REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 628 OF 2017

(FORMERLY HCCC NO. 1678 OF 1998)

KISUMU GUEST HOUSE LIMITED.....PLAINTIFF

=VERSUS=

L. OUMA.....1ST DEFENDANT

T. M. KYENDO.....2ND DEFENDANT

JOHN WACHIRA.....3RD DEFENDANT

E. W. KIBUGI.....4TH DEFENDANT

ERIC OBARE MARAMBA.....5TH DEFENDANT

STELLA MWANGI.....6TH DEFENDANT

JOHN KENNEDY MASAKHWE.....7TH DEFENDANT

JOHNSON NGUYO.....8TH DEFENDANT

J. BARAZA.....9TH DEFENDANT

MAURICE ODERA.....10TH DEFENDANT

ATSYAYA ONZERE.....11TH DEFENDANT

(ALL ACTING ON THEIR OWN BEHALF AND

ON BEHALF OF SOUTHLANDS RESIDENTS ASSOCIATION)

SOUTHLANDS RESIDENTS ASSOCIATION.....12TH DEFENDANT

J. BARAZA & ATSYAYA ONZERE

(SUED ON BEHALF OF MEMBERS OF SOUTHLANDS

ESTATE NAIROBI).....13TH DEFENDANT

JUDGMENT

Background:

All that parcel of land known as Nairobi/Block 72/737 measuring 2.686 hectares (“hereinafter referred to only as Plot No. 737”) was at all

material times registered in the name of a company known as Southlands Housing Development Limited (hereinafter referred to as "the Company"). Plot No. 737 was created following a survey that was carried out in 1980. That survey gave rise to Plot No. 737 and Nairobi Block 72/738 (hereinafter referred to as "Plot No. 738"). The survey was authenticated by the Director of Surveys and registered as Folio No. 154 Register No. 78 (hereinafter referred to as "F/R No. 154/78"). The company intended to develop a residential housing estate on Plot No. 737 known as Southlands Estate ("hereinafter referred to as "the Estate". In pursuance of that objective, the company in 1981 subdivided Plot No. 737 into 67 parcels known as Nairobi/Block 72/1328 – 1349 and Nairobi/Block 72/1478 – 1544. The survey that gave rise to these sub-plots were authenticated by the Director of Survey on 16th September, 1981 and registered as Folio 155 Register No. 30 and Folio 155 Register No. 31 (hereinafter referred to as "F/R No. 155/30 and F/R No. 155/31"). Following the said sub-division, the company surrendered its lease for Plot No. 737 on 2nd April, 1985 in exchange for the leases for the sub-plots. One of the sub-plots that came about following the sub-division of Plot No. 737 was Nairobi/Block 72/1544 (hereinafter referred to as "Plot No. 1544"). Open spaces, roads and other public utility land that were planned for Southlands Estate (the Estate) were encompassed in this plot. This is clear from survey plan F/R No. 155/31.

In 1982, another survey was carried out that gave rise to Nairobi/Block 72/1983 – 1988. The six parcels of land that were created by this survey were created from parts of Plot No. 1543, Plot No. 1544 and Plot No. 1345. The survey plan that gave rise to these plots was authenticated by the Director of Surveys on 1st March, 1982 and registered as Folio 158 Register No. 58 (hereinafter referred to as "F/R No. 158/58"). This survey reduced the size of Plot No. 1544 since a portion of Plot No. 1544 was used to create the six plots aforesaid. Plot No. 1544 was therefore cancelled pursuant to section 19(2) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) and the remainder thereof was given a new number Nairobi/Block 72/1988 (hereinafter referred to as "Plot No. 1988"). This can be seen in F/R No. 158/58. It follows from the foregoing that as at 1st March, 1982, the roads, open spaces and other public utility plots that were planned for the Estate were on Plot No. 1988.

In 1993, a new survey was carried out that created a parcel of land known as Nairobi/Block 72/2919 (hereinafter referred to as "the suit property"). The suit property was created from part of Plot No. 1988 and another parcel of land the particulars of which I have not managed to ascertain from the evidence on record. The said parcel of land a portion of which was added to a portion of Plot No. 1988 to create the suit property is most likely, Nairobi/Block 72/2249. Nairobi/Block 72/2249(hereinafter referred to as Plot No. 2249") was created in 1984 following consolidation of a number of parcels of land.

When the suit property was created, the Estate had already been developed by the company, the houses sold and occupied by the purchasers (hereinafter referred to as "the residents"). The residents were already enjoying the use of the public utility plots, open spaces and the public roads of access in the estate.

The portion of Plot No. 1988 that was curved out and added to a portion of Plot No. 2249 to create Plot No. 2919(the suit property) was an open space within the Estate behind Plot Nos. 1492 to 1506. These plots were developed with houses which were occupied by some of the residents. The residents occupying these houses were using the said open space behind their houses for various activities.

