering and transferring or dealing in any manner whatsoever with parcel No. Eldoret / Municipality Block 7/150.
 3. Moreover, a permanent injunction is hereby issued to restrain the defendants jointly and severally from trespassing into and or interfering with plaintiffs use and enjoyment of the entire parcel known as Eldoret/ Municipality Block 7/150.
 4. Furthermore, for avoidance of doubt, a declaration is hereby issued that the plaintiff be re-instated as the bonafide leasehold title holder of all that parcel referred to as Eldoret / Municipality Block 7/150.
 5. Lastly but not least, a declaratory order to issue declaring the title issued in favour of the 1st 2nd, and 3rd defendants to be null and void and that the 5th, 6th and 7th defendants to jointly and severally cancel the said title on their record.
 6. The claim for damages was not proved and therefore is not allowed by the court.

DATED AT KISUMU THIS 8TH DAY OF JULY 2022

ANTONY OMBWAYO

