



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 226 OF 2017

WIBESO INVESTMENTS LIMITED.....1ST PLAINTIFF

NOVICOME LIMITED.....2ND PLAINTIFF

VERSUS

TAMARIND MEADOWS LIMITED.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

DIRECTOR, DIRECTORATE OF

CRIMINAL INVESTIGATIONS3RD DEFENDANT

DIVISIONAL CRIMINAL INVESTIGATION

OFFICER, CENTRAL.....4TH DEFENDANT

DANIEL NJUKI.....5TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

Introduction

1. This suit was commenced by way of a Plaint dated 15th May, 2017. In the Plaint, the 1st Plaintiff averred that it was the original Grantee of land known as Grant Number I.R. 72481, with Land Reference No. 18469, being a parcel of land situated at Athi River in Machakos County (*the suit property*) and that on the 8th August, 2003, it transferred the suit property to the 2nd Plaintiff, the current registered proprietor.

2. The Plaintiffs averred that the 1st Defendant trespassed upon the suit property, through its employees, associates, agents and persons acting through it, dug holes and erected structures on the suit property, thereby interfering with and damaging the suit property, thus depriving the 2nd Plaintiff of the use and enjoyment thereof. The 2nd Plaintiff averred that it has never sold, transferred, surrendered or offered the suit property to the 1st Defendant or to any other person, and that the 1st Defendant, or any person claiming the suit property under it, are trespassers. The Plaintiffs are seeking for the following reliefs:

a. A declaration be and is hereby issued that the Grant Number I.R. 72481 and allocated L.R. 18469 issued to the 1st Plaintiff and registered on 13th March, 1997 is the valid and genuine title for the parcel of land L.R. No. 18469 situate in Athi River, Machakos County.

b. A declaration be and is hereby issued that the purported Grant number I.R. 71611 said to have been allocated L.R. No. 18469 for residential purposes on 18th June 2002 and transferred to the 1st Defendant on 29th August, 2008 is duplicitous, fraudulent, invalid non-existent, null and void.

c. A declaration be and is hereby issued that the Grant Number I.R. 72481 and allocated to L.R. No 18469 having been the first in time to be registered in the government lands register, is the only valid and genuine title of land L.R. 18469 situate in Athi River in Machakos County.

d. The Honourable Court be pleased and hereby Grants a permanent injunction directed at the 1st Defendant, its directors, shareholders, members, associates, agents, employees and any person acting through them, restraining them from trespassing or in any way dealing with or interfering with the Plaintiffs' parcel of land registered as Grant number I.R. 72481 and allocated L.R. No. 18469 situate in Athi River, Machakos County.

e. The Honourable Court be pleased and hereby Grants a permanent injunction directed at the 1st Defendant, its directors, shareholders, members associates, agents, employees and any person acting through them, compelling them to vacate the Plaintiffs' parcel of land registered as Grant number I.R. 72481 and allocated L.R. No. 18469 situate in Athi River, Machakos County failure to which they will be forcefully evicted from the Plaintiffs' land.

f. The Honourable Court be pleased to and hereby Grants a permanent injunction directed at the 2nd Defendant, his subordinates, officers or persons acting through them from interfering with or dispossessing/depriving the Plaintiffs herein of his parcel of land registered as Grant number I.R. 72481 and allocated L.R. No 18469 situate in Athi River Machakos county including through making entries, registration or receiving documents on the lands register adverse to the Plaintiffs' interests and proprietorship of the suit property without the Plaintiffs' consent.

g. The Officer Commanding Police Division, Athi River, the Divisional Criminal Investigations Officer Athi River to ensure that the orders issued by this Honourable Court are obeyed and to provide assistance in the evictions should the 1st Defendant, its directors, shareholders, members, associates, agents, employees and any person acting through them fail to vacate the suit property that is to say the parcel of land registered as Grant number I.R. 72481 and allocated L.R. No. 18469 situate in Athi River, Machakos County.

h. The Honourable Court be pleased to and does hereby find and order the 1st Defendant liable for and to compensate the Plaintiffs herein including by way of general and exemplary damages for trespass and all illegal activities on the Plaintiffs' parcel of land registered as Grant number I.R. 72481 and allocated L.R. No. 18469 situate in Athi River, Machakos County.

i. The Honourable Court be pleased to and hereby find and order the 2nd Defendant liable for and to compensate the Plaintiffs including by way of general and exemplary damages for all losses arising from double allocation and/or illegal registration on the land register of Grant number I.R. 71611 said to have been allocated the Plaintiffs' land IR. No. 72481 for residential purposes on 18th June 2002 and transferred to the 1st Defendant on 29th August, 2008.

j. The Honourable Court be pleased to and does hereby find and order the 3rd 4th, and the 5th Defendants liable for and to compensate the Plaintiffs including by way of general and exemplary damages for all losses, damages and injury arising from failing to properly and expeditiously conducting investigations in regard to the Plaintiff's complaint regarding illegal activities on the Plaintiffs' parcel of land registered as Grant number I.R. 72481 and allocated L.R. No 18469 situate in Athi River, Machakos County.

k. The Honourable Court be pleased to Grant any other remedy, prayer and relief it deems fit and just to protect the Plaintiffs' right to the parcel of land registered as Grant number I.R. 72481 and allocated L.R. No. 18469 situate in Athi River, Machakos County.

l. The Honourable Court be pleased to award the Plaintiffs costs with compound interest from the date of judgment till payment in full.

