



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 254 OF 2014

CATHOLIC DIOCESE OF NAKURU.....PLAINTIFF

VERSUS

ABDI FATAH ALI HASSAN.....1ST DEFENDANT

THE NAKURU COUNTY LAND REGISTRAR.....2ND DEFENDANT

J U D G M E N T

1. The plaintiff commenced the present suit vide a plaint dated 10th September 2014. The plaintiff's claimed that it was vide a letter of allotment dated 3rd April 1996 allocated **unsurveyed plot 'A' Nakuru Municipality** for the extension of Elimu Nursery School which plot after survey became land parcel **Nakuru Municipality Block 5/306** ("the suit property"). The plaintiff further alleged that the 2nd defendant fraudulently issued a certificate of lease to the 1st defendant who on or about 27th August 2014 attempted to take possession of the suit property and to fence the same claiming the property belonged to him. The plaintiff vide the plaint prays for judgment against the defendants for:-

(a) An order of injunction restraining the 1st defendant by himself, his agents and or servants from entering, depositing materials or constructing any building on LR No. Municipality Block 5/306.

(b) An order that the certificate of lease issued to the 1st defendant by the 2nd defendant is illegal null and void due to fraud and the same should be cancelled.

(c) That the 2nd defendant be ordered to amend the register in respect to of LR No.Nakuru/Municipality Block5/306 and to reflect the plaintiff as the legal owner of the same.

(d) Cost of suit and interest.

2. The 1st defendant filed a statement of defence dated 12th February 2015 on the same date. The 1st defendant averred that he was the registered owner of the suit property **LR No. Nakuru Municipality Block 5/306** and was issued with a certificate of Lease for the same upon registration following purchase from Albert Kipkosgei Lesonet. The 1st defendant denied the allegations of fraud and pleaded that he was a bonafide purchaser for value without notice of any defect in the title he purchased. The plaintiff further pleaded that the action by the plaintiff was statute barred under the provisions of Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya and hence the court lacked jurisdiction to grant the reliefs sought.

3. The suit was heard and concluded before Hon Justice Munyao who reserved judgment but on the date he had scheduled to deliver judgment on 19th September 2018 he issued directions that he had seen it necessary to have the Director of Surveys and the Chief Land Registrar summoned to clarify various aspects of the evidence that he felt needed clarification before he could prepare the judgment. The 1st defendant felt aggrieved by these directions and sought leave to appeal against the directions and a stay of further proceedings pending the determination of the intended appeal. The 1st defendant was granted his wish. However, the 1st defendant on 10th February 2020 notified the court he no longer wished to pursue the appeal. Thereafter, after two failed attempts to get the Director of Surveyors to attend court to testify, the parties opted to have the court proceed to prepare the judgment on the basis of the evidence adduced by the parties and the submission filed by the parties.

During the trial 3 witnesses, Father Bernard Ngaruiya (PW1) Caleb Wanjala Sungut (PW2) and Gordon Odeka Ochieng (PW3) testified on behalf of the plaintiff although PW3, a Senior Lands Officer in Nairobi, was treated as an independent witness. The 1st defendant, Abdi Fatah Ali Hassan (DW1) testified as the sole witness for the defence.

The plaintiff's case.

4. PW1 Father Bernard Ngaruiya testified that he was a Trustee of the Catholic Diocese of Nakuru and that he had the authority of the other Trustees to represent them in these Proceedings. He testified that the Catholic Dioceses of Nakuru was allocated land Adjacent to Elimu Nursery School to extend the nursery school following application to the government. The witness produced the letter of allotment dated 3rd April 1996 Ref.NO.30884/XLIV allocating to the Catholic Diocese of Nakuru **"UNS.NURSERY SCHOOL PLOT 'A'-NAKURU MUNICIPALITY"** measuring approximately 0.46 hectares for a term of 99 years from 1st April 1996 (PEX1). The witness affirmed the allocation was accepted and the plaintiff paid the requisite allotment charges of Kshs6,034. Letter accepting the allotment terms and conditions dated 9th April 1996 was tendered in evidence together with a copy of Bankers cheque for Kshs6,034 to the Commissioner of Lands on account of the allotment charges. The allotment letter attached a copy of a Part Development Plan (PDP) showing the delineation of the plot allocated to the plaintiff.

5. The witness explained that after the plaintiff were allocated the plot they fenced the same plot with timber off-cuts and the land remained vacant without any development. He stated that land was adjacent to Regina Pacis Elimu Primary School owned by the plaintiff. He stated it was the plaintiff's intention to extend the primary school into this land. The witness stated on 27th August 2014 he received information that there was somebody who was removing the fence that the plaintiff had put and when he went to the site he was informed by the workers on site that it was one Abdi, the 1st defendant who had engaged them to put up a fence. The witness testified that he later learnt the 1st defendant had obtained a certificate of lease to the plot. He stated that before the activity on the plot on the said date no person had ever come forward claiming ownership of the plot. He said Albert Kipkosegei Lesonet who was shown to have been registered as owner of the land and sold to the 1st defendant had never been to the land and it was the plaintiff who had been in continuous occupation of the plot. The witness explained that they vide the letter dated 28th August 2014 (PEX5) sought to be furnished with an abstract of title for the suit property but the Land Registrar never availed the same to them.

6. In cross examination by Mr. Ngacha counsel for 1st defendant, PW1 affirmed that he became the procurator (incharge of church properties) of the Diocese in 2004 and as such was the custodian of the church's property documents. He stated the plot in dispute is land parcel 306 and it was the same plot where the plaintiff's Elimu Nursey school was sited. He explained that the Christ the King College is in land parcel No.307 and was under a parish and was separate and distinct from the nursery school which the parish had no role in. PW1 conceded that they had not processed title for the plot they were allocated as an extension, but maintained they remained the beneficial owners since they had paid for the allocation and had taken occupation and possession of the same. The witness further explained they had applied for the land vide a letter dated 16th October 1989. The witness upon being referred to various correspondences in their bundle of documents (letter dated 12th June 1996 and 1st July 1996) conceded the plot had been allocated to one Chebon who had been issued a title but he stated Chebon had been requested to surrender the title documents. The witness further stated other than the 1st defendant no other person had ever come raising any claim of ownership to the suit property since 1996.

7. PW2 Caleb Wanjala Sungut Land Registrar, Nakuru testified that he was summoned to produce all documents relating to land parcel **Nakuru Municipality Block 5/306**. He stated he was not able to trace any documents relating to the parcel of land in the land registry. He stated that although a letter of allotment did not confer ownership, it initiates the process as a title is processed in favour of an allottee after he satisfies the terms of the allotment. The witness was afforded an opportunity to further search for any available documents on the suit property but when he was recalled after nearly 1 year, he still affirmed he did not find any records on the property save for an extract of the Presentation Book which showed that on 1st August 2014 a transfer in respect of title Nakuru **Municipality Block 5/306** from Albert Kipkosgei Lesonet to Abdi Fata Ali Hassan (PEX7) was lodged for registration. He explained after presentation, the documents are verified and if in order registration is effected by making an entry in the Green card. He stated the Green card was missing in the Land Registry together with the supporting documents.

8. PW3 Gordon Odeka Ochieng an officer from the Ministry of Lands Headquarters, Nairobi testified that he had worked with the Ministry of Land since 1989 and that he was familiar with allotment of Government Land. He testified that he could not trace the ministry's correspondence file relating to the suit property. He explained that before a lease is issued, there is first a letter of allotment; a letter of acceptance of the offer; receipts of payment of the allotment charges; Director of Surveys confirmation of survey having been done and survey number issued which becomes the parcel number. The witness explained that the Director of Survey issues an amended Registry Index Map (RIM) to include the new Land Parcel. He stated the conveyancing paperwork is done and the lease is executed by the Commission of Lands. The Lease thereafter is forwarded to the relevant registry for registration.

9. In the present matter PW3 stated he did not obtain the correspondence file and/or any other documents that supported the lease. He stated he visited the Director of Surveys to find out what records they held which could have assisted. He said he was only able to obtain a copy of the RIM for Nakuru Block 5 in which plot No.306 was identifiable but the RIM did not indicate when it was amended to reflect plot No.306 as the amendment section of the RIM did not show. He stated the amendment section of the RIM would ordinarily indicate the date of the amendment; the old parcel number if it was a subdivision; and the new parcel number. The amendment would also indicate the plan reference number and the officer who did the amendment and his signature. All this information was missing in the RIM produced as **"PEX6"**.

10. Upon cross examination by Mr. Ngacha advocate for 1st defendant, PW3 affirmed plot Number 306 appeared on RIM issued to him by the Director of Surveys although there was no land parcel Number 307 appearing on the map. He stated he was not furnished with the Survey Plan (F/R) by the Director of Surveys which would have indicated how parcel 306 was generated. The witness stated in 2015 he had obtained a RIM when he had earlier been summoned to attend court that did not reflect plot No.306.

11. The witness further explained that the only letter of allotment shown to him was the one issued to the plaintiff (ref 30884/XLIV and he could not tell if any other letter of allotment for the same plot had been issued to anybody else. The witness explained that the survey plan referenced **TP6/3/XXII/96** dated 10th June 1996 shows two plots No.306 and 307 but the RIM only indicated plot No.306 and there is no plot No.307. He stated the reference in the letter of allotment would ordinarily be reflected in the survey plan to denote it was what triggered the survey. He stated all his efforts to get the survey plan failed to yield any results. He stated that the information in the 1st defendant's

certificate of lease is in the absence of the survey plan (FR) unsupported and authentication is difficult.

12. When questioned by the court the witness explained that according to the Survey Plan held by the 1st defendant plot No.306 was surveyed on 11th December 2002. He further indicated going by the survey Plan (FR) the date of amendment should have been indicated on the RIM and further the two new land parcel Nos 306 and 307 should have been denoted on the column for new numbers since the two parcels emanated from unsurveyed Government land and the column for "Old parcel" should be blank because there was no amendment of a previously surveyed land. The witness stated the only PDP he saw was the one allocating the land to the church.

The 1st defendant's case.

13. The 1st defendant Abdi Fattah Ali Hassan (DW1) testified that he made a witness statement and filed a bundle of documents on 12th February 2015 which he relied on as his evidence. It was the 1st defendant's evidence that he purchased the suit property from Albert Kipkosgei Lesonet after undertaking due diligence and confirming that the said Lesonet was the registered proprietor of the suit land. He stated he carried out a search at the Lands Office that confirmed the same. He stated he entered into a sale agreement on 10th July 2014 for the consideration of Kshs6.5 million. The Agreement of sale was tendered in evidence as "DEX3". He stated he initially paid part of the purchase price of Kshs5 million by cheque; paid land rates and land rents. The payment receipts for land rent, rates and rates clearance certificates were tendered as evidence. The 1st defendant explained consent for transfer of the property was obtained and that the transfer was presented for registration after stamp duty was duly paid and registered and he was issued with a certificate of lease. The letter of consent, stamp duty, payment receipts, and the certificate of lease in favour of the 1st defendant were produced in evidence. The 1st defendant testified that he paid the balance of the purchase price on 19th August 2014.

14. The 1st defendant further testified that after the land had been transferred and registered in his name he wanted to have the same fenced by erecting a perimeter wall. He stated that when the Engineer he had contracted to undertake the exercise went on site and carried out beacon verification he found that the plaintiff's college had encroached onto the plot by 6 metres. The 1st defendant stated that he met with PW1 after he was informed, and PW1 requested for time to enable them remove the materials they had deposited on his plot. However instead of the plaintiff removing the materials, they came to court and obtained an order of injunction stopping any construction on the plot. The 1st defendant contended he was a bonafide purchaser for value and did not fraudulently acquire the land. He sought the plaintiff's case to be dismissed with costs.

15. The 1st defendant under cross examination by Ms Njoroge advocate for the plaintiff affirmed that when he was initially shown the plot there were building materials that had been deposited on the plot by the plaintiff who were constructing on the plot housing the school. He stated all the completion documents for the transaction were followed up and processed by a Mr. Araka who was his Agent. He stated that even though the land registrar testified that he had not found any of the records for the suit property, he had carried out searches on the property on two different occasions. He stated one Hassan had assured him the land belonged to Lesonet before he purchased the same. He said it was Hassan who he paid the money for the price produced since he was the one he knew and he trusted him as a Somali like himself. He stated he did not know Lesonet and saw no need to call him as a witness. Although the 1st defendant had indicated he would call a surveyor to produce some survey records that had been marked for identification, he opted to close his case without calling the witness and accordingly those documents were not produced and do not form part of the record.

Submissions, analysis and determination.

16. The plaintiff and the 1st defendant filed final closing submissions. The 2nd defendant did not file any submissions. After reviewing and considering the pleadings, the evidence adduced and the submissions, the issues for determination are as follows: -

(i) Whether the plaintiff was allocated Unsurveyed plot 'A' Nakuru Municipality for Nursery School?

(ii) Whether land parcel Nakuru Municipality Block 5/306 formed a part of the "Unsurveyed plot 'A' delineated on the PDP dated 21st January 2001 annexed to the letter of allotment to the plaintiff dated 3rd April 1996.

(iii) Whether land parcel Nakuru Municipality Block 5/306 was regularly and procedurally registered and if so whether the 1st defendant was an innocent and bonafide purchaser for value without any notice of any defect in the title?

(iv) Whether the plaintiff is entitled to the reliefs sought in the plaint?

17. There was undisputed evidence that indeed the plaintiff runs a nursery school known as Elimu Nursery School and also had built a college known as Christ the King College on the land adjacent to the disputed plot. The testimony by the plaintiff was that the nursery school was on land parcel 306 while the college was on land parcel 307. Both the nursery school and the college had been running over a long period. The plaintiff applied to the Municipal Council Nakuru to be allocated extra land for the expansion of the Elimu Nursery School vide their letter dated 16th October 1989. The Commissioner of Lands allocated the plaintiff an unsurveyed plot 'A' Nakuru Municipality for the Nursery School vide the letter of allotment dated 3rd April 1996 referenced 30884/XLIV. The plot allocated measured 0.46 Hectares (approximately) and was for a term of 99 years from 1st April 1996. A PDP showing the proposed extensions to Elimu Nursery School 'A' and CPK Nursery school 'B' dated 21st January 1991 was appended to the original letter of allotment produced in evidence.

18. The plaintiff produced in evidence a letter dated 9th April 1996 accepting the allotment and forwarding to the Commissioner of Lands a Banker's Cheque No.NK/BP 062082 for Kshs6,034/00 dated 10th April 1996 being charges as set out in the letter of allotment. The plaintiff thereafter took occupation of the plot though they did not effect any developments thereon. The plaintiff asserted that ever since 1996 when they were allocated the land, there has been no one who had laid claim to the land until August 2014 when the 1st defendant entered into the

plot intending to fence it off. The plaintiff was empathic that the person the 1st defendant purportedly bought the land form had never been to the land.

19. The Nakuru Land Registrar PW2 and the Lands officer (PW3) from the Ministry of Lands Nairobi testified and stated there were no records respecting the suit property both at the Lands office, Nakuru and at the Ministry of Lands Headquarters at Nairobi. Notably the register for the title Nakuru Municipality Block 5/306 (green card and white card) were not available at the Lands office, Nakuru. The Land Registrar after having been stood down to enable him trace if there were any documents which could have been misplaced was only able to locate the presentation Book which only disclosed an instrument of transfer had been lodged for registration.

20. At Nairobi, PW3 equally stated he could trace no documents relating to the suit property. He explained the procedure that is usually followed before a lease is issued by the Commissioner of Lands. He explained there has to be a letter of allotment which should be accompanied by a PDP which delineates and identifies the plot the subject of allotment. The allottee must accept the allotment and pay the allotment charges whereupon survey is done by the Director of Surveys who advises the commissioner of Lands and furnishes the Surveys Documents to the commissioner of Lands. The Commissioner of Land processes the lease and directs the Director of Surveys to amend the Registry Index Map (RIM) to reflect the new parcel numbers. The commissioner of Lands then executes the Lease and forwards the same to the relevant registry for registration and issue of certificate of Lease to the allottee.

21. PW3 explained further that the survey Map (RIM) he obtained from the Director of Surveys did not carry any information to illustrate how land parcel Nakuru Municipality Block 5/306 came into being as there was no notation on the amendments Section regarding the same. It was not apparent whether it was a direct allotment and/or subdivision of an existing plot. If the amendment was done in the RIM, it would have shown when the amendment was done and it would have shown the plan reference number (FR) which led to the amendment and the name of the officer who did it.

22. The 1st defendant made reference to a survey plan referenced TP6/3/XXII/96 dated 10th June 1996 which showed it related to plot No.306 and 307 and when the same was put to PW3 he stated from the plan it was not evident which land parcel caused the survey. The 1st defendant did not produce the Survey Plan and/or the Survey Map and therefore the same are not on record for the court to scrutinize and evaluate. Pw3 asserted that in the absence of the information on the Survey Plan (FR) and on the RIM the particulars contained in the certificate of case held by the 1st defendant could not be authenticated.

23. The 1st defendant for his part in claiming ownership of land parcel **Nakuru Municipality Block 5/306** placed reliance on the certificate of lease that he held. He contended that he was a bonafide purchaser and that he was validly registered and issued with the title after due process. He asserted he carried out due diligence, obtained an official search that revealed Lesonet was the registered owner, obtained the appropriate consent to transfer, paid the requisite land rent, rates and the necessary stamp duty before the transfer was registered in his favour. The 1st defendant entered the scene in July/August 2014 when one Hassan showed him the plot which he eventually agreed to buy from Lesonet who was purportedly the owner. After the 1st defendant agreed to purchase the property he entrusted an agent Mr. Araka to follow up and process the transfer. On being cross examined by Ms Njoroge the 1st defendant stated:-

“the consent to transfer was followed up by one of my agents called Mr. Araka. I left it to Mr. Araka to follow up on all required documents and to transfer the property to me. (Witness referred to DEX8 the consent to transfer states:-)

This consent is dated 1st August 2014 It refers to my letter of 31st July 2014 which was the day before- I got my title on 1st August 2014...”

24. On the evidence adduced by the plaintiff, it is evident that the plaintiff had a running Nursery School under the name Elimu Nursery School and a College. The plaintiff following an application to be allocated land for extension of the Nursery School was through the letter of allotment dated 3rd April 1996 allocated: **“Uns. Nursery School plot ‘A’ Nakuru Municipality”** by the Commissioner of Lands as identified on the PDP attached to the letter of allotment. The plaintiff accepted the allotment and the terms thereof vide a letter dated 9th April, 1996 and paid the allotment charges as evidenced by the Banker’s cheque for Kshs.6034/= dated 10th April 1996 drawn in favour of the Commissioner of Lands. Although the 1st defendant has submitted that there was no evidence that the plaintiff paid the allotment charges, the correspondences exhibited by the plaintiff in its bundle of documents leave no doubt that the plaintiff accepted the allotment and were following up the formalization of the allocation. In a letter dated 12th June 1996 the plaintiff wrote to the District Commissioner, Nakuru as follows: -

June 12,1996

The District Commissioner

Nakuru District

P O Box 81,

NAKURU

Dear Sir,

RE: ELIMU NURSERY SCHOOL EXTENSION PLOT- MARKED ‘A’

The above mentioned plot was planned to be an extension of Elimu Nursey School. Unfortunately, the same plot was allocated to Mr. Job Chebon of Box 125 Kabarnet. The commissioner of Lands has asked Mr. Job Chebon to return the Title Deed but it seems as if Mr. Chebon is not heeding the commissioner's letter of 11th April 1996 (herein- attached)

Please Sir, assist us to get the allocated land so as to develop a primary school.

Hoping to hear from you.

Yours faithfully

Signed

Mr. Job Chebon

P O Box 125

KABARNET

FR/fms

25. The District Commissioner Nakuru on 1st July 1996 further to the said plaintiff's letter wrote to Job Chebon who allegedly had been allocated a portion of the same land as follows: -

Mr. Job Chebon

P O Box 125

KABARNET

ELIMU NURSERY SCHOOL- EXTENSION PLOT MARKED 'A'

I wish to refer you to the commissioner of Lands Letter No.134989 addressed to you dated 11th. 1996 regarding the above subject.

As stated in the above quoted letter a portion of the land allocated to you had been earlier planned for extension of Elimu Nursery School. In the circumstance therefore you are required to surrender the tile deed issued to you to enable the Commissioner of Lands issue two separate titles to you and the nursery school.

The purpose of this letter therefore is to request you surrender the title deed and also asks you to remove the fence that you have erected there until you are shown the new boundary.

signed

John A ABDUBA

DISTRICT COMMISSIONER

NAKURU DISTRICT

Cc

The Director of Lay apostolate

P O Box 938

NAKURU

(Att. Mr. Francis Rotich)

The commissioner of land

P O BOX 30039

NAIROBI

26. On my evaluation of the evidence I am satisfied that indeed the plaintiff was allocated land for the extension of Elimu Nursery School vide the letter of allotment dated 3rd April 1996. I am persuaded they accepted the allotment and paid the necessary charges for allotment and that henceforth they became the beneficial owners of the land. The plaintiff's assertion that they have since allotment been in occupation of the land has not been rebutted and I find and hold that they have been in possession and occupation of the plot that was allocated to them.

27. As to whether the unsurveyed plot allocated to the plaintiff was part of land parcel **Municipality Block 5/306** claimed by the 1st defendant and in respect of which the 1st defendant holds a certificate of lease, the evidence both by the plaintiff and the 1st defendant is clear. The plaintiff's evidence was to the effect that the plot number 306 is sited where their Elimu Nursery School is located. The 1st defendant in his evidence stated that the Nursery School plot on one side extended onto plot No.306 by as much as 6 metres. That by any measure would be sizeable portion of land considering these are supposed to be township plots. The evidence that came through was that the land where the plaintiff's structures, the Nursery School and Christ the King College were was not surveyed and did not appear in the RIM that was produced in evidence by PW2. Indeed PW1 during his testimony admitted they did not have title to the Elimu Nursery school plot. It was not clear whether they had title to the premises where the college stands and where the other church structures stand. On the evidence the irresistible conclusion was that the plot allocated to the plaintiff and plot number 306 shared the same spot on the ground and/or were overlapping to a considerable extent.

28. The 1st defendant's defence to the plaintiffs claim is predicated on the fact that he holds a registered title to the suit property which he contended he lawfully and validly acquired after due process. This is the title that was under challenge by the plaintiff and under prayer (b) and (c) of the plaint, the plaintiff has sought for the nullification and cancellation of the title and for the land register to be amended to reflect the plaintiff as the legal owner of the suit property. Whereas section 26 (I) of the Land Registration Act 2012 provides that a certificate held by a registered proprietor is conclusive evidence of proprietorship, it also provides for instances where such title may be challenged. It provides as follows: -

26. Certificate of title to be held as conclusive evidence of proprietorship.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

29. The plaintiff under paragraph 9 of the plaint asserted claim of ownership to the suit property and it was the plaintiff's contention that the suit property was fraudulently and/or unprocedurally transferred to the 1st defendant. Once there was a challenge to the 1st defendant's title, it was incumbent upon the 1st defendant to establish the root of the title he was putting forth as proof of ownership. It was not going to be sufficient to just wave the title and say this proves I am the owner. The process of how the title was acquired by the person who sold the land to him is equally important. If the land had been unlawfully and illegally acquired by the person who sold the land to the 1st defendant, that person could not have had any good title to the property and he accordingly could not equally pass a good title to any other person.

30. The court of appeal in the case of **Munyu Maina -vs- Hiram Gathiha Maina (2013) eKLR** commenting on the instance where there is challenge of the proprietor's title stated as follows:-

“We stated 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 legality of how he acquired title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony”.

31. In the present matter the 1st defendant merely stated he purchased the property from Lesonet. In the face of the plaintiff's evidence that they had been allocated the property it was necessary for the root of Lesonet's title to be established. The Land Registrar and the Ministry of Lands official from Nairobi were categorical there were no documents in their offices that could support the 1st defendant's ownership of the property. **How did Lesonet acquire the title he transferred to the 1st defendant? Who was Reuben Wahome shown as Lessee in the property section of the certificate of Lease issued to both Lesonet and the 1st defendant? Did he have an allotment letter issued to him and if so was a Lease issued to him?** These are the pertinent questions the records and documents from the Land Registry and Ministry of Lands offices would have provided answers to if they were available. The problem was even more compounded when no records were available in the Department of Survey to explain how land parcel 306 got to be created.

32. It was further intriguing that the 1st defendant was himself apparently able to obtain searches on the suit property as late as 6th May 2016, yet PW2, himself a Land Registrar in the same Nakuru Land Registry, when he testified on 2nd February 2016 and on 27th February 2017 when he was recalled stated he could not locate any documents after they had been searched for other than the presentation Book. This begs the question on what information were the searches conducted by the 1st defendant based?. There was no green card or white card available from which the information could be generated. Ordinarily the green card is contained in a binder that holds the records of a specific registration block and hence the record for particular parcels are either there or not there. It is instructive that the plaintiff's advocate vide their letter dated 28th August, 2014 applied to be furnished a copy of the green card which was not supplied to them as per the plaintiff's evidence. This puts to question how the searches produced by the 1st defendant and indeed how the entire transaction was handled by the lands office.

33. The plaintiff in their submission have expressed surprise at the speed with which the transaction in favour of the 1st defendant was handled by the Lands office.

34. The consent for transfer was issued on 1st August 2014, the transfer lodged on the same date for registration, registered and title issued in the name of the 1st defendant the same very day. There is of course a chance that this was a mark of efficiency on the part of the land registry staff, but given the dilatory manner land transactions are handled it does raise suspicion.

35. Be it as it may be, and particularly paying particular regard to the evidence of PW3 who testified respecting the lack of records at the Ministry Headquarters and absence of any appropriate survey records at the Director of Surveys Department, it is doubtful how the title transferred to the defendant came into being. A title cannot drop from nowhere. A title has to have a source. In the case of government land, ownership is initiated from a letter of allotment which carries terms, which terms have to be accepted and survey of the land carried out and thereafter a lease processed and signed by the Commissioner of Lands before it is registered. In the instant case, it is not clear where the title transferred to the 1st defendant originated from. The 1st defendant was duty bound to verify the root of the title considering it was government land that was alienated. If he had, he would have probably discovered there were no appropriate survey records and that the plaintiff was holding a letter of allotment for the same Land that had yet to be processed. The letter of allotment issued to the plaintiff had not been cancelled and/or annulled.

36. The 1st defendants ought to have extended his due diligence to the Department of Survey particularly when he discovered the location of the plot was surrounded by institutions. A duly authenticated PDP and RIM were essential documents in the identification of the property.

37. It is noteworthy that without sight of the lease respecting plot number 306, if ever one had been issued, it is not possible to determine what the intended user of land parcel 306 was. In the case of the plaintiff the plot allotment was specifically for extension of the Nursery School. In the circumstances and taking the evidence in its totality it is my determination and holding that land title **Nakuru Municipality Block5/306** was not regularly and procedurally registered. The 1st defendant has argued no fraud was pleaded and/or proved against him and that he was a bonafide purchaser for value. Section 26 (1) (b) of the Land Registration Act 2012 provides that a title that is shown to have been acquired illegally or unprocedurally can be challenged. I have made a finding that the title to land parcel **Nakuru Municipality Block5/306** could not have been regularly and/or procedurally registered. The 1st defendant in my view could have discovered that if he had carried out appropriate due diligence. He did not and for that reason he will suffer the consequences. The conduct of the 1st defendant is not that of an innocent purchaser. He stated in this evidence that he used an agent to hasten the process of completing the transaction by obtaining all the necessary documents and procuring the registration of the transfer. The Agent Mr. Araka did not testify and the court is unaware how he went through the process. In the case of *Arthi Highway Developers Ltd –vs- West End Butchery Ltd & 6 others (2015) eKLR* the Court of Appeal held that in determining whether a party was complicit in any fraud or any factors that would vitiate or taint a transaction it was necessary to consider the conduct of such party in the overall execution of the transaction. Taking into account the totality of the evidence, I cannot exonerate the 1st defendant and possibly some officers of the 2nd defendant from being complicit in the irregular and unlawful registration of the title in regard to the suit property. There was no plausible explanation for the missing records regarding the suit property that was given. The Land Registrar is the custodian of the Land records and it is disturbing when the whole record of a parcel of land cannot be retrieved. The courts place reliance on the records that are held in the Lands office in respect of the particular parcels of land. Where they are missing, the court is denied a critical piece of evidence in its adjudicative process. Land Registrars need to style up and ensure the sanctity of the records in their custody. The entire system of title registration is predicated on the ability of the government to guarantee title and that cannot be possible if its officers who are entrusted and charged with the responsibility to register and maintain records are reckless and /or are compromised to interfere with those records.

38. Finally, and before I conclude this judgment, I need to comment on the issue raised and submitted on by the 1st defendant that the plaintiff's suit is statute barred under the provisions of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. With respect, the plaintiff's cause of action as against the 1st defendant arose in August 2014 when the 1st defendant attempted to enter into the suit land and the plaintiff resisted. The 1st defendant only got registered as the owner of the suit land on 1st August 2014. Prior to that date it was only the person who allegedly had been registered as proprietor who would have claimed to have rights over the land. On the evidence, the plaintiff was in possession and occupation of the land from the time of allotment in 1996. It was only the previous registered owner who would have been entitled to sue the plaintiff for recovery of the land. The plaintiff in such event would possibly have been entitled to plead limitation and/or raise the doctrine of adverse possession in its defence. In my view therefore, the plaintiff's suit as against the 1st defendant was not statute barred on account of limitation.

39. In conclusion and after careful analysis and evaluation of the evidence adduced by the parties, I am satisfied the plaintiff has proved their case on a balance of probabilities and are entitled to Judgment. I accordingly enter judgment in favour of the plaintiff and make the following final orders:-

1. That the plaintiff is the beneficial owner of UNS.NURSERY SCHOOL PLOT 'A'- NAKURU MUNICIPALITY allotted to it vide letter of allotment dated 3rd April 1996 Ref.30884/XLIV.

2. That Land parcel Nakuru Municipality Block 5/306 registered in the 1st defendant's name was irregularly and unprocedurally registered and is null and void.

3. The Chief Land Registrar is directed to cancel land parcel Nakuru Municipality Block 5/306 from the register and to process title in favour of the CATHOLIC DIOCESE OF NAKURU on the basis of the letter of allotment made to them on 3rd April 1996.

4. The 1st defendant is restrained by way of a permanent injunction from in any manner dealing with or interfering with the land parcel described as LR No. Nakuru Municipality Block5/306.

5. Each party to bear their own costs of the suit.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 4TH DAY OF NOVEMBER 2021.

J M MUTUNGI

JUDGE