



**Thindigua Dairy Investments Limited v Ndumberi Farmers Co-op. Society Ltd & 3 others (Environment and Land Case Civil Suit 1346 of 2006) [2022] KEELC 2541 (KLR) (12 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2541 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1346 OF 2006  
SO OKONG'O, J  
JULY 12, 2022**

**BETWEEN**

**THINDIGUA DAIRY INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**NDUMBERI FARMERS CO-OP. SOCIETY LTD ..... 1<sup>ST</sup> DEFENDANT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT  
KIAMBU MUNICIPAL COUNCIL ..... 3<sup>RD</sup> DEFENDANT  
GEORGE NGUGI KARUNGO ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit against the 1<sup>st</sup> Defendant which was the sole defendant through a plaint dated 13<sup>th</sup> December 2006 seeking for the following reliefs;
  - a. Vacant possession of all that parcel of land known as L.R No. 22402(hereinafter referred to as “the suit property”).
  - b. Eviction of the Defendant from the suit property.
  - c. Damages for trespass calculated at a monthly rent value of Kshs. 10,000/= per month from January 2000 until possession is delivered up.
  - d. Cost and interest on (c) above.
2. The Plaintiff averred that it was the registered proprietor of the suit property and that in January 2000 or thereabouts, the 1<sup>st</sup> Defendant entered the suit property without its consent, erected a temporary shelter on a portion thereof and started operating a milk delivery shed thereon.



3. The Plaintiff averred that it made a formal demand upon the 1<sup>st</sup> Defendant to vacate the suit property but it failed to do so thereby depriving the Plaintiff of the use and enjoyment of the suit property. The Plaintiff averred that the suit property was valued at Kshs. 2,000,000/- and the portion thereof upon which the 1<sup>st</sup> Defendant had trespassed could fetch a market rent of Kshs. 10,000/- per month.
4. The 1<sup>st</sup> Defendant entered appearance and filed a defence and counter-claim against the Plaintiff on 30<sup>th</sup> March 2007. On 24<sup>th</sup> September 2008, the 1<sup>st</sup> Defendant filed amended defence and counter-claim in which it added the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the suit. On 24<sup>th</sup> December 2012, the 1<sup>st</sup> Defendant amended its defence and counter-claim further and added the 4<sup>th</sup> Defendant as a party to the suit. In its further amended defence and counter-claim, the 1<sup>st</sup> Defendant sought the following reliefs against the Plaintiff and the 4<sup>th</sup> Defendant;
  - a. An order that it had acquired the suit property by adverse possession;
  - b. In the alternative, an order cancelling the title that was fraudulently acquired by the Plaintiff in respect of the suit property in breach of the procedure of allocation and the court orders in High Court Civil Suit No.524 of 1998.
  - c. An order cancelling the entries made by the 2<sup>nd</sup> Defendant on the title of the suit property in favour of the 4<sup>th</sup> Defendant.
  - d. In the alternative, the costs of dairy milk collection of 748 liters valued at Kshs. 15,680/- per day from February 2007 till the determination of this suit.
  - e. Damages for the damaged structures valued at Kshs. 200,000/- plus general damages.
5. In its further amended defence and counter-claim, the 1<sup>st</sup> Defendant denied that the Plaintiff was the legally registered owner of the suit property. The 1<sup>st</sup> Defendant denied further that it entered the suit property in 2000 or thereabouts without the Plaintiff's permission. The 1<sup>st</sup> Defendant averred that it came to know of the Plaintiff's alleged title over the suit property when thugs hired by the Plaintiff entered the suit property on 7<sup>th</sup> March 2007 and demolished the structures that had been put up thereon by the 1<sup>st</sup> Defendant.
6. The 1<sup>st</sup> Defendant averred that the title held by the Plaintiff in respect of the suit property if any was acquired illegally and fraudulently through forgery and concealment of material facts to the Commissioner of Lands. The 1<sup>st</sup> Defendant averred that the Deed Plan for the suit property was among the Deed Plans for public utility plots that disappeared mysteriously when the Plaintiff's Chairman was the Chairman of Thindigua Company Limited, a land buying company that initially owned the suit property.
7. The 1<sup>st</sup> Defendant averred that the suit property was mentioned in the Report on the illegal/irregular allocation of public land popularly known as "the Ndungu Report" as a public land belonging to Kiambu County Council that was irregularly allocated for private use.
8. The 1<sup>st</sup> Defendant averred that it was a co-operative society formed in 1963 to assist the public in the collection and marketing of their milk produce. The 1<sup>st</sup> Defendant averred that the suit property was surrendered by Thindigua Company Limited (hereinafter referred to only as "Thindigua") to Kiambu County Council as a public utility plot and as such its allocation to the Plaintiff should have been approved by Kiambu County Council. The 1<sup>st</sup> Defendant averred that the Plaintiff was formed by the former directors of Thindigua as a ploy to acquire and sell public utility land.



9. In its counter-claim, the 1<sup>st</sup> Defendant averred that it had been on the suit property since 1994 and had put up structures thereon which it was using for the business of collecting milk until 7<sup>th</sup> March 2007 when the said structures were brought down by hired thugs. The 1<sup>st</sup> Defendant averred that it was entitled to the suit property by adverse possession.
10. The 1<sup>st</sup> Defendant averred that the suit property was allocated to the 3<sup>rd</sup> Defendant in early 1994 to use for dairy purposes and that this allocation was communicated to the Commissioner of Lands by the 3<sup>rd</sup> Defendant on 30<sup>th</sup> December 1996. The 1<sup>st</sup> Defendant averred that in 1994 it lodged a caveat on the title of the suit property to prevent any grabbing or dealing with the same which caveat was lifted by the 2<sup>nd</sup> Defendant at the request of the plaintiff without consulting the 1<sup>st</sup> and 3<sup>rd</sup> Defendants after which the 2<sup>nd</sup> Defendant proceeded to issue a title in respect of the suit property to the Plaintiff on 25<sup>th</sup> April 1996.
11. The 1<sup>st</sup> Defendant averred that with the knowledge that the Plaintiff had been issued with a title in respect of the suit property on 25<sup>th</sup> April 1996, the Plaintiff's director misled the court in another suit namely, HCCC No. 524 of 1998 that the deed plan for the suit property among others was lost.
12. The 1<sup>st</sup> Defendant averred that the suit property which was reserved for milk collection by Thindigua was allocated to the 1<sup>st</sup> Defendant by the 3<sup>rd</sup> Defendant in 1994, the 1<sup>st</sup> Defendant took possession immediately and put up thereon stone and timber structures. The 1<sup>st</sup> Defendant averred that it had been collecting milk from the public on the suit property for 13 years at an average of 784 liters per day.
13. The Plaintiff filed a reply to the amended defence and defence to the amended counter claim on 23<sup>rd</sup> January 2013. The Plaintiff averred that the 1<sup>st</sup> Defendant had no valid claim of ownership to the suit property. The Plaintiff averred that the 1<sup>st</sup> Defendant was all along a trespasser on the suit property and that its attempts to put up structures on the property on 7<sup>th</sup> March 2007 were thwarted by the Plaintiff. The Plaintiff denied the allegations of fraud levelled against it by the 1<sup>st</sup> Defendant.
14. In response to the 1<sup>st</sup> Defendant's counter-claim, the Plaintiff denied the same in its entirety. The Plaintiff averred that at no time was the 1<sup>st</sup> Defendant allocated the suit property by any person or authority. The Plaintiff denied that the 1<sup>st</sup> Defendant had acquired the suit property by adverse possession and averred that the adverse possession claim was improperly before the court. The Plaintiff reiterated that the 1<sup>st</sup> Defendant entered the suit property in 2000 and not 1994 as claimed and contended that the 1<sup>st</sup> Defendant's occupation had since been brought to an end by the Plaintiff.
15. The Plaintiff denied that the 3<sup>rd</sup> Defendant was allocated the suit property. The Plaintiff reiterated that it was a bona fide owner of the suit property having been allocated and registered as the owner of the same by the Commissioner of Lands. The Plaintiff averred that if the 1<sup>st</sup> Defendant wished to challenge the allocation of the suit property to the Plaintiff, it should have sued the Commissioner of Lands.
16. The Plaintiff averred that in order to meet its financial needs, it sold the suit property to the 4<sup>th</sup> Defendant and that there was no restriction or caveat on the title against sale of the property. The Plaintiff termed the 1<sup>st</sup> Defendant's counter-claim fictitious and an afterthought brought merely to justify its acts of trespass.
17. The 3<sup>rd</sup> Defendant filed a defence to the 1<sup>st</sup> Defendant's counter-claim on 26<sup>th</sup> November 2009. The 3<sup>rd</sup> Defendant averred that the 1<sup>st</sup> Defendant's counter-claim did not disclose any cause of action against it. The 3<sup>rd</sup> Defendant averred that the said counter-claim was incompetent, bad in law and incurably defective.



18. The 4<sup>th</sup> Defendant filed a statement of defence to the 1<sup>st</sup> Defendant's counter-claim on 2<sup>nd</sup> April 2013. The 4<sup>th</sup> Defendant averred that the 1<sup>st</sup> Defendant's counter-claim against him was bad in law and incurably defective. The 4<sup>th</sup> Defendant averred that instead of filing a counter-claim against him, the 1<sup>st</sup> Defendant should have instituted third party proceedings. The 4<sup>th</sup> Defendant averred that in the absence of a suit between them, a counter-claim could not lie against him at the instance of the 1<sup>st</sup> Defendant.
19. On the merit of the claim, the 4<sup>th</sup> Defendant averred that it was the registered owner of the suit property having purchased the same from the Plaintiff for valuable consideration. The 4<sup>th</sup> Defendant averred that he had no notice of any defect in the title that was held by the Plaintiff. The 4<sup>th</sup> Defendant averred that he had no notice that there was an ongoing suit concerning the suit property or of any order that had been made in relation thereto.
20. The 4<sup>th</sup> Defendant averred that he had taken possession of the suit property and had fenced the same. The 4<sup>th</sup> Defendant denied that the suit property was sold to him secretly and fraudulently. The 4<sup>th</sup> Defendant averred that the 1<sup>st</sup> Defendant's prayer for his title to be cancelled had no basis. The 4<sup>th</sup> Defendant averred that he had charged the suit property to Equity Bank Limited and as such it was necessary to join Equity Bank Limited to the suit. The 4<sup>th</sup> Defendant averred that neither Equity Bank Limited nor he were parties to HCCC No. 524 of 1998 which was the basis for the 1<sup>st</sup> Defendant's prayer for the cancellation of his title to the suit property.
21. The 4<sup>th</sup> Defendant averred that the suit property was lawfully transferred to him and that the 1<sup>st</sup> Defendant's claim had been overtaken by events. The 4<sup>th</sup> Defendant urged the court to dismiss the 1<sup>st</sup> Defendant's claim with costs.
22. I have not seen on record a defence by the 2<sup>nd</sup> Defendant. The Plaintiff's case was closed when the suit came up for hearing on 12<sup>th</sup> July 2017 and the Plaintiff was not ready to tender its evidence. The Plaintiff's witness(PW1) had given evidence in part earlier. PW1's evidence in chief was not completed neither was the witness cross-examined. The Plaintiff's case was in essence closed without evidence.
23. The 1<sup>st</sup> Defendant called a number of witnesses in proof of its counter-claim against the Plaintiff and the other Defendants. The 1<sup>st</sup> Defendant's first witness was Patrick Gachau Macharia(DW1). DW1 told the court that he was a farmer and the vice chairman of the 1<sup>st</sup> Defendant's board of directors. He stated that the 1<sup>st</sup> Defendant's business was to collect milk from its members for sale and that at Thindigua they used to collect milk along the road. He stated that in 1991, the 1<sup>st</sup> Defendant was given a central place to collect milk at Thindigua by Thindigua Company Limited (Thindigua). He stated that the 1<sup>st</sup> Defendant made a formal request to be allocated land to be used for milk collection and received a positive response from Thindigua.
24. DW1 stated that the land that was given to the 1<sup>st</sup> Defendant by Thindigua was reserved for public utility. DW1 stated that one of the directors of the Plaintiff, Francis Njuguna Gikonyo was the Chairman of Thindigua when it resolved to allocate the said parcel of land to the 1<sup>st</sup> Defendant to use for milk collection. DW1 stated that the 1<sup>st</sup> Defendant was allocated a parcel of land known as L.R No. 76/381/3(which later became L.R No. 22402) (the suit property). He stated that the allocation of the suit property to the 1<sup>st</sup> Defendant was confirmed by the 3<sup>rd</sup> Defendant in a letter to the Commissioner of Lands. He stated that the structures that the 1<sup>st</sup> Defendant had put up on the suit property were demolished by the Plaintiff in 2007 before it sold the property to the 4<sup>th</sup> Defendant. DW1 stated that the suit property was mentioned in the Ndungu Report on illegal/irregular allocation of public land.



25. DW1 stated that after the public utility plots were surrendered to the 3<sup>rd</sup> Defendant by Thindigua, the 1<sup>st</sup> Defendant made another application to the 3<sup>rd</sup> Defendant to be allocated the suit property. DW1 urged the court to grant the reliefs sought by the 1<sup>st</sup> Defendant in its counter-claim. He produced several documents as exhibits. The 1<sup>st</sup> Defendant's witnesses who followed Dw1, Joseph Gitau Kamau(dw2) And Joseph Maina Kamau(dw3) relied entirely on their witness statements dated 19<sup>th</sup> October 2017 and 18<sup>th</sup> January 2018 respectively as their evidence in chief.
26. The 4<sup>th</sup> Defendant gave evidence next as (DW4). DW4 adopted his witness statement dated 13<sup>th</sup> February 2018 as his evidence in chief. In summary, DW4 stated that he acquired the suit property procedurally from the Plaintiff who was the registered owner thereof. He stated that when he purchased the property there was no encumbrance on its title and he had no knowledge that an order had been issued in this suit stopping the transfer of the property. DW4 stated that after holding the property for four years he sold the same on 18<sup>th</sup> July 2013 to David Ndungu Mwangi and Diamond Court Limited. He stated that he no longer had any interest in the property. DW4 produced as exhibits the 4<sup>th</sup> Defendant's list and bundle of documents filed on 11<sup>th</sup> June 2019.
27. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not tender evidence at the trial. After the close of evidence, the parties were directed to make closing submissions in writing.
28. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their submissions dated 1<sup>st</sup> July 2021, 1<sup>st</sup> September 2021 and 29<sup>th</sup> September 2018(sic) respectively. I have not seen on record the submissions by the Plaintiff and the 2<sup>nd</sup> Defendant.
29. In its submissions, the 1<sup>st</sup> Defendant set out each parties' pleadings, the facts of its case, the evidence tendered by the parties and the issues for determination. The 1<sup>st</sup> Defendant framed five issues for determination by the court namely; whether the evidence that was adduced by the Plaintiff had any probative value, whether the suit property was public utility land, whether the Plaintiff violated the doctrine of lis pendens, whether the 1<sup>st</sup> defendant had proved its adverse possession claim and whether the 1<sup>st</sup> Defendant had proved fraud against the Plaintiff, the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant.
30. On the first issue, the 1<sup>st</sup> Defendant submitted that the evidence that was given by the Plaintiff's witness was incomplete since the witness neither completed his evidence in chief nor was he cross-examined. The 1<sup>st</sup> Defendant submitted that the court had directed that the hearing of the Plaintiff's case should start de novo which direction was ignored by the Plaintiff. The 1<sup>st</sup> Defendant submitted that the said incomplete evidence that was not tested in cross-examination had no probative value.
31. On the second issue, the 1<sup>st</sup> Defendant submitted that the suit property was a public utility plot and as such the same was not available for allocation to the Plaintiff and subsequent sale to the 4<sup>th</sup> Defendant. In support of this submission, the 1<sup>st</sup> Defendant cited *Niaz Mohamed Janmohamed v Commissioner of Lands and 4 others* [1996] eKLR and *Jimmy Gichuki Kiago & another v Transitional Authority & 7 others* [2019] eKLR among others. The 1<sup>st</sup> Defendant submitted that the suit property was reserved for a milk collection Centre and as such the same deserved protection by the court. The 1<sup>st</sup> Defendant submitted that the suit property was allocated to the 1<sup>st</sup> Defendant by the 3<sup>rd</sup> Defendant after it was surrendered by Thindigua the initial owner thereof as a public utility plot.
32. On the issue of lis pendens, the 1<sup>st</sup> Defendant submitted that the Plaintiff fraudulently transferred the suit property to the 4<sup>th</sup> Defendant in violation of the doctrine of lis pendens. The 1<sup>st</sup> Defendant submitted that an order was given in this suit on 1<sup>st</sup> November 2011 for the maintenance of the status quo in relation to the suit property pending the hearing and determination of this suit. The 1<sup>st</sup> Defendant submitted that in violation of the said order, the Plaintiff proceeded to sell and transfer



- the suit property to the 4<sup>th</sup> Defendant in 2013. The 1<sup>st</sup> Defendant submitted that the sale of the suit property was intended to defeat the 1<sup>st</sup> Defendant's claim and the substratum of this suit.
33. The 1<sup>st</sup> Defendant submitted further that the 4<sup>th</sup> Defendant was not a bona fide purchaser of the suit property for value without notice since the property was fraudulently transferred to him by the Plaintiff with the full knowledge of the pendency of this suit. The 1<sup>st</sup> Defendant submitted that the 4<sup>th</sup> Defendant's plea of innocence could not stand on the face of the proved acts of fraud, misrepresentation and forgery.
34. On whether it had proved its claim to the suit property by adverse possession, the 1<sup>st</sup> Defendant submitted that it had been in possession of the suit property from 1991 until 2007 when it was evicted therefrom by the Plaintiff. The 1<sup>st</sup> Defendant submitted that its occupation of the suit property was peaceful and without the permission of the Plaintiff. The 1<sup>st</sup> Defendant submitted that it had satisfied the elements of adverse possession. The 1<sup>st</sup> Defendant cited several authorities among them, Wambugu v Njuguna [1983] KLR 173 and Mbira v Gachubi [2002] I EALR 137 in support of its submission on this issue.
35. On proof of fraud, the 1<sup>st</sup> Defendant submitted that it had demonstrated that the Plaintiff's title to the suit property was acquired through fraud and misrepresentation. The 1<sup>st</sup> Defendant submitted that there was no way the Plaintiff would have acquired title to the suit property without engaging in fraud. The 1<sup>st</sup> Defendant submitted that a fraudulent title cannot be allowed to stand. The 1<sup>st</sup> Defendant cited a number of authorities in support of this submission.
36. In its submissions, the 3<sup>rd</sup> Defendant contended that the 1<sup>st</sup> Defendant's counter-claim did not disclose any cause of action against it. The 3<sup>rd</sup> Defendant submitted further that even in the reliefs sought by the 1<sup>st</sup> Defendant, none has been sought against the 3<sup>rd</sup> Defendant.
37. In his submissions, the 4<sup>th</sup> Defendant set out what he termed as undisputed facts one of which was that the suit property was no longer owned by the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant contended that the property had been sold by the 4<sup>th</sup> Defendant and that the same had been transferred and registered in the names of one, David Mwangi Ndungu and Diamond Court Limited who had developed the same with permanent structures.
38. The 4<sup>th</sup> Defendant submitted that he was not a party to the various court cases between the Plaintiff and the 1<sup>st</sup> Defendant concerning the suit property and that as at the time that he purchased the suit property, there was no encumbrance registered against the title of the same. The 4<sup>th</sup> Defendant submitted that the suit property was transferred to it by the Plaintiff on 29<sup>th</sup> April 2010 before the status quo order of 1<sup>st</sup> November 2011. On the issue of lis pendens, the 4<sup>th</sup> Defendant submitted that the same applies only to the parties to a suit or those who have been notified of the existence of the suit. The 4<sup>th</sup> Defendant submitted that it was not a party to this suit when he purchased the suit property neither was he notified of the suit. The 4<sup>th</sup> Defendant reiterated that he was an innocent purchaser of the suit property for value.
39. On the 1<sup>st</sup> Defendant's contention that the suit property was contained in the Ndungu Report and as such that served as a notice that the property was acquired unlawfully, the 4<sup>th</sup> Defendant submitted that it was not aware that the suit property had been mentioned in the Ndungu Report and that in any event, the Ndungu Report was not a legally enforceable document in Kenya as it merely catalogued complaints by various parties on public land and identified scenarios for proper subsequent investigations and legal action. The 4<sup>th</sup> Defendant cited Geoffrey Kirimi Itania v Chief Land Registrar & 3 Others [2018] eKLR in support of this submission.



40. In conclusion, the 4<sup>th</sup> Defendant submitted that the 1<sup>st</sup> Defendant's claim was misplaced for various reasons. The 4<sup>th</sup> Defendant submitted that the 1<sup>st</sup> Defendant was a private entity and not a public entity that it was masquerading to be. The 4<sup>th</sup> Defendant submitted that the 1<sup>st</sup> Defendant's claim over the suit property in the name of the public was mischievous. The 4<sup>th</sup> Defendant submitted further that a public utility land once surrendered belongs to the Government and that only the Government could allocate the same. The 4<sup>th</sup> Defendant submitted that the 1<sup>st</sup> Defendant never applied to the Government to be allocated the suit property. The 4<sup>th</sup> Defendant submitted that Thindigua had no power to allocate the suit property to the 1<sup>st</sup> Defendant and that the promise by Thindigua that the 1<sup>st</sup> Defendant's request for land would be considered by Thindigua at the AGM was given in error. The 4<sup>th</sup> Defendant submitted that the suit property was never allocated to the 1<sup>st</sup> Defendant by any person or entity and that no evidence of such allocation was placed before the court by the 1<sup>st</sup> Defendant.
41. The 4<sup>th</sup> Defendant submitted that although the 1<sup>st</sup> Defendant claimed to have been given approval by Thindigua in 1991 to occupy the suit property, no such approval was tendered in evidence. The 4<sup>th</sup> Defendant submitted that the 1<sup>st</sup> Defendant was a trespasser on the suit property and was lawfully evicted therefrom. The 4<sup>th</sup> Defendant submitted that the 1<sup>st</sup> Defendant's adverse possession claim could not be maintained against him since he was no longer the registered owner of the suit property. The 4<sup>th</sup> Defendant submitted that for the same reason, the title for the suit property could not be cancelled since the registered owners were not parties to the suit.
42. With regard claim for loss of profits and damages for demolished structures, the 4<sup>th</sup> Defendant submitted that the issues concerned the 1<sup>st</sup> Defendant and the Plaintiff and had nothing to do with the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant submitted that a case had not been made out by the 1<sup>st</sup> Defendant against the 4<sup>th</sup> Defendant and urged the court to dismiss the suit as against the 4<sup>th</sup> Defendant.

**Analysis of the issues arising and determination:**

43. I am of the view that the following are the issues that arise for determination in this suit;
- a. Whether the Plaintiff acquired the suit property lawfully and as such had a valid title in respect thereof.
  - b. Whether the 4<sup>th</sup> Defendant acquired a valid title to the suit property from the Plaintiff.
  - c. Whether the 1<sup>st</sup> Defendant was trespasser on the suit property.
  - d. Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in its counter-claim.
  - e. Who is liable for the cost of the suit?

**Whether the Plaintiff acquired the suit property lawfully and as such had a valid title in respect thereof.**

44. In *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR the Court stated that:

“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 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.”



45. In *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), *Milankumar Shab & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

46. It is common ground that the suit property was part of larger parcels of land known as L.R. No. 76/240, 32, 381, 324 and 78(hereinafter referred to as “the original parcels”). The original parcels were owned by a company known as Thindigua Company Limited (“Thindigua”). Sometimes in 1990, Thindigua prepared a subdivision scheme and sought approval from the Commissioner of Lands and the 3<sup>rd</sup> Defendant to subdivide the original parcels into several portions of various sizes. Thindigua’s subdivision scheme was approved by the Commissioner of Lands and the 3<sup>rd</sup> Defendant on 26<sup>th</sup> November 1991 and 2<sup>nd</sup> July 1991 respectively. The approval was granted on condition that Thindigua was going to surrender all the plots that were reserved for public use to the Government. In the subdivision scheme that was approved by the Commissioner of Lands and the 3<sup>rd</sup> Defendant, Thindigua had reserved several plots for public use.
47. It was common ground that the suit property that was given reference number 76/32/3 in the said approved subdivision scheme was reserved for “special purpose”. According to a letter addressed to the Commissioner of Lands by Thindigua on 12<sup>th</sup> February 1996 (see page 3 of DEXH. 1), the suit property that Thindigua referred to as L.R No. 76/381/3 was reserved for “Dairy Produce collection point”.
48. The 1<sup>st</sup> Defendant contended that the suit property was surrendered to the 3<sup>rd</sup> Defendant by Thindigua for public use as a dairy collection point and that the same was allocated to the 1<sup>st</sup> Defendant by the 3<sup>rd</sup> Defendant for the same use. I will later in this judgment consider the 1<sup>st</sup> Defendant’s claim to the suit property. What I need to determine at this stage is the legality of the acquisition of the suit property by the Plaintiff. According to the material that was placed before the court by the Plaintiff, the suit property that was described as Plot No. 76/381/3-Nairobi City was allocated to the Plaintiff by the Commissioner of Lands through a letter dated 11<sup>th</sup> June 1996.
49. The Plaintiff was subsequently issued with Grant No. I.R 71848, L.R No. 22402(Original No. 76/32/3) (the suit property) on 9<sup>th</sup> December 1996. According to the said grant, the suit property was allocated to the Plaintiff and a title issued to it for “commercial purposes only”. The issue that has been raised in the 1<sup>st</sup> Defendant’s counter-claim was whether this allocation and issuance of title to the Plaintiff in respect of the suit property was lawful. The burden was upon the Plaintiff who had brought



this suit against the 1<sup>st</sup> Defendant to prove that he held a valid title in respect of the suit property. As was stated in the cases I have cited earlier, it was not sufficient for the Plaintiff to merely dangle the Grant that was issued to it by the Commissioner of Lands as proof of its ownership of the suit property.

50. The Plaintiff had a duty to explain to the court how the suit property that was reserved for public use and surrendered to the Government for that purpose was allocated to it for commercial use. The land use planning legislation that was in force when Thindigua applied for and obtained approval for subdivision of the original parcels was Town Planning Act, Chapter 134 Laws of Kenya and [Land Planning Act](#), Chapter 303 Laws of Kenya (both now repealed) together with the rules and regulations that were made thereunder. The two statutes were repealed by the Physical Planning Act, Chapter 286 Laws of Kenya (now repealed) that came into effect on 29<sup>th</sup> October 1998.
51. Regulation 11 of the *Development and Use of Land (planning) Regulations* 1961 under the [Land Planning Act](#), Chapter 303 Laws of Kenya (now repealed) provided as follows:
- (1). Every person requiring consent for development shall make application to the interim planning authority for the area in which the land concerned is situated or where no such authority exists for the area, to the Central Authority in such form and such manner as may be prescribed and shall include such plans and particulars as are necessary to indicate the intention of the applicant.
  - (2) In particular such application shall show the use and density proposed and the land which the applicant intends to surrender for the purposes of -
    - (a) principal and secondary means of access to any subdivisions within the area included in the application and to adjoining land, and
    - (b) public purposes consequent upon the proposed development.
  - (3) For the purpose of this regulation "public purpose" means any non-profit-making purpose which may be declared by the Minister to be a public purpose and includes -
    - (a) educational, medical and religious purposes;
    - (b) public open spaces and car parks;
    - (c) Government and local government purposes."
52. Regulation 16 of the Regulations provided as follows:
- (1) (1) Conditions imposed in granting consent to a planning application may require the doing of things, or may require that things shall not be done in relation to land or buildings or any part thereof, or may be of such other character as the Central Authority or interim planning authority, as the case may be, may think proper, and the Central Authority or the interim planning authority, as the case may be, may require the applicant to enter into an undertaking in such form as may be prescribed, to observe the conditions imposed and may require the applicant (except in the case of unalienated Government land) to furnish security, whether by bond or otherwise, in such sum as the Central Authority or the interim planning authority, as the case may be, may think fit, for the due observance of the conditions.
  - (2) Where in the opinion of the Central Authority or the interim planning authority, as the case may be, insufficient land is surrendered in the application for the purposes specified under regulation 11 (2) of these Regulations or such land is, for any reason, unsatisfactory, the



authority may disapprove the application or may inform the applicant that the application will be approved if additional land or satisfactory land, as the case may be, is surrendered:

Provided that -

- (i) the authority shall not request the surrender of additional land for public purposes if, having regard to the nature and amount of the development proposed in the application, the land surrendered for such purposes represents an appropriate contribution of the total land required for public purposes to serve the area as a whole;
  - (ii) the authority shall not disapprove an application under this paragraph where the owner surrenders an area of land for public purposes equal to 20 per cent or more of the area of land included in the application;
  - (iii) land surrendered for the public purposes specified under regulation 11 (2) of these Regulations shall be freely surrendered to the Government and subject to the approval of the Minister the land surrendered shall be made available for public purposes related to the area generally, as and when required;
53. Under regulation 11(3) aforesaid Development and Use of Land (planning) Regulations of 1961 (hereinafter referred to only as “the Regulations”), “public purposes” is defined as “any non-profit making purpose” and includes educational, medical and religious purposes; public open spaces and car parks; and Government and local government purposes.
54. Proviso (iii) to Regulation 16(2) of the Regulations made it mandatory for land surrendered for public purposes to be surrendered to the Government free of charge and subject to the approval of the Minister the land could be made available for public purposes related to the area where it was situated.
55. According to the Grant that was issued to the Plaintiff in respect of the suit property, the same was issued pursuant to a surrender. That means that Thindigua surrendered the suit property to the Government. It is beyond contention that the purpose for which the Commissioner of Lands allocated the suit property to the Plaintiff was not a public purpose for which the land was surrendered. The Plaintiff is a limited liability company. It was not demonstrated that it was involved in any undertaking of a public nature. Can the Commissioner of Lands allocate land surrendered to him for public purposes to a private entity for private use? The answer must be in the negative.
56. This court dealt with a similar issue in *Bencaster Investments Ltd v John Murithi & 3 others; Attorney General & 5 others* [2020]eKLR. In that case the court stated as follows:

“My answer to the first issue is that the registration of the 4<sup>th</sup> interested party as the proprietor of Nairobi Block 122/39 and Nairobi Block 122/42 on 13<sup>th</sup> September, 2006 was unlawful and as such the 4<sup>th</sup> interested party did not acquire any valid title or interest in the two parcels of land. The two parcels of land were to be surrendered to the Nairobi City Commission and as long as the 4<sup>th</sup> interested party held the same and refused to surrender the same as by law provided, the 4<sup>th</sup> interested party held the same in trust for the Nairobi City Commission which was to use the same for public purposes for the benefit of the residents of City Chicken Farm and their neighbours.... Land once reserved for public purpose is for the benefit of the residents of the area where it is situated who must at all times be consulted in case the land is to change hands or is to be put in any use other than that for which it was reserved. I am therefore in agreement with the defendants that the 4<sup>th</sup> interested party held the suit properties as a trustee and not as the owner thereof.”



57. In *Registered Trustees of Redeemed Gospel Church v Umoja Residents Association* [2020]eKLR, this court stated as follows:

“From the material placed before the court, Umoja II Estate is an expansive residential area which is a home to several people. During the planning of the estate, the suit property was reserved for the construction of a community centre for use by the residents of Umoja II Estate. The suit property was therefore surrendered to the 2<sup>nd</sup> defendant to hold for that public purpose. I am of the view that once the suit property was surrendered to the 2<sup>nd</sup> defendant for the purposes of construction of a community centre for use by the residents of Umoja II Estate, the 2<sup>nd</sup> defendant held the property in trust for the residents of Umoja II Estate. As a trustee of the said property, the 2<sup>nd</sup> defendant could not deal with the same in a manner inconsistent with that trust and without consulting the beneficiaries of the trust....

As I have stated above, the 2<sup>nd</sup> defendant held the suit property in trust for the residents of Umoja II Estate. The suit property was supposed to be used for construction of a community centre for the benefit of the residents of the said Estate. The 2<sup>nd</sup> defendant disposed of the suit property to the plaintiff through 99 years lease with effect from 1<sup>st</sup> July, 1973. According to the letter of allotment, the suit property was allocated to the plaintiff for religious purposes. However, in the instrument of lease, the property was let to the plaintiff for residential purposes.

Whether the plaintiff acquired the suit property for religious or residential purposes, those were not the purposes for which the 2<sup>nd</sup> defendant held the suit property in trust. The disposal of the suit property to the plaintiff was therefore in breach of the trust for which the 2<sup>nd</sup> defendant held the suit property and as such violated section 144 (8) of the Local Government Act aforesaid.”

58. In *John Edward Njeru & another v Commissioner of Lands & 8 others* [2019] eKLR the court stated as follows on the role of Commissioner of Lands as a trustee of land surrendered to him:

“In my opinion, this surrender to the Commissioner of Lands was not an absolute surrender that was without strings attached. It is clear that the Society was making the surrender because it could not hold public land, which could only be held by the Government through the Commissioner of Lands. The Commissioner of Lands was thus acting as a trustee or custodian on behalf of the public. He could not do as he wished with the land and indeed with the other parcels of land which were surrendered. It is apparent to me that each of the several parcels of land that were surrendered had a specific purpose tied to it.... In the instance of this case, the Commissioner of Lands was a trustee. He was entrusted to keep the land for use by the public and he could not breach this trust by allotting the land to the plaintiffs for private use. The position of the Commissioner of Lands in this instance was no different from the position of a private proprietor of land, who holds the same as trustee. There is a long chain of authorities on this point, including the celebrated decision in the case of *Kanyi Muthiora vs Maritha Nyokabi Muthiora* (1984) eKLR. In the same way that a private individual can be held to be subject to a trust, so too the Government, and any of its institutions and agencies, including the Commissioner of Lands. It should not be forgotten that this land had actually been purchased by the Society. By passing it over to private hands, the Commissioner of Lands was in effect depriving the Society of its investment, and unjustly enriching a third party.”



59. In *Republic v 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 the court stated as follows on the doctrine of public trust:

“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 the principle of the indefeasibility of title deed. It is clear from section 75 of the Constitution that the doctrine of public trust is recognised and provided for by the superior law of the land and applies in a very explicit way as regards trust land. The doctrine is, however, not confined to trust lands and covers all common properties and resources as well as public land. Although the doctrine had origins in Roman Law it is now a common heritage in all countries who adopted the English common law..... It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A 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 holds 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.”

59. In view of the foregoing, I am of the opinion and I so hold that the suit property was surrendered to the Commissioner of Lands to hold in trust for the residents of Thindigua most of whom were members of the 1<sup>st</sup> Defendant for public use within Thindigua. The said parcel of land was therefore not available for allocation by the Commissioner of Lands to the Plaintiff for private use. The evidence before the court shows that the residents of Thindigua were in fact using the suit property as a milk collection centre as at the time the Plaintiff purported to apply to be allocated the same. I am persuaded that the Plaintiff's director, Francis Njuguna Gikonyo who was also a director of Thindigua used his influence to have the suit property allocated to the Plaintiff. I am not in agreement with the 4<sup>th</sup> Defendant that once the said parcel of land was surrendered to the Commissioner of Lands, the Commissioner of Lands could allocate it to whoever he wished. It is therefore my finding that the suit property was not acquired by the Plaintiff lawfully as the same was allocated to the plaintiff in breach of the trust on which the same was held by the Commissioner of Lands.

**Whether the 4<sup>th</sup> Defendant acquired a valid title to the suit property from the Plaintiff.**

60. According to the evidence before the court, the suit property was transferred to the 4<sup>th</sup> Defendant by the Plaintiff on 29<sup>th</sup> April 2010 while this suit was pending. I am in agreement with the 4<sup>th</sup> Defendant that he was not a party to this suit as at the time the property was transferred to him at a consideration of Kshs. 4,000,000/- by the Plaintiff and that he may not have been aware of the existence of this suit. That notwithstanding, under the doctrine of *lis pendens*, the 4<sup>th</sup> Defendant acquired the suit property subject to the outcome of this suit.
61. In *Margaret Wairimu Warima v Phylis Wanjiru Thairu & 2 others* [2017] eKLR, the court stated as follows on the doctrine of *lis pendens*:

“Apart from the court orders, which we find were operative at all times material to the suit, there is a common law doctrine of *Lis pendens* which is unaffected by statute and has been upheld by this Court. The common sense of it was explained by Lord Justice Turner in the case of *Bellamy vs. Sabine* [1857] 1 De J 566, as follows: -



“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

62. In *Mawji v US International University & Another* [1976] KLR 185, the Court stated that:

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other.....Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

63. In *Emmanuel Ngade Nyoka v Kitbeka Mutisya Ngata*, [2017] eKLR, the court stated that:

“So that by the time he was subdividing, selling and transferring portions of the suit premises to the interested parties he was well aware that litigation regarding the suit premises was still ongoing in the first appellate court. This state of affairs obviously attracts the application of the lis pendens doctrine. It is a doctrine of law and thus it matters not when it is raised. The doctrine simply prohibits a party to a suit from transferring the suit premises to a third party while the suit, with regard to the suit premises is pending. The purpose of the doctrine is of course to preserve the suit premises until the finalisation of the ongoing litigation.....As already stated the appellant was well aware of the pending appeal when he purported to subdivide, sell and transfer to the interested parties portions of the suit premises. This being the case the interested parties cannot be heard to argue that they were innocent purchasers for value without notice. As correctly observed by the learned Judge purchase of a property pendente lite for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly bound by the judgment or decree in the suit. It does not matter that at the time of purchase there was no order stopping the selling or subdivision of the suit premises as the interested parties have argued. Nor was there need to tender evidence to show that the interested parties were never parties to any collusion or fraud in their acquisition of portions aforesaid. What is pertinent is that the appellant well knowing of the pending litigation involving the suit premises nonetheless went ahead to mischievously subdivide and transfer portions thereof to the interested parties. In the circumstances the learned Judge did not err in invoking the doctrine.”

64. In *Kawaljeet Singh Rekhi v Peter Wainaina Kamau & 2 others*[2016] eKLR, the court stated that:

“...Mulla and Gour in their treatises on the Indian Transfer of Property Act explain the doctrine further that:



“... Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendent lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree on the suit”.

The doctrine therefore bars dealing with landed property under litigation to the detriment of the parties to the pending litigation. A transfer, if undertaken in those circumstances will really amount to nothing, and this is the case here.”

65. Having found that the Plaintiff had no valid title to the suit property the same having been allocated to it unlawfully by the Commissioner of Lands, the 4<sup>th</sup> Defendant is bound by that finding under the doctrine of lis pendens since the 4<sup>th</sup> Defendant acquired the suit property while this suit was pending. In the absence of a valid title, there was nothing that the Plaintiff could convey to the 4<sup>th</sup> Defendant. In *Macfoy v United Africa Co. Ltd.* (1961) 3 All E.R. 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

66. The Plaintiff could only convey to the 4<sup>th</sup> Defendant what it had. It had a null and void title to the suit property. That is what the 4<sup>th</sup> Defendant acquired. The 4<sup>th</sup> Defendant’s title to the suit property was similarly null and void and I so hold. In my view, the fact that the 4<sup>th</sup> Defendant was not aware of the defects in the Plaintiff’s title is inconsequential. The 4<sup>th</sup> Defendant’s innocence cannot validate an invalid title neither can it confer a valid title upon the 4<sup>th</sup> defendant.

#### **Whether the 1<sup>st</sup> Defendant was trespasser on the suit property.**

67. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on *Torts*, 18<sup>th</sup> Edition, page 923, paragraph, 18-01. In the case of *Gitwany Investments Limited v Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. I have already made a finding that the Plaintiff who sought to evict the 1<sup>st</sup> Defendant from the suit property had no valid title to the suit property since the property was held by the Commissioner of Lands in trust for the residents of Thindigua most of whom were members of the 1<sup>st</sup> Defendant. As beneficiaries of the said trust, members of the 1<sup>st</sup> Defendant who were residents of Thindigua had a right to enter and use the suit property in dispute for the purpose for which the same was held on their behalf namely “dairy produce collection point”. Their right to do so was only subject to the rights of the Commissioner of Lands as a trustee of the property. Since the members of the 1<sup>st</sup> Defendant residing in Thindigua had a lawful interest in the suit property, they had a right to enter thereon. It is my finding in the circumstances that the 1<sup>st</sup> Defendant’s members’ entry onto and use of the suit property did not amount to trespass more particularly for the reason that the Plaintiff had no valid title to the property and as such could not maintain an action for trespass against the 1<sup>st</sup> Defendant. It was only the Commissioner of Lands that could challenge the 1<sup>st</sup> Defendant’s members’ entry and use of the land if it was contrary to the purpose for which the land was held by the Commissioner in trust.



**Whether the 1<sup>st</sup> Defendant is entitled to the reliefs sought in its counter-claim.**

68. I have set out at the beginning of this judgment the reliefs sought by the 1<sup>st</sup> Defendant. The first relief sought by the 1<sup>st</sup> Defendant is an order that it has acquired the suit property by adverse possession. I find the 1<sup>st</sup> Defendant's adverse possession claim inconsistent with its pleadings and the findings that I have made above. I have already made a finding that the suit property was held by the Commissioner of Lands in trust for the residents of Thindigua. It follows therefore that the suit property was public land. The 1<sup>st</sup> Defendant cannot acquire public land by adverse possession. The 1<sup>st</sup> Defendant's claim over the suit property by adverse possession is also inconsistent with its claim that the land was allocated to it by the 3<sup>rd</sup> Defendant. It is therefore my finding that the 1<sup>st</sup> Defendant's claim over the suit property by adverse possession had no merit.
69. The 1<sup>st</sup> Defendant had also sought an order for the cancellation of the title for the suit property held by the 4<sup>th</sup> Defendant. Having held that the 4<sup>th</sup> Defendant did not hold a valid title over the suit property since the title he acquired from the Plaintiff was null and void, I am satisfied that a case has been made out for the cancellation of the invalid title that was passed to the 4<sup>th</sup> Defendant. The 4<sup>th</sup> Defendant led evidence that he had sold and transferred the suit property to one, David Ndungu Mwangi and Diamond Court Limited. The sale was purportedly conducted on 18<sup>th</sup> July 2013 while this suit was pending and the 4<sup>th</sup> Defendant was already a party to this suit having entered appearance on 27<sup>th</sup> March 2013. The 4<sup>th</sup> Defendant did not however place any evidence showing that the land had been transferred to the alleged purchasers. The 4<sup>th</sup> Defendant did not also plead the alleged sale to give the other parties an opportunity to respond to the same. Since the issue was not pleaded, this court cannot determine the effect thereof on the claims by various parties herein.
70. However, I wish to make a comment or two on the alleged sale of the suit property by the 4<sup>th</sup> Defendant. As a party to this suit, the 4<sup>th</sup> Defendant is deemed to have been aware of all the orders that had been made herein. The 4<sup>th</sup> Defendant was also bound by the doctrine of *lis pendens* that prohibits disposal of a property which is a subject of an active litigation. The purported sale of the suit property by the 4<sup>th</sup> defendant was in violation of an order that was made by this court on 1<sup>st</sup> November 2011 that directed that the status quo in relation to the suit property be maintained pending the hearing of the suit. In any event, this court having held that the 4<sup>th</sup> Defendant had no valid title to the suit property, it had no title that it could pass to the purported purchasers of the suit property. The purported purchasers who were not disclosed until 11<sup>th</sup> June 2019 after the 1<sup>st</sup> Defendant had closed its case are bound by this decision if at all the suit property has been transferred to them having purchased a property that was the subject of an ongoing suit. I am of the view that it was fraudulent on the part of the 4<sup>th</sup> Defendant to sell the suit property to the purported purchasers without disclosing to them the existence of this suit.
71. In *Clarke and Others v Chadburn & Others* [1985] 1 All E.R. (PC) 211, it was held as follows:
- “An act done in willful disobedience of an injunction or Court Order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others.....I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Willful disobedience to an order of the Court is punishable as a contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of Court for doing what they did, nevertheless those acts were validly done ... but



the legal consequences of what has been done in breach of the Law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them ... even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

72. That decision was adopted with approval in *Kenya Tea Growers Association v. Francis Atwoli and 5 others* [2012] eKLR. An act done in disobedience of a court order is invalid and an invalid act is void for all intents and purposes. The purported sale of the suit property by the 4<sup>th</sup> Defendant that was carried out in defiance of a court order issued herein and contrary to the doctrine of lis pendens is null and void and did not confer upon the purported purchasers any valid right or interest in the property. The 1<sup>st</sup> Defendant is therefore entitled to an order for the cancellation of the title that was issued for the suit property by the Commissioner of Lands.
73. The 1<sup>st</sup> Defendant had also prayed for what it referred to as the costs of dairy milk collection at the rate of Kshs. 15,680/- per day from February 2007 until the determination of the suit. The other claim was for damages for the structures that the 1<sup>st</sup> Defendant had put up on the suit property. These claims are in the nature of special damages. The law on special damages is that the same must be specifically pleaded and strictly proved. The 1<sup>st</sup> Defendant made no attempt to prove these special damages. I find the same not proved and as such not for granting.

#### **Who is liable for the costs of the suit?**

74. The 1<sup>st</sup> Defendant has succeeded in proving that the allocation of the suit property to the Plaintiff and the subsequent sale of the property to the 4<sup>th</sup> Defendant were unlawful. I will condemn the Plaintiff to pay the costs of this suit. As I observed earlier, one of the Plaintiff's directors, Francis Njuguna Gikonyo used his position as a director of Thindigua to have the suit property that was reserved as a public utility plot allocated to the Plaintiff illegally for private use. The Plaintiff also went ahead to sell the suit property to the 4<sup>th</sup> Defendant while this suit was pending. For the foregoing reasons, the Plaintiff shall bear the costs of the suit and the 1<sup>st</sup> Defendant's counter-claim.

#### **Conclusion:**

75. In conclusion, I hereby make the following orders;
- a. The Plaintiff's suit is dismissed.
  - b. Grant No. I.R 71848 issued to Thindigua Dairy Investments Limited on 9<sup>th</sup> December 1996 in respect of L.R No. 22402 and all subsequent transactions involving the said parcel of land are cancelled.
  - c. L.R No. 22402 shall be registered in the name of the National Land Commission to hold in trust for the residents of Thindigua for the public purpose for which it was reserved.
  - d. The Plaintiff shall pay the costs of the suit and the 1<sup>st</sup> Defendant's Counter-claim to the 1<sup>st</sup> Defendant and the 4<sup>th</sup> Defendant.

**DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF JULY 2022**

**S. OKONG'O**

**JUDGE**



**Judgment read through Microsoft Teams Video Conferencing platform in the presence of;**

N/A for the Plaintiff

Mr. Muriuki for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Ms. Mukuna h/b for Mr. Kimani for the 4<sup>th</sup> Defendant

Ms. C. Nyokabi-Court Assistant