3. In its Statement of Defence, the 1st Defendant averred that it is a *bona fide* purchaser for value of parcel of land known as L. R. No. 18469 under Grant No. I.R. 71611 having purchased it from Volta Insurance Consultants Limited, through a transfer instrument dated 7th August, 2008; that after acquiring the suit property, it charged the property to secure a loan of Kshs. 170 Million and that it erected 69 houses on the suit property.

4. The 1st Defendant filed a Notice of Claim against the 2nd and 6th Defendants seeking for indemnity or contribution arising out of their negligence. The 1st Defendant also issued a Third party notice against Volta Insurance Consultants Limited claiming indemnity for any damages and costs that may be awarded to the Plaintiffs in the suit.

5. In their Defence, the 2nd to 6th Defendants averred that the parcel of land number LR. 18469 was a Grant under Grant number IR 72481, LR No. 18469, with the 1st Plaintiff being the original Grantee; that the 1st Plaintiff subsequently transferred the suit property to the 2nd Plaintiff; that Grant Number IR 71611 with LR No. 18469 is a non-existent document as it does not emanate from the Ministry of Lands and that the said title was not issued by the 2nd Defendant and as such, is invalid. The 2nd to 6th Defendants averred that they are not liable to indemnify the 1st Defendant as claimed in the Notice of Claim.

The Plaintiffs' case.

6. The 1st Plaintiff's witness, PW1, adopted his Witness Statement. PW 1 informed the court that he was an official of both the 1st and 2nd Plaintiffs; that Grant No. I.R. 72481, L. R. No. 18469 was an original Grant that was issued to the 1st Plaintiff who was registered as its proprietor on 13th March, 1997 and that the designated use of the parcel of land was for inoffensive light industrial purposes. PW1 stated that the 1st Plaintiff subsequently transferred the property L.R. No. 18469 under Grant No. I.R. 72481 to its sister company, the 2nd Plaintiff, on 8th August, 2003. PW 1 produced in evidence the original Grant.

7. PW1 informed the court that the 2nd Plaintiff has never transferred the suit property; that in December, 2009, him, together with the 2nd Plaintiff's property Manager, were tipped off by the neighbours that a group of unknown persons had trespassed on their land L.R. No.18469 and had put up structures on the land. It was his evidence that upon visiting the suit property, they confirmed the information to be true.

8. PW1 stated that after enquires, they discovered that the suit property registered as L.R. No. 18469 had been used by the 1st Defendant as a collateral to secure a loan from Savings & Loans (K) Limited and that they immediately reported the matter to Central Police Station. PW1 requested the court to determine which of the two Grants, Grant No. I.R. 72481 held by the 2nd Plaintiff and Grant No. I.R. 71611 held by the 1st Defendant, is a genuine and valid title for the property L.R. No. 18469.

9. In cross examination, PW1 stated that the Plaintiffs' Grant for the suit property is I.R. No. 72481; that he knows the firm of Kariuki Muigua and Company Advocates and that he has never seen a letter copied to the said firm requesting the 2nd Plaintiff to take its title to lands for verification.

10. The 2nd Plaintiff's Property Manager, PW2, stated that the 1st Defendant's acts were acts of trespass, which interfered with and wasted the 2nd Plaintiff's property, and also prevented the Plaintiff from developing the suit property in accordance with its designated user. PW2 testified that unless the 1st Defendant and its agents are stopped by the court, they will continue with their illegal and criminal activities to the detriment of the 2nd Plaintiff.

11. PW2 informed the court that he was the property manager of the 2nd Plaintiff, and that the suit property was originally registered in the name of the 1st Plaintiff in the year 1997 before the 1st Plaintiff transferred it to the 2nd Plaintiff.

The 1st Defendant's case:

12. The 1st Defendant's Managing Director, DW1, informed the court that the 1st Defendant was incorporated on 20th May, 2008, with the purpose of purchasing land for development and subsequent sale. DW1 stated that the 1st Defendant bought the suit property L.R. No. 18469 measuring approximately 17 acres from Volta Insurance Consultants Limited for Kshs 51, 000, 000; that simultaneously, the 1st Defendant also bought another parcel of land, which is not a subject to these proceedings, measuring 10 acres, from Al Hassan International Limited.

13. DW 1 informed the court that the firm of C.W. Wanjihia & Co Advocates acted for the 1st Defendant in the purchase of the property in dispute, and that after the said purchase, the 1st Defendant used its title, Grant No. I.R. 71611 with L.R. No. 18469, as a security to borrow Kshs 170, 000, 000 from the bank.

14. DW1 further informed the court that after purchasing the suit property, it erected and sold some 69 houses on the suit property and that the 2nd Defendant refused to register the subleases over the suit property in favour of the purchasers of the units the 1st Defendant had constructed on account that the Grant No. IR 71611, L.R. No. 18469 held by the 1st Defendant was not genuine.