Before the survey that gave rise to suit property namely, F/R No. 250/147 was carried out, the plot had been allocated to Mr. S. R. N. Wachi by the Commissioner of Lands as Unsurveyed Residential Plot through a letter of allotment dated 20th August, 1992. The plot was indicated to be measuring 0.6 hectares. The residents of the estate learnt of this allotment in early 1994 or thereabouts. The residents wrote to the Commissioner of Lands in January and February, 1994 objecting to the allotment of the suit property to the said S.R.N Wachi (hereinafter referred to as "the original allottee" or "Mr. Wachi"). The Commissioner of Lands initially supported the allotment. It is not clear from the evidence on record how the suit property changed hands from Mr. Wachi to the plaintiff, Kisumu Guest House Limited (hereinafter referred to as "the plaintiff").

On 20th February, 1998, a lease in respect of the suit property was issued in favour of the plaintiff. In the said lease, the measurement of the suit property was given as 0.9144 hectares. The lease was registered on 4th March, 1998 and the plaintiff was issued with a certificate of lease on the same date as the first registered proprietor of the suit property. There were strong protests by the residents of the estate when the plaintiff moved in to take possession of the suit property more particularly the portion thereof behind their houses. The residents complained to the Commissioner of Lands and the Provincial Administration about the allocation through various correspondence. The Commissioner of Lands changed tune and claimed that part of the suit property was allocated to the plaintiff in error as it was an open space for the estate. The Commissioner of Lands asked the plaintiff to surrender its title for the suit property for correction/amendment. This demand was contained in the letters from the Commissioner of Lands dated 27th August, 1998 and 15th April, 2003. The plaintiff was aggrieved by the resident's refusal to allow it to take possession of the portion of the suit property behind their houses in the estate. This prompted the filing of this suit.

The suit:

The plaintiff brought this suit against 11 residents of the estate who owned Nairobi/Block 72/1495 to 1506 who resisted the plaintiff's attempt to take possession of the portion of the suit property behind their houses. These residents were sued on their own behalf and on behalf of an association known as Southlands Residents Association, that was also joined in the suit as 12th Defendant. Two of the residents, the 9th and 11th defendants subsequently obtained leave of the court to defend the suit on behalf of Residents of Southlands Estate, Nairobi. I have added the Residents of Southlands Estate as the 13th Defendant. The individual residents of the estate who were sued, those represented by the two residents and the association shall all hereinafter be referred to only as "the defendants". The suit was filed in the High Court on 29th July, 1998 and was transferred to this court on 28th September, 2017 and given its current case number. The defendants filed a defence and counter-claim against the plaintiff on 18th August, 1998. The plaintiff filed a reply to defence and defence to the defendants' counter-claim on 27th August, 1998.

The plaintiff's case:

In its undated plaint filed on 29th July, 1998 as aforesaid, the plaintiff averred that it was the registered proprietor of the suit property and

another parcel of land known as Nairobi/Block 72/1506. The plaintiff averred that it was operating a school known as Malezi Preparatory School on a parcel of land known as Nairobi/Block 72/2249 (Plot No. 2249). The plaintiff averred that Plot No. 2249 on which the school was situated was adjacent to Nairobi/Block 72/1495 – 1505 owned by the defendants. The plaintiff averred that the defendants had blocked its attempt to expand the school by developing the suit property. The plaintiff averred that on 1st July, 1998 it entered the suit property with an intention to clear it for the purposes of development and on 4th July, 1998, the defendants trespassed on to the suit property and unlawfully prevented the plaintiff from developing the property. The plaintiff averred that on 17th July, 1998, the defendants once again entered the suit property and erected illegal structures thereon. The plaintiff averred that the defendants had by their said illegal activities caused and continued to cause irreparable injury, annoyance and damage to the plaintiff and the school. The plaintiff sought the following reliefs against the defendants.

(i) A permanent injunction restraining the defendants from trespassing on the suit property.

(ii) A mandatory injunction compelling the defendants to stop blocking the plaintiff's development of the suit property.

(iii) Any other or further order that the court may deem fit and just to grant.

At the trial, the plaintiff called two (2) witnesses. The first witness was Stanley Rotich (PW1). PW1 gave evidence in relation to the report dated 3rd February, 2000 that he prepared and filed in court pursuant to witness summons dated 26th October, 1998 that required him to produce the survey maps in respect of the suit property and to point out the beacons demarcating the suit property and the neighbouring plots. In the said report, PW1 narrated the origins of Plots No. 737, 1544, 1988 and 2919 (the suit property). In his conclusion, PW1 stated that the surveys giving rise the aforementioned parcels of land were carried out and approved by the Director of Surveys on the basis of the land allocations that were done by the Commissioner of Lands. He stated that the beacons on the ground were consistent with the said survey records and that there was no encroachment by any of the parcels on the others. In cross-examination, PW1 stated that when the suit property was created, it took part of Plot No. 1988. He stated that Plot No. 1988 should have been a public utility land and that it comprised of road reserves and part of access to the other subdivisions.

The plaintiff's second witness was its director James Odera Abok (PW2). PW2 told the court that the suit property was owned by the plaintiff. He stated that the plaintiff's title to the suit property had not been cancelled. He stated that the plaintiff also owned Plot No. 2249 and Plot No. 1506. He stated that Plot No. 2249 and Plot No. 1506 which were adjacent to each other were being used by Malezi School. He stated that Plot No. 1506 was part of Southlands Estate ("the Estate"). He stated that the plaintiff wanted land to expand the school and the owner of the suit property agreed to sell the same to the plaintiff. He stated that the plaintiff purchased the suit property from Mr. Wachi and that it was issued with a title in July, 1998 and started developing it in bits. He stated that in July, 1998, the plaintiff started to clear a portion of the suit property that had not been developed which had big trees and crops which had been planted by the defendants and other third parties who had no title to the land. He stated that the defendants opposed the plaintiffs attempt to develop that portion of the suit property and that it is why the plaintiff filed this suit. He stated that the plaintiff identified the defendants from the various meetings that they attended together to resolve the dispute. He stated that the defendants owned the parcels of land adjacent to the portion of the suit property in dispute and that the suit property did not encroach on the defendants' parcels of land or any other land. He stated that that fact was confirmed by the report that was submitted to court by PW1. He stated that it was the defendants who had encroached on the suit property by constructing walls thereon. He stated that the suit property was not a playing ground and that when the plaintiff attempted to develop it, it was being used for farming. PW2 stated that part of the suit property was a portion of the former Plot No. 737 that was surrendered to the Government upon subdivision of the said parcel of land which gave rise to the Estate. He stated that the residents of the estate had no rights beyond their individual parcels. He stated that the Commissioner of Lands was at liberty to re-plan that land (Plot No. 1544) that was surrendered to it free of charge by the company upon the subdivision of Plot No. 737. PW2 produced a number of documents in evidence as exhibits.

PW2 denied that the suit property was public utility land and that it was held by the Commissioner of Lands in trust for the defendants. He denied further that the plaintiff obtained the suit property by fraud. He stated that the plaintiff purchased the suit property from an allottee and that it was not involved in the allocation of the same. PW2 stated that the plaintiff had no claim against the Commissioner of Lands since the Commissioner of lands had confirmed its title and the beacons for the property. PW2 urged the court to grant the reliefs sought in the plaint.

In cross-examination, PW2 stated that the plaintiff purchased the suit property from Mr. Wachi around 1995 and that they entered into a sale agreement. He stated that he did not have the agreement and could not remember the total amount that the plaintiff paid for the property. He stated that Mr. Wachi had a letter which authorized him to sell the suit property and for the same to be registered in the name of the buyer. He stated that the dispute before the court concerned only a portion of the suit property. PW2 admitted that he was aware that the residents were opposed to the portion of the suit property in dispute being allocated to Mr. Wachi. He stated that the plaintiff had developed the suit property save for the portion in dispute. He stated that he was aware that the land surrendered to the Government upon a subdivision is to be used for public purposes. He stated that such land can be re-planned for other uses.

The Defendants' case:

In their defence and counter-claim filed on 18th August, 1998, the defendants averred that the suit property was improperly and illegally transferred to the plaintiff since part of it was reserved for public use. The defendants averred further that the plaintiff acquired the suit property fraudulently. The defendants denied that they trespassed on the suit property and prevented the plaintiff from developing the same. The defendants averred that it was the plaintiff that had interfered with the defendants' use of the disputed part of the suit property which was a public utility plot. The defendants averred that the plaintiff was not entitled to the reliefs sought since the disputed part of the suit property was part of the public utility land that was held by the Commissioner of Lands in trust for the benefit of the defendants.

In their counter-claim, the defendants averred that they were residents and house owners in the Estate. The defendants averred that they bought their houses from the company on or about 1984. The defendants averred that when they purchased their houses in the estate, they also acquired the open spaces in the Estate. The defendants averred that the said open spaces were surrendered to the Government to hold in

trust for them. The defendants averred that on or about 20th August, 1992, the Government in breach of the fiduciary duty owed to them allocated part of the open space within the Estate forming part of the suit property to Mr. Wachi who subsequently purported to transfer the same to the plaintiff fraudulently. The defendants averred that the plaintiff was aware at all material times that the disputed part of the suit property was public utility land and that it was being used by the defendants. The defendants averred further that the disputed part of the suit property was already alienated and held in trust by the Commissioner of Lands for the defendants and as such the same could not be lawfully alienated again to the plaintiff.

The defendants averred that the disputed part of the suit property was curved out of Plot No. 1544 which was a larger public utility plot which served several purposes in the Estate including, access to several houses in the Estate, holding of the main sewerage system that serves the Estate, playground and an escape route in case of a disaster like fire. The defendants averred that the plaintiff was in the process of putting up structures on the disputed part of the suit property which constituted public utility land unless restrained by the court. The defendants prayed for judgment against the plaintiff for

(i) A declaration that the allocation and transfer of a portion of Plot No. 1544 to the plaintiff was unlawful, null and void and should be cancelled.

(ii) An order for the rectification of the register of the suit property by removing or curving out therefrom the portion of Plot No. 1544 that was included therein.

(iii) A permanent injunction restraining the plaintiff from selling, fencing off, wasting, damaging and/or interfering with the defendants' enjoyment of part or all that parcel of land known as Plot No. 1544 as shown in Map No. 148/4.

(iv) A declaration that part of Plot No. 1544 had been unlawfully curved out and included in the suit property during the subsistence of a trust between the Commissioner of Lands and the defendants in relating thereto.

(v) Costs of the suit.

(vi) Any other or further order that the court may deem just and fit to grant.

At the trial, the defendants called one witness, Aggrey Atsyaya Onzere (DW1). DW1 told the court that the defendants were residents of Southlands Estate ("the Estate") and that they bought their houses from Southlands Estate Housing Company Ltd. ("the Company"). He stated that he owned Plot No. 72/1495 on which he had his house No. 366. He stated that he knew one of the directors of the plaintiff by the name Abok Odera (PW2) who also had a house in the estate. He stated that he lived in the estate peacefully until 1994 when he learnt that someone was interested in purchasing part of the estate. He learnt of this when surveyors came to the ground.

DW1 stated that the portion of the Estate that was being sold was not available for sale. He stated that the company that developed the Estate surrendered open spaces and roads of access within the estate to the Government to hold in trust for the resident of the Estate. DW1 stated that the Estate was developed on Plot No. 737 portions of which were sold to the residents together with the houses thereon. He stated that the company who developed the Estate planned for roads, sewers and open spaces where the children could play. DW1 stated that the subdivision and development plans for the Estate could not be approved without provisions for the foregoing. He stated that when he purchased his house, the Estate had access roads, open spaces and trees which were planted around the Estate. He stated that he was attracted by the open spaces when he was purchasing his house. He stated that all the roads and open spaces in the Estate were given one title number namely, Plot No. 1544. He stated that Plot No. 1544 comprised of open spaces, wayleaves and roads in the Estate. DW1 stated that since no one individual in the Estate could hold the title for Plot No. 1544, the company surrendered the same to the Commissioner of Lands to hold in trust for the residents.

DW1 stated that since Plot No. 1544 was held in trust for the residents, the same could only be allocated by the Commissioner of Lands for any other use with the permission of the residents of the Estate who had a right to object to such user. He stated that land reference number for Plot No. 1544 was later changed to 1988. He stated that the change in the reference number did not affect the status of Plot No. 1544. He stated that in 1998, the residents saw surveyors surveying the open space behind some of the residents' houses. He stated that the survey led to the creation of the suit property. Following the creation of the suit property, one day in July, 1998 the residents' gates opening to the open space behind the said houses were shut and welded without notice. The residents complained to the Provincial Administration. That is when the residents came to know that PW2 was behind the welding of their gates and he was ordered to re-open the said gates.

DW1 stated that after the gates were opened, the open space was fenced with a barbed wire. He stated that further complaints were made to the Commissioner of Lands who requested the plaintiff to surrender its title for rectification to exclude the portion of Plot No. 737 that had been made part of it. DW1 stated that the plaintiff then decided to file this suit. He stated that it was after this suit was filed that they noted several discrepancies in the letter of allotment of the suit property and other documents of title relating thereto. He stated that how the size of the land that was allocated which measured 0.6 hectares changed to 0.9 hectares in the title was a mystery the same with how the suit property charged hands from Mr. Wachi to the plaintiff. DW1 stated that the defendants were not interested in the whole of the suit property. He stated that their claim was limited to the portion thereof behind their houses. He stated that if the plaintiff was allowed to develop that portion of the suit property, the defendants would be denied access to the back of their houses which they need for safety. He stated that any development on that part of the suit property would interfere with the enjoyment of the defendants' properties. He stated that since the Commissioner of Lands was holding the said portion of the suit property in trust for the defendants, the same was not available for allocation. He stated that since PW2 who was the plaintiff's director was a resident of the estate, he was aware that the residents were using the portion of the suit property in dispute. DW1 produced the defendants' bundle of documents dated 15th June, 2006 as an exhibit.

DW1 told the court that the Ndung'u Commission on irregular/illegal allocation of public land found that the suit property was illegally allocated and recommended that its title be revoked. He stated that the National Land Commission also recommended the revocation of the plaintiff's title to the suit property. DW1 urged the court to grant the reliefs sought in the counter-claim.

The plaintiff's submissions:

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed its submissions on 8th October, 2020. The plaintiff gave a summary of the pleadings and the evidence that was given at the trial in support of each party's case. The plaintiff cited sections 27 and 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) and submitted that its rights as the proprietor of the suit property were indefeasible save as provided for in the said Act. The plaintiff argued that its title to the suit property could only be challenged on account of fraud or misrepresentation or where it was proved that the property was acquired illegally, unprocedurally or through a corrupt scheme. The plaintiff argued that the defendants' allegation that its title was fraudulently acquired was not sufficiently proved. The plaintiff submitted that it acquired the suit property from an allotee and that neither the said allotee nor the Commissioner of Lands against whom the alleged fraud in the allocation of the suit property has been levelled were joined in the suit as parties. The plaintiff submitted that in any event no evidence in proof of the alleged fraud was tendered by the defendants.

With regard to the defendants' contention that the Commissioner of Lands held the suit property in trust for them, the plaintiff submitted that the defendants did not produce any documents in proof of the alleged trust. The plaintiff submitted that no evidence was placed before the court showing that the parcel of land said to have been held by the Commissioner of Lands in trust was registered in his name as a trustee in accordance with section 126 of the Registered Land Act (now repealed). The plaintiff submitted that there was no evidence that any trust was registered against the titles of Plot No. 737 and Plot No. 1544. The plaintiff submitted that the suit property was not public land and as such could not be held by the Commissioner of Lands in trust for the defendants. The plaintiff submitted further that the defendants did not produce their titles in evidence to show that they were entitled to land beyond the boundaries of the individual titles that they held. The plaintiff referred to the evidence of PW1 and submitted that the allocation, survey and the placement of beacons on the boundaries of the suit property were carried out regularly and properly and that it was the defendants who had encroached on its land on the disputed portion of the suit property.

On case law, the plaintiff cited Shimoni Resort *v* Registrar of Titles & 5 others [2016] eKLR and Prisila Jesondin Chumo *v* Nelly Jebor alias Nelly Chebor [2018] eKLR and argued that its title was indefeasible and could not be challenged or impeached based on the correspondence that was produced in evidence by the defendants. The plaintiff also cited Robert Mutiso Lelli and Cabin Crew Investments Ltd. *v* National Land Commission & 3 others [2017] eKLR and Mwangi Stephen Muriithi *v* National Land Commission & 3 others [2018] eKLR and submitted that the defendants' prayer for the revocation of its title was without basis and merit and should be dismissed with costs to the plaintiff. The plaintiff submitted that it should be paid damages in the sum of Kshs. 10,000,000/- for the losses that it suffered during the period in which it was unable to develop the suit property.

In conclusion, the plaintiff submitted that it had proved its case against the defendants to the required standard and as such it was entitled to the reliefs sought. The plaintiff submitted that the defendants' counter-claim was not proved and urged the court to dismiss the same with costs.

The ddefendant's' submissions:

The defendants filed their submissions on 1st December, 2020. The defendants also gave a summary of each party's case and thereafter framed the following issues for determination by the court;

1. Whether a portion of the suit land was reserved as public utility land and held in trust for the defendants by the Commissioner of Lands.

2. Whether the allotment of part of parcel No. 1544 comprised in the suit property to Mr. Wachi was lawful, regular, and/or procedural.

3. Whether the sale and transfer of the suit property to the plaintiff was lawful and thus the plaintiff holds a valid title in respect thereof.

4. Whether the suit property has encroached on the defendants' land.

5. Whether the defendants trespassed on the suit property.

6. Whether the plaintiff is entitled to the reliefs sought in the plaint.

7. Whether the defendants are entitled to the reliefs sought in the counter-claim.

8. Who is liable for costs of the suit?

On the first issue the defendants submitted that the portion of Plot No. 1544 that was included in the suit property was part of land that was surrendered back to the Government to be held in trust for the defendants as residents of the Estate. The defendants submitted that the said portion of Plot No. 1544 was therefore public utility land and as such not capable of being allocated by the Commissioner of Lands. In support of this submission, the defendants relied on Regulation 11 of the Development and Use of Land (Planning) Regulations of 1961 that were made under the repealed Land Planning Act, Article 62 of the Constitution and the decisions in Bencaster Investments Ltd *v* John Murithi & 3 others; Attorney General & 5 others (Interested Parties) [2020] eKLR.

On the second issue, the defendants submitted that the allocation of part of Plot No. 1544 to Mr. Wachi as part of the suit property was irregular as the same was not available for allocation as it had been reserved for a public purpose. In support of this submission, the defendants relied on Section 9 of the repealed Government Lands Act, Chapter 280 Laws of Kenya and the decisions in Jimmy Gichuki

Kiago & another *v* Transtional Authority & 7 others [2019] eKLR, John Edward Njeru & another *v* Commissioner of Lands & 8 others [2019] eKLR and Telposta Pension Scheme *v* Geoffrey Ng'ang'a Ngugi & 2 others [2019] eKLR.

On the third issue, the defendants submitted that the plaintiff had not acquired a good title to the part of Plot No. 1544 contained in the suit property as Mr. Wachi's acquisition thereof was irregular. The defendants submitted that Mr. Wachi had no valid title to the said portion of the suit property that he could pass to the plaintiff. The defendants submitted further, that the plaintiff could not be termed as a bona fide purchaser for value as it had not conducted due diligence which would have revealed that the property in dispute was public utility land.

In support of this submission, the defendants relied on section 26 of the Land Registration Act, 2012 and the decisions in Chemey Investment Limited *v* Attorney General & 2 others [2018] eKLR, Kenya Anti-Corruption Commission *v* Online Enterprises Limited & 4 others [2019] eKLR and Karen Roses Limited *v* Attorney General & 4 others [2019] eKLR.

On the fourth issue, the defendants submitted that the suit property had encroached on the defendants' property. The defendants relied on the letters that were written by the Commissioner of Lands and the Permanent Secretary Ministry of Lands informing the plaintiff of the said encroachment.

On the fifth issue, the defendants submitted that they had not encroached or trespassed on the portion of the suit property in dispute. The defendants submitted that they were lawfully using the said portion of the suit property as public utility plot until it was allotted to Mr. Wachi who thereafter sold it to the plaintiff. The defendants submitted that it was the plaintiff who had illegally trespassed on their public utility plot.

On the sixth issue, the defendants submitted that the plaintiff was not entitled to the reliefs sought in the plaint as it had not proved its case. The defendants argued that the plaintiff had not proved that it had purchased the suit property from Mr. Wachi and that it was a bona fide purchaser for value. The defendants submitted also that the plaintiff had not proved that Mr. Wachi had a good title in the suit property that he could pass to it. In support of this submission, the defendants relied on The Presbyterian Foundation *v* Bernard Ole Mereu & 4 others [2020] eKLR and Bencaster Investments Limited (supra).

On the final issue, the defendants submitted that they were entitled to the reliefs sought in the counter-claim having proved that the portion of Plot No. 1544 contained in the suit property was owned by them.

Analysis and determination of the issues arising:

I have considered the pleadings, the evidence tendered, the submissions by the advocates for the parties and the authorities cited in support thereof. The following in my view are the issues arising for determination in the main suit and the counter-claim by the defendants;

1. Whether the disputed portion of the suit property was reserved for public use and was surrendered to the Commissioner of Lands to hold in trust for that purpose.

2. Whether the initial allocation and subsequent sale and transfer of the disputed portion of the suit property to the plaintiff was lawful and whether the plaintiff acquired a valid title in respect of thereof.

3. Whether the defendants trespassed on the disputed portion of the suit property.

4. Whether the plaintiff's entry into the disputed portion of the suit property amounted to a breach of trust.

5. Whether the plaintiff is entitled to the reliefs sought in the plaint.

6. Whether the defendants are entitled to the reliefs sought in the counter-claim.

Whether the disputed portion of the suit property was reserved for public use and was surrendered to the Commissioner of Lands to hold in trust for that purpose.

I have at the beginning of this judgment given the history of the dispute between the parties. It is not necessary to repeat the same. It is not disputed that Southlands Housing Development Limited (the company) was the developer of Southlands Estate (the estate). It is not disputed that the Estate was developed on a parcel of land known as Plot No. 737 measuring 2.686 hectares that was wholly owned by the company. It is also not disputed that before developing the Estate, the company subdivided Plot No. 737 into several sub-plots. It is also not disputed that in the sub-division scheme, the company set aside portions of Plot No. 737 for use by the residents of the Estate as open spaces, roads and such like. It is not disputed that the portion of Plot No. 737 that was reserved for public purposes aforesaid was given Plot No. 1544 which was later changed to Plot No. 1988. It is also common ground that as a condition for the sub-division approval, the company was required to surrender to the Government (the Commissioner of Lands) the said Plot No. 1544(1988) free of charge. The company thereafter developed houses on the sub-plots which had individual titles following the subdivision and sold the same to the defendants. The company ceased to have any interest in the estate after selling all the sub-plots in the estate and surrendering the land for common areas or public utility to the Government.

It is not disputed that a portion of Plot No. 1544(1988) that was surrendered by the company to the Government for public use within the Estate was curved out and allocated by the Commissioner of Lands to a Mr. Wachi together with another parcel of land. The said portion of Plot No. 1544(1988) together with the other parcel of land that was combined with it before the same was allocated to Mr. Wachi was given Land Reference No. 2919(the suit property) after survey. It is this portion of Plot No. 1544(1988) within the suit property which is in dispute in this suit.

What is disputed is whether the Commissioner of Lands had power to allocate the said portion of Plot No. 1544(1988) that was surrendered for public use within the estate to Mr. Wachi for private use. This is not the first time that this court has been called upon to determine the rights of the residents of an estate over land reserved for public use within an estate during the development of the estate.

In Bencaster Investments Ltd *v* John Murithi & 3 others; Attorney General & 5 others (Interested Parties) (supra) that has been cited by the defendants, I dealt with a similar issue although the dispute in the case pitted the developer against the residents. The developer had refused to surrender public utility plots to the Nairobi City Commission in accordance with the subdivision approval and had instead sold the same to a third party for private use. The third party like in the present case sued the residents for trespass. In that matter I stated as follows:

> **"My answer to the first issue is that the registration of the 4th interested party as the proprietor of Nairobi Block 122/39 and Nairobi Block 122/42 on 13th September, 2006 was unlawful and as such the 4th 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 4th interested party held the same and refused to surrender the same as by law provided, the 4th 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. With regard to Nairobi Block 122/32, the 4th interested party was entitled to be registered as the owner thereof. However, since the same was reserved for public purposes, the 4th interested party was supposed to hold the same in trust for the residents of City Chicken Farm for whose benefit the same was reserved.**
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> **I wish to disabuse the 4th interested party from its erroneous stance that since the defendants were not members of the 4th interested party, they were not entitled to benefit from the public purpose plots. When the 4th interested party purported to apply to be re-allocated the suit properties, it stated that it wanted to develop the said properties for the benefit of the residents and not its members. It should be understood that when a developer, a land buying company or a co-operative Society buys land which it then subdivides and allocates to its members or sells to third parties, the plots reserved for public purposes in the subdivision schemes are for the benefit of the residents of the subplots arising from the subdivisions and not the developers or their members. A dangerous trend is developing in this country whereby developers are revisiting the developments which they completed several years ago and sold and seizing public utility plots which they never surrendered and either selling them or developing them contrary to the purposes for which they were reserved. This practice that was encouraged by the 2nd interested party must be discouraged. The defendants led evidence that was uncontroverted that 98% of the residents of City Chicken Farm were not shareholders or original members of the 4th interested party and that explained why the 4th interested party did not see anything wrong with selling of the public utility plots and sharing the proceeds with its shareholders. 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 4th interested party held the suit properties as a trustee and not as the owner thereof."**

This court also dealt with a similar matter in Registered Trustees of Redeemed Gospel Church *v* Umoja Residents Association [2020]eKLR, where I 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 2nd defendant to hold for that public purpose. I am of the view that once the suit property was surrendered to the 2nd defendant for the purposes of construction of a community centre for use by the residents of Umoja II Estate, the 2nd defendant held the property in trust for the residents of Umoja II Estate. As a trustee of the said property, the 2nd 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 2nd 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 2nd defendant disposed of the suit property to the plaintiff through 99 years lease with effect from 1st 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 2nd 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 2nd defendant held the suit property and as such violated section 144 (8) of the Local Government Act aforesaid."**

I am not alone in this line of reasoning. 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."

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."

It is my finding from the foregoing that Plot No. 1544 that later changed to Plot No. 1988 was surrendered to the Commissioner of Lands to hold in trust for the defendants (the residents of Southlands Estate) for public use within Southlands Estate (the Estate). The said parcel of land or any portion thereof was therefore not available for allocation by the Commissioner of Lands to a third party for private use. I am not in agreement with the argument by the plaintiff's advocates that once the said parcel of land was surrendered to the Commissioner of Lands, he had power to re-plan it and to allocate it to whoever he wished. It must be appreciated that this parcel of land was part of the larger Plot No. 737 that was owned by the company. It was not unalienated Government land. It had already been alienated and reserved for a specific public use. It follows from the foregoing that the purported allocation of a portion of Plot No. 1544(1988) that is in dispute between the parties herein to Mr. Wachi was carried out in breach of trust.

Whether the initial allocation and subsequent sale and transfer of the disputed portion of the suit property to the plaintiff was lawful and whether the plaintiff acquired a valid title in respect of the property.

I have already held that the allocation of the suit property to Mr. Wachi was carried out in breach of trust. The same was in the circumstances, illegal, null and void. The plaintiff claimed to have purchased the suit property from Mr. Wachi. The plaintiff placed no evidence before the court in support of this transaction. No sale agreement or transfer was tendered in evidence. The plaintiff's director(PW2) could not even remember the amount that was paid by the plaintiff for the suit property. No evidence was placed before the court of any payment passing from the plaintiff to Mr. Wachi. The plaintiff put forward a veiled argument that it was a bona fide purchaser of the suit property for value and that it was not involved in the irregular allocation of the suit property if at all there was any irregularity. In Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura *v* Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014 the court cited with approval the case of Katende *v* Haridar & Company Ltd [2008] 2 EA 173, where the Court of Appeal in Uganda held that:

"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine…. he must prove that:

a. he holds a certificate of title;

b. he purchased the property in good faith;

c. he had no knowledge of the fraud;

d. he purchased for valuable consideration;

e. the vendors had apparent valid title;

f. he purchased without notice of any fraud;

g. he was not party to any fraud."

From what I have stated earlier, I am not satisfied that the plaintiff was a bona fide purchaser of the suit property without notice of any defect in its title. A part from the assertions that he made in court, PW2 who gave evidence on behalf of the plaintiff did not tender any convincing evidence that the plaintiff purchased the suit property from Mr. Wachi. As I have observed earlier, there is no evidence of sale agreement, transfer and payment of the purchase price. How the land that was allocated to Mr. Wachi in 1992 was registered in the name of the plaintiff in 1998; 6 years later is a mystery. In Munyu Maina *v* Hiram Gathiha Maina [2013] eKLR, the Court of Appeal 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…. 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….."

The same reasoning was adopted in Daudi Kiptugen *v* Commissioner of Lands & 4 Others [2015] eKLR where 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."

Even if the plaintiff purchased the suit property from Mr. Wachi, the plaintiff did not convince me that it was not aware of the defect in Mr. Wachi's title. It is in evidence that the plaintiff's director, PW2 has a house in the Estate and that the plaintiff also owns other parcels of land in the Estate. In the circumstances, the plaintiff was aware that Plot No. 1544(1988) a portion of which was allocated to Mr. Wachi was reserved as a public utility plot within the Estate. The plaintiff was also aware that the defendants had protested against the allocation of the said portion of Plot No. 1544(1988) to Mr. Wachi. I have noted from the record that the protest against the allocation of the suit property to Mr. Wachi started as way back as January, 1994. The plaintiff was therefore not a bona fide purchaser of the suit property.

Even if it is assumed further that the plaintiff was a bona fide purchaser of the suit property without notice, which it was not, Mr. Wachi had no valid title in the suit property to transfer to it. As I held earlier, the allocation of the suit property by the Commissioner of Lands to Mr. Wachi was a nullity. It follows that Mr. Wachi had no title that he could pass to the plaintiff.

The plaintiff could not therefore acquire a valid title from an invalid one merely on account of its innocence. In Macfoy *v* United Africa Co. Ltd. (1961)3 All ER 1169, Lord Denning stated as follows at page 1172:

"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."

It is my finding that the purported sale and registration of the suit property in the name of the plaintiff was unlawful and as such the plaintiff did not acquire a valid title in respect of the suit property.

Whether the defendants trespassed on the disputed portion of the suit property.

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, 18th 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 does not hold a valid title in respect of the suit property and that the portion of the suit property in dispute was held by the Commissioner of Lands in trust for the defendants. As the beneficiaries of the said trust, the defendants had a right to enter and use the portion of the suit property in dispute for the purposes for which the same was held on their behalf. Since the defendants had a lawful interest in the suit property, they had a right to enter thereon. The defendants' entry onto the suit property was therefore lawful and as such did not amount to trespass.

Whether the plaintiff's entry into the disputed part of the suit property amounted to a breach of trust.

I have held that the allocation of the suit property to Mr. Wachi by the Commissioner of Lands was undertaken in breach of trust. It follows that the plaintiff who acquired the suit property from Mr. Wachi received the same subject the trust in respect of which it was held by the Commissioner of Lands. It is apparent that the property was never registered in the name of Mr. Wachi. It was transferred directly by the Commissioner of Lands to the plaintiff. In N W K *v* J K M & another [2013] eKLR, the court stated as follows on liability of strangers to a trust:

"The liability of strangers to a trust for breach of trust is determined by two principles, known as the "dishonest assistance" and "knowing receipt" principles. These principles are explained in the text by Alistair Hudson on Equity and Trusts, 4th Edition, at page 732 as follows:

"First, a person who is neither a trustee nor a beneficiary will be personally liable to account to the trust for any loss suffered in a situation in which she dishonestly assists the commission of a breach of trust, without receiving any proprietary right in that trust property herself. This liability is referred to as 'dishonest assistance'. The test for 'dishonesty' in this context is a test which asks whether or not the defendant acted as an honest person would have acted. This notion of dishonesty extends beyond straightforward deceit and fraud potentially into reckless risk-taking with trust property.

Secondly, a person who is neither a trustee nor a beneficiary will be personally liable to account to the trust for any loss suffered in a situation in which she receives trust property with knowledge that the property has been passed to her in breach of trust. This form of liability is referred to as 'knowing receipt'. 'knowledge' in this context includes actual knowledge, wilfully closing one's eyes to the breach of trust, or failing to make the inquiries which a reasonable person would have made in these circumstances.

In either case, there must have been loss suffered by the beneficiaries as a result of some breach of trust: the liability of the strangers is then to account to the beneficiaries for that loss, providing that the knowing receipt or dishonest assistance has

been demonstrated. Therefore, there must have been a breach of trust before either of these claims could arise."

From the evidence on record, I am satisfied that the plaintiff was aware that the Commissioner of Lands and Mr. Wachi held the suit property in trust for the defendants. The registration of the suit property in the name of the plaintiff and its entry into the property was therefore carried out in breach of the said trust for which the plaintiff is liable to the defendants as it knowingly received trust property.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

The plaintiff has failed to prove that it is the lawful proprietor of the suit property. The Plaintiff is therefore not entitled to the reliefs sought in the plaint.

Whether the defendants are entitled to the reliefs sought in the counter-claim.

The defendants have proved on a balance of probabilities that the portion of the suit property in dispute was part of a public utility plot that was held in trust for them by the Commissioner of Lands and that it was irregularly and illegally allocated to Mr. Wachi and subsequently registered in the name of the plaintiff in unclear circumstances. The defendants have proved that they have a right to enter and use the said portion of the suit property and that the plaintiff has no right to enter the same. The defendants are therefore entitled to the reliefs sought in their counter-claim.

Conclusion.

In conclusion, I hereby make the following orders;

1. The plaintiff's suit is dismissed.

2. Judgement is entered for the defendants against the plaintiff for;

    a) It is declared that part of the parcel of land known as Nairobi/Block72/1544 which later changed to Nairobi/Block72/1988 was unlawfully carved out and included in Nairobi/Block72 /2919 during the existence of a trust between the defendants and the Commissioner of Lands in respect thereof.

    b) It is declared that the allotment and registration of part of all that parcel of land formerly known as Nairobi/Block72/1544 whose land reference number was changed to Nairobi/Block72/1988 in the name of the plaintiff was unlawful, null and void and the same is hereby cancelled.

    c) An order for re-survey forthwith of all that parcel of land known as Nairobi/Block72/2919 by a Government Surveyor at the cost of the plaintiff and excision of the portion thereof that originated from Nairobi/Block72/1544 which later changed to Nairobi/Block72/1988 and return or restoration of the said excised portion to Nairobi/Block72/1544 which later changed to Nairobi/Block72/1988.

    d) The Registry Index Map, Land Register, Lease and Certificate of Lease and any other such document in respect of the parcel of land known as Nairobi/Block72/2919 shall be amended to reflect the reduced size or measurement of the said parcel of land following the excision therefrom of the portion thereof that originated from Nairobi/Block72/1544 which later changed to Nairobi/Block72/1988.

    e) A permanent injunction is issued restraining the plaintiff by itself or through its agents from in any way whatsoever selling, alienating, fencing off, wasting, damaging and/or interfering with the defendants' quiet enjoyment of all that parcel of land known as Nairobi/Block72/1544 which later changed to Nairobi/Block72/1988 or any part thereof.

    f) The defendants shall have the costs of the suit and the counter-claim.

DELIVERED AND DATED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2021

S. OKONG'O

JUDGE

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

Ms. Ligala h/b for Mr. K'Opere for the Plaintiff

Mr. Kamunde for the defendants

Ms. C.Nyokabi-Court Assistant