15. In cross examination, DW1 stated that the police informed him that they were investigating a case of fraud concerning L.R. No.18469; that the 2nd Defendant had informed him verbally that the 1st Defendant's title was not valid, and that he was informed by the 2nd Defendant that the land was already allocated and registered in the name of another entity.

16. DW1 admitted to having never dealt with any of the Plaintiffs; that he had never reported the matter to the police or taken any action against the vendor who sold the suit property to the 1st Defendant and that he knew the people who sold the suit property to the 1st Defendant. DW1 stated that the 1st Defendant's title was valid.

17. DW1 stated that the 1st Defendant paid the purchase price to the vendor's advocates by instalments; that he did not have any acknowledgement of receipt of the purchase price from the advocate; that the 2nd Defendant informed them in the year 2011 that the title held by the 1st Defendant was not valid and that the 2nd Defendant directed them to the Commissioner of Lands, who informed them that the suit property had already been allocated.

18. It was the evidence of DW1 that he filed a Deed of Indemnity, through the firm of Sichangi & Co Advocates, as an undertaking, to enable the registration of sub-leases over the suit property; that he met both the Minister for Lands and Hon. Mwau and that the Minister for Lands promised he would sort out the issue. It was the evidence of DW1 that the Plaintiffs never notified him of their claim over the suit property for the entire three years that he constructed on the land.

19. DW1 stated that the 1st Defendant was sued by Kenya Commercial Bank because they had defaulted on the repayment of the loan and that the 1st Defendant paid the purchase price for the suit land from the year 2007 to 2009.

20. The 1st Defendant's second witness, DW2, testified that he is an Architect by profession; that he was shown the suit land in the year 2007; that in the year 2008, they instructed their advocate to do due diligence on the land and that the land was then transferred to the 1st Defendant. It was the evidence of DW1 that as a group, they raised Kshs 150,000,000 to develop the land and obtained Kshs 172, 000, 000 from Kenya Commercial Bank.

21. DW1 stated that while registering the sub-leases, they encountered obstacles, which necessitated them to see the Permanent Secretary in the Ministry of Lands, the Chief Land Registrar, the Commissioner of Lands and the Minister for Lands. It was the evidence of the Commissioner of Lands that after looking at their documents, he informed them that there were inconsistencies in the documents which

needed investigations. DW1 informed the court that it was at that particular point that KCB sued them for recovery of the loan.

22. DW2 stated that they had a sale agreement with the vendor, which he did not produce in court; that they never dealt with the Plaintiffs and that he swore an affidavit in the High Court stating that he was informed in March 2011 that their title was not valid.

23. It was the evidence of DW2 that the 1st Defendant bought the suit land in August, 2008 and begun developing it immediately and that the 1st Defendant never took any steps against the seller of the suit property because they believed that the title the 1st Defendant is holding was valid. It was the evidence of DW2 that the 2nd Defendant is to blame in the event it is found that the title the 1st Defendant is holding is not valid because he is the custodian of government records.

24. DW2 informed the court that they were informed by the Registrar of Titles that their title was questionable; that they were also informed by the Commissioner of Lands that the 1st Defendant's title had issues and that the 1st Defendant sought for the reconstruction of the file to enable it register sub-leases over the suit land. DW1 concluded his testimony by stating that although it was unjust for the Plaintiffs to lose their land, it was also unjust on the part of the 1st Defendant to lose the land that it had purchased.

2nd to 6th Defendants' case

25. The 2nd Defendant, DW3, adopted his witness statement filed on 3rd July, 2017. He stated that he works in the Ministry of Lands as a Registration Clerk; that his duties entail receiving documents presented for registration and that he has worked in the Ministry of Lands for more than 20 years. DW1 stated that he was the clerk who received the documents that were presented for registration on 18th June, 2002 under presentation numbers 279 and 280 of the same date, and that the instruments registered under the said presentation numbers were Trust Deeds and not registration of new Grants.

26. DW3 denied having ever received Grant No. I.R. 71611 for L.R. 18469 on 18th June, 2002 for registration. DW3 supported his testimony by producing certified copies of the presentation book and the register which showed that the instrument that was registered on 18th June, 2002 under Presentation number 279 was a Trust Deed and not a new Grant.

27. The 5th Defendant, DW4, stated that he is an employee of the 3rd and 4th Defendants; that he investigated the complaint filed by the Plaintiffs' witnesses, PW1 and PW2; that PW1 and PW2 had reported to the police on 13th January, 2010 complaining that some unknown people had trespassed and invaded their land in Athi River in Mavoko and that when the members of the said group was confronted, they produced a different title from the one in the 2nd Plaintiff's possession.

28. DW4 stated that in a bid to establish the authenticity of the two disputed titles, he visited the lands office and that he recorded statements from several witnesses, including the statement of the then land registrar, Mr. G. S. Birundu, who was deceased as at the time of the trial. The statement of Mr. Birundu was produced in evidence by DW4 by consent of all the parties.

29. DW4 testified that his investigations established that LR No. 18469 was allocated Grant no. IR 72481, and was issued to the 1st Plaintiff on 13th March, 1997, with a correspondence file no. 141301; that Grant no. IR 71611 with LR No. 18469 which shows that it was registered on 18th June, 2002 in favour of Volta Insurance Consultants Limited was found not to be a registered document and that the Grant did not have a correspondence file at the Ministry of Lands.

30. According to DW4, his investigations revealed that the Plaintiffs' title was properly issued by the Ministry of Lands, and that the 1st Plaintiff transferred Grant No. IR 72481, L.R No. 18469 to the 2nd Plaintiff. DW4 stated that he established from the former Commissioner of Lands, Mr. Mabea, that Grant No. I.R. 71611 for L.R. No. 18469 was not registered because the presentation and the date of registration purportedly under which it was registered, showed that what was registered was a Trust Deed and not a Grant and that Mr. Mabea denied having issued the allotment letter to Volta Insurance Consultants Limited as alleged.

31. DW4 further testified that his investigations revealed that the letter of allotment under which Grant No. I.R. 71611 for L.R. No. 18469 was purported to have been created, was a forgery; that the purported signatory, Mr. Z.A. Mabea, denied having signed it; that the signature on the said letter of allotment was found to be a forgery by the document examiner and that the stand premium and rent purportedly paid for the said letter of allotment were incorrect.

32. According to DW4, Mr. Sammy Mwaita, who is purported to have witnessed the registration of Grant No. I.R. 71611 for L.R. No. 18469 in the year 2002 as the Commissioner of Lands, denied ever signing the same; that the document examiner also determined that the signature on the said Grant was a forgery; that he also established that the signature of the person who allegedly drew the Grant, and witnessed the Commissioner of Land's signature, Mr. Caleb T. Muhuyi, was also forged and that Mr. Muhuyi denied having drawn the Grant and/or witnessed the Commissioner of Land's signature.

33. DW4 stated that investigations at the companies' registry established that Volta Insurance Consultants Limited was incorporated in 1989 and later changed its name to Volta Insurance Consultants Limited and that in 2008, Mr. Francis Mwirigi Mbogori sold the company for Kshs. 50,000 without any assets to Francis Mwirigi Muguna, Michael Leboin Nene and Saul Tuka Chemus.

34. In cross examination, DW4 stated that they had charged the directors of the 1st Defendant with the offence of obtaining money by false pretences from the Kenya Commercial Bank using the non-existent Grant, No. I.R. 71611 for L.R. No. 18469 and not fraud and that after the decision in Nairobi High Court Petition number 405 of 2016, fresh charges were prepared excluding the 1st Defendant's directors.

35. DW5, informed the court that he is a Land Registrar with the Ministry of Lands; that Grant No. I.R. 71611 for L.R. No. 18469 exhibited

by the 1st Defendant was non-existent; that the Grant did not originate from the Lands office and that upon examining the records held by the Lands department, it was revealed that it is not true that Grant No. I.R. 71611 allegedly registered on 18th June, 2002 under day book entry no. 279 of the same day was ever registered at lands.

36. According to DW5, the day book no. 279 of 18th June, 2002 was a registration of a Trust Deed and not a new Grant; that L.R. No. 18469 was allocated Grant No. IR 72481 registered on 13th March, 1997 in favour of the 1st Plaintiff under day book No. 660 of the same date; that the Correspondence File No. 141301 for IR 72481 exists at Lands and that the records confirm that day book entry No. 660 of 13th March, 1997 relates to the registration of a new Grant, Grant No. I.R. 72481.

37. DW5 stated that Grant numbers I.R. 71610 and I.R. 71611 belong to sub-divisions of parcel of land registered as L.R. No. 209/11521 on 16th December, 1996; that according to the records held at the Land Registry, Grant Number IR 72481 is the genuine title and that Grant Number IR 72481 was originally Granted to the 1st Plaintiff under correspondence file no.141301.

38. It was the evidence of DW5 that the transfer document from Volta Insurance Consultants Limited shows that the declaration of value of the company's worth was endorsed on 26th August, 2008 for payment of stamp duty; that it is only after the endorsement of the value of the property on the transfer document that the stamp duty payable is assessed; that the stamp duty assessment and payment were done twice on 8th August, 2008 and on 15th August, 2008 and that the stamp duty payment could not have been made on 8th and 15th August, 2008 before the endorsement of the value for stamp duty assessment, which was done on 26th August, 2008.

39. DW5 stated that the government guarantees titles issued to persons; that the government cannot issue two titles over the same piece of land; that he has never heard of such a circumstance happening; that the Government did not issue two titles over the same parcel of land, that is LR No. 18469 and that the charge in favour of KCB was received on 5th June, 2009, with the 1st Defendant as the chargor, for the sum of Kshs 170,000,000. The witness stated that the charge was shown to have been registered but on the contested title.

40. It was the evidence of DW5 that the payments for the land rates was made to the Municipal Council of Mavoko and not to the Ministry of Land; that in its Deed of Indemnity, the 1st Defendant promised to indemnify the Government and that the Deed of Indemnity shows that the 1st Defendant promised to indemnify the Government in order to open a temporary file to register the sub-leases.

41. DW5 finally stated that the genuine original owner of the suit property is the 2nd Plaintiff; that the payment of stamp duty by the 1st Defendant should have been made after 26th August, 2008, when the endorsement of the value of the property for purposes of assessment of stamp duty payable was made on the alleged transfer, and not earlier and that when they called for the documents to verify which title was fake, and which was genuine, they concluded that the Grant No. I.R. 71611 for L.R. No. 18469 held by the 1st Defendant, was a forgery.

42. DW6 stated that he runs an insurance agency known as Cover Guard Insurance Agency; that in 1989, together with Lawrence Ngige Mbugua, they formed a company known as Meruki Enterprises Limited and that in the same year, they changed the name of the company from Meruki Enterprises Limited to Volta Insurance Consultants Limited.

43. According to DW6, the company remained inactive; that in the year 2007/2008, they decided to sell Volta Insurance Consultants Limited at Kshs 50,000 to new Directors and that at the time of the sale of the said company, Volta Insurance Consultants Limited did not own any property. DW6 denied that Volta Insurance Consultants Limited ever applied for land. DW6 also denied that the company was ever issued with the letter of allotment and that the company never owned land with Grant No. 71611, L.R. 18469.

44. On cross examination, DW6 stated that he was a director of Volta Insurance Consultants Limited from the year 1989 to 2007. He denied that the company ever owned any land in Machakos County during the said period and denied having applied for any land. He reiterated that the company never had any assets when he sold the shares to the new directors.

Submissions:

45. The Plaintiffs' advocate filed submissions of about 31 pages, while the 1st Defendant filed two sets of submissions, the first bundle running up to about 73 pages, and the second bundle up to about 25 pages. The 2nd to 6th Defendants submissions were about 38 pages. Due to the length of the submissions, I will not reproduce them. I will however refer to them, together with the adduced evidence and the authorities, in my analysis.

Analysis and findings:

46. After considering the pleadings, the evidence, the submissions and the authorities cited by all the parties, the following issues arise for determination:

a. Whether this suit is res judicata

b. Whether this suit is barred by the doctrine of laches

c. Which Grant between I.R. 72481 and Grant I.R. 71611 is valid in respect of land registered as L.R. No. 18469.

d. Whether the 1st Defendant is a bona fide purchaser for value without notice.

e. Whether the 1st Defendant is entitled to indemnity as against the 2nd and 6th Defendant.

f. Whether the 1st Defendant and persons claiming through it are trespassers on L.R. 18469?

g. Whether the Plaintiff is entitled to the suit land and damages.

A. Res judicata, Laches and Estoppel

47. The 1st Defendant's counsel submitted that the issue of validity or genuineness of the title to the suit property and ownership was decided in *Nairobi Milimani Constitutional & Human Rights Division, Petition No. 405 of 2016, Kennedy Otieno Agwaro, Joseph Mungai and David Kitawi Ngoda versus Director of Criminal Investigations, Director of Public Prosecution and others*. The doctrine of *res judicata* is codified under Section 7 of the Civil Procedure Act, and provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

48. The basic threshold for the doctrine of *res judicata* was expounded by the Court of Appeal in the case of *Uhuru Highway Development Limited –versus-Central Bank of Kenya & 2 others [1996] eKLR*, wherein the Court held, *inter alia* that in order to rely on the defence of *res judicata*, there must be:

i. A previous suit in which the matter was in issue;

ii. The parties were the same or litigating under the same title;

iii. A competent Court heard and finally determined the matter in issue;

iv. The issue has been raised once again in a fresh suit.

49. The central issue before this court is which of the two Grants between I.R. 72481 and No. I.R. 71611 is the genuine and valid Grant for L.R. No. 18469. The jurisdiction of this Court and that of the High Court is enshrined in the Constitution of Kenya.

50. Article 162(2)(b) of the Constitution, provides that *“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— the environment and the use and occupation of, and title to, land.”* Pursuant to this Constitutional dictate, Parliament established this Court through the Environment and Land Court Act. The jurisdiction of this court is set out under Section 13 of the said Act.

51. Article 165(5) of the Constitution ousts the jurisdiction of the High Court in relation to matters whose jurisdiction is reserved for this court. In *Republic v Karisa Chengo & 2 others [2017] eKLR*, the Supreme Court found that Article 165(5) of the Constitution precludes the High Court from exercising the jurisdiction of the specialized courts established under Article 162(2) of the Constitution.

52. In *Nairobi Milimani Constitutional & Human Rights Division, Petition No. 405 of 2016*, the prayers sought by the Petitioners therein were principally against the Director of Public Prosecution, in which they sought to stop their prosecution. The question of ownership and title of L.R. No. 18469 could not have been resolved before the said court by virtue of lack of jurisdiction. Indeed, the High Court did not resolve the issue of ownership of L.R. NO. 18469 in the said Petition.

53. In any event, the Plaintiffs herein were not parties to the suit that was before the High Court, neither was the 1st Defendant nor the 2nd Defendant. These three parties are central to the issue of ownership of LR No. 188469. It is therefore my finding that the issue of ownership of L.R No. 188469 as between the Plaintiffs and the 1st Defendant was never determined by the High Court.

54. The 1st Defendant's counsel submitted that the Plaintiffs' suit is barred by laches, which is an equitable doctrine based upon fairness. Counsel submitted that the 2nd Plaintiff's rights and interests should be extinguished on account of failure to exercise their rights timeously.

55. Order 2 Rule 4(1) and (2) of the Civil Procedure Rules provide as follow:

“4(1). A party shall in any pleading subsequent to a plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, an act of God, any relevant Statute of limitation or any fact showing illegality-

a. Which he alleges makes any claim or defence of the opposite party not maintainable;

b. Which, if not specifically pleaded, might take the opposite party by surprise; or

c. Which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to sub rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”

56. The 1st Defendant did not plead the defence of laches in its Defence. Indeed, the issue of the Plaintiffs being guilty of laches was raised for the first time by the 1st Defendant in the submissions, contrary to the rules of pleadings as enunciated in Order 2 Rule 4 of the Civil Procedure Rules. That plea is therefore not maintainable.

57. However, and for the purpose of argument, the Plaintiffs’ claim relates to recovery of the suit property and trespass. Under section 7 of the Limitation of Actions Act, the Plaintiffs can seek to recover the suit property or bring suits concerning the suit land, within a period of 12 years, which should commence from when the Plaintiffs discovered the fraud allegedly perpetrated by the 1st Defendant, which, according to the Plaintiffs, was in December, 2009. The suit having being file in the year 2017, the suit cannot be said to be caught up by the limitation of time or laches.

58. The 1st Defendant’s counsel also raised the defence of equitable estoppel in his submission and cited several authorities in support of the said defence. Just like the doctrine of laches, the defence of equitable estoppel was not pleaded in the Defence by the 1st Defendant, contrary to the provisions of Order 2 Rule 4 of the Civil Procedure Rules.

59. I will however address that issue briefly. As was held in the case of **Chase International Investment Corporation and Another Vs Laxman Keshra and 3 others (1978) eKLR**, a land owner who allows and encourages another to build on his land in the expectation of being allowed to keep the building or be paid for it will be prevented by equity from enriching himself to the detriment of the other.

60. The key words for the defence of *equitable estoppel* in the circumstances of this case, and as enunciated in the *Laxman* case (*supra*) are ‘allow’ and ‘encourages.’ No evidence was led by the 1st Defendant to support the position that the Plaintiffs allowed or encouraged the 1st Defendant to develop the suit property.

61. To the contrary, the evidence before the court shows that the Plaintiffs reported the alleged encroachment on the suit land to the police after being notified of the ongoing construction on the suit land. Having not led any evidence to show that the Plaintiffs allowed or encouraged the 1st Defendant to develop the suit land, the defence of equitable estoppel would not have succeeded even if the same had been pleaded.

B.The genuine title between I.R 72481 and IR 71611

62. I will now deal with the issue of which Grant between I.R. No. 72481 (being held by the 2nd Plaintiff) and I.R. No. 71611 (being held by the 1st Defendant), both for L.R. No.18469, is genuine. The two Grants are registered under the Registration of Titles Act (repealed). By virtue of the provisions of Section 107 of the Land Registration Act and Section 162 (1) of the Land Act, the applicable law is the repealed Registration of Titles Act.

63. The evidence before me shows that the 1st Plaintiff was registered as proprietor of land known as LR No. 18469 on 13th March, 1997 under Grant number I.R.72481. The 1st Plaintiff transferred the said Grant to the 2nd Plaintiff which, according to PW1, is a sister company of the 1st Plaintiff.

64. The evidence by the 1st Defendant is that a Grant for L.R. No.18469, I.R. 71611, was registered in the name of Volta Insurance Consultants Limited on 18th June 2002 and that by a transfer executed on the 7th of August, 2008, the land was transferred to the 1st Defendant on 29th August, 2008.

65. As correctly submitted by the 1st Defendant’s counsel, the Registration of Titles Act (repealed) was based on the Torrens system submissions. The very concept of stability and indefeasibility of titles covered under the Torrens System of registration rules out as an anathema the issuance or registration of two certificates of title over the same land to two different proprietors thereof.

66. Under the Torrens system, the general rule is that in case of two certificates of title, purporting to be for the same land, the first in time to be registered prevails. That is the import of Section 28 of the Registration of Titles Act (repealed) which provided as follows:

“28. Except as is hereinafter otherwise provided, every instrument presented for registration shall be accompanied by the prescribed form and fee, and shall be registered in the order of time in which it is presented for that purpose; and instruments registered in respect of or affecting the same land shall be entitled to priority according to the date of registration, and not according to the date of each instrument itself; and the registrar, upon registration thereof, shall file a photostat copy in the registry of titles and shall deliver the original to the person entitled thereto, and as soon as it is registered every instrument shall, for the purposes of this Act, be deemed and be taken to be embodied in the register as part and parcel thereof.”

67. The reason why the first Grant to be registered takes priority over other Grants purported to be registered later is because under the Government Lands Act (repealed), which is the substantive law governing Grants issued under the Registration of Titles Act, a Grant could only be issued out of un-alienated government land, meaning that once the land is alienated and the title registered in the name of the proprietor, the same cannot be available for further alienation.

68. This position was addressed by Lenaola J, as he was then, in **Gitwany Investment Limited v Tajmal Limited & 3 others [2006] eKLR**, as

follows:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier Grant and in the words of the Court of Appeal in *Wreck Motors Enterprises v Commissioner of Lands*, C.A. No. 71/1997 (unreported):- is the “Grant [that] takes priority. The land is alienated already.”

69. The above holding was accepted by the Court of Appeal in *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, where the Court held as follows:

“It is our considered view that the trial court did not err in upholding the 1st, 2nd and 3rd respondents’ title to the suit property and cancelling the appellant’s title. The alienation to the 1st, 2nd and 3rd respondents is the Grant [that] takes priority; at the time another Grant was being made to the appellant, the suit land had already been alienated; there was nothing for the 5th respondent to allot and alienate to the original allottees.

In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.”

70. Section 23 of the Registration of Titles Act (*repealed*) provides that as long as a certificate of title issued by the registrar remains in force, it is conclusive evidence that the person named in the title as the proprietor of the land is the absolute and indefeasible owner thereof, and his title shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

71. Section 23 of the said Act is based on the Australian Torrens system of registration and its prime principle is the sanctity of the register. See *Popatlal vs. Visandjee* [1960] EA 361, 365; [1959] EA 372, 376 (PC); *Souza Figueiredo vs. Moorings Hotel* [1960] EA 926; *Cross vs. Great Insurance Company Limited of India* [1966] EA 94.

72. The manner of registration of instruments is set out in Part V of the Registration of Titles Act (*repealed*). The key provisions relating to registration are sections 25, 26, 27, 28, 29, 30, 31 and 32 of the Registration of Titles Act which provides as follows:

‘26. (1) The registrar of each registration district shall also keep a book, to be called the presentation book, in which shall be entered by a short description every instrument which is given in for registration, with the day and hour and, when that is required by the person presenting the instrument, the minute of presentation, and for the purpose of priority the time of presentation shall be taken as the time of registration.

(2) The registrar in entering memorials upon the photostat copies of Grants and certificates of title embodied in the register and endorsing a memorandum upon an instrument to be issued shall take the time from the presentation book as the time of registration.

27. Every Grant shall be deemed and taken to be registered under and for the purposes of this Act as soon as it has been marked by the registrar with folio and volume, so as to indicate its place in the register; and every transfer and other instrument purporting to transfer or in any way to affect the land under this Act shall be deemed to be so registered as soon as a memorial thereof, as hereinafter described, has been entered in the register upon the folio constituted by the existing Grant or certificate of title of that land.

28 Except as is hereinafter otherwise provided, every instrument presented for registration shall be accompanied by the prescribed form and fee, and shall be registered in the order of time in which it is presented for that purpose; and instruments registered in respect of or affecting the same land shall be entitled to priority according to the date of registration, and not according to the date of each instrument itself; and the registrar, upon registration thereof, shall file a photostat copy in the registry of titles and shall deliver the original to the person entitled thereto, and as soon as it is registered every instrument shall, for the purposes of this Act, be deemed and be taken to be embodied in the register as part and parcel thereof.

29. In every instrument creating or transferring an interest in land, there shall be implied the agreement by the party creating or transferring the interest that he will do such acts and execute such instruments as may be necessary in accordance with the provisions of this Act to give effect to all agreements, conditions and purposes expressly set out in the instrument, or declared by this Act to be implied against that party in instruments of a similar nature.

30. Every memorial entered in the register shall state the nature of the instrument to which it relates, the day and hour of the production of the instrument for registration, and the names of the parties thereto, and shall refer by number or symbol to the instrument, and shall be signed by the registrar.

31. Whenever a memorial of an instrument has been entered in the register, the registrar shall, except in the case of transfer or other dealing endorsed upon any Grant, certificate or other instrument as hereinafter provided, record the same memorial on the photostat copy of the Grant, certificate or other instrument evidencing title to the land intended to be dealt with or in any way affected, and the registrar shall endorse on every instrument so registered a certificate of the time at which the instrument was presented to be registered, and shall authenticate each certificate by signing his name and affixing his seal thereto, and a certificate shall be conclusive evidence that the instrument has been duly registered.

32. No instrument, until registered in the manner herein before described, shall be effectual to pass any land or any interest therein, or render the land liable as security for the payment of money, but upon the registration of an instrument in the manner hereinbefore prescribed the land specified in the instrument shall pass, or, as the case may be, shall become liable as security in the manner and subject to the agreements, conditions and contingencies set out and specified in the instrument, or declared by this Act to be implied in instruments of a similar nature.”

73. The above provisions show that a person secures a Grant or certificate of title by virtue of the fact that it is a registered instrument pursuant to part V of the Registration of Titles Act (repealed). Any instrument under the said Act not registered as per Part V cannot be effectual to pass any interest or title as provided under Section 32 of the said Act.

74. According to the Plaintiffs' witnesses, PW1 and PW2, the 1st Plaintiff was the original Grantee of Grant No. I.R. 72481, L.R. No. 18469, whose designated user was light inoffensive industrial purposes. The 1st Plaintiff transferred the said property to the 2nd Plaintiff on 8th August, 2003. It is the 2nd Plaintiff's case that it has never sold, transferred, charged or surrendered the suit property. The Plaintiffs' witnesses produced the original title during trial.

75. In its Defence, the 1st Defendant denied the 1st Plaintiff's averment that it was the original Grantee of No. I.R. 72481 with L.R. No. 18469. The 1st Defendant further alleged in the Defence that the 1st Plaintiff had no title to pass to the 2nd Plaintiff. However, the 1st Defendant did not lead any evidence at all to prove that the Grant that the 2nd Plaintiff is holding was issued to the 1st Plaintiff fraudulently or by misrepresentation.

76. The evidence by the 2nd Defendant's witnesses was that the 1st Plaintiff's Grant No. I.R. 72481 for L.R. No. 18469 was genuine. DW5 informed the court that the Register showed that the correspondence file No. 141301 was opened in respect of the 1st Plaintiff under I.R. No. 72481 for L.R. No. 18469. This position was not challenged by the 1st Defendant's witnesses.

77. The 3rd, 4th and 5th Defendants, having investigated the complaint made by the Plaintiffs, established that indeed, L.R. No. 18469 was assigned to Grant No. I.R. 72481 with a correspondence file No. 141301 which was opened in the name of the 1st Plaintiff. In the circumstances, it is my finding that the 1st Plaintiff was the original Grantee of Grant No. I.R. 72481 for L.R. No. 18469 Granted on 13th March, 1997 under presentation number 660 of the same date with correspondence file No. 141301.

78. As relates to Grant No. I.R. 71611 for L.R. No. 18469, the 1st Defendant's case is that it purchased the same from Volta Insurance Consultants Limited. A perusal of Grant No. I.R. 71611 for L.R. No. 18469 shows that the title was registered in favour of Volta Insurance Consultants Limited on 18th June, 2002 as a new Grant under presentation no. 279 of the same date.

79. The 1st Defendant's Grant was produced in evidence by DW4, who, in his evidence, stated that investigations established that the said Grant no. IR 71611 with LR No. 18469 was an unregistered and non-existent document. He further stated that LR No.18469 was allocated to Grant No. IR 72481 and not IR 71611.

80. The 2nd to 6th Defendants denied that Grant No. I.R. 71611 for L.R. No. 18469 was ever issued to Volta Insurance Consultants Limited or at all. According to the 2nd Defendant, the presentation day book number 279 of 18th June, 2002 under which the said Grant was said to be registered, was not for the registration of a new Grant, but was for the registration of a Trust Deed.

81. DW3 stated that he was the registry clerk who handled the instruments presented under presentation daybook numbers 279 and 280 of 18th June, 2002 and that both presentation day book numbers relate to the registration of Trust Deeds, and not for new Grants. DW3 denied ever receiving for registration any Grant on 18th June, 2002 under day book numbers 279 and 280. DW3 produced certified copies of the presentation daybook of 18th June, 2002. The extract produced by DW3 confirmed that Presentation day book numbers 279 and 280 related to the registration of Trust Deeds and not a Grant allegedly issued in favour of the 1st Defendant's Grant.

82. The 1st Defendant's Grant dated 18th June 2002 was said to have been signed and sealed by one Mr. G.S. Birundu, a registrar of titles to land. During trial, it became clear that Mr. G.S. Birundu (deceased) had recorded a statement with the 3rd, 4th and 5th Defendants. The Plaintiffs and the Defendants agreed to the admission of the statement.

83. In his statement, the deceased stated that having been shown a copy of Grant No. I.R. 71611 with L.R. Number 18469 belonging to Volta Insurance Consultants Limited purportedly bearing his signature, he stated that the signature on the Grant was not his, and that what appeared as his signature was forged. He also denied that the stamp appearing on the 1st Defendant's Grant was his.

84. Mr. Birundu further confirmed in his statement that in the year 2002, when the alleged Grant No. I.R. 71611 with L.R. No. 18469 was purportedly issued to Volta, the IR series for number 71611 was not in existence then and that in the year 2002, the running I.R. Series numbers were in the 80s.

85. According to the statement of the late Birundu, the alleged Grant No. I.R. 71611 for L.R. No. 18469 has a memorial stating that he registered a transfer for Grant No. I.R. 71611 with L.R. No. 18469 on 29th August, 2008 in favour of the 1st Defendant; that he could not have registered the transfer as he was not working in the Registry Section but in the Stamp Duty Section and Administration Section, where he could not register instruments and that a registrar working in the stamp duty section does not register title instruments. The statement of Mr. Birundu was not controverted by the 1st Defendant or at all.

86. The other ground upon which 2nd Defendant attacked the 1st Defendant's Grant No. I.R. 71611 for L.R. No. 18469 was that the records held by the 2nd Defendant confirmed that No. I.R. 71611 is not a registration of an original Grant to Volta Insurance Consultants Limited but is a sub-division of L.R. No. 209/11521. DW3 produced in evidence a certified copy of the I.R. Register for the parcel of land No. L.R. No. 209/11521, which showed the I.R. to be 71611.

87. DW5, in his testimony to the Court, explained that the said I.R register shows that No. I.R. 71611 was a sub-division of L.R. No. 209/11521, which appears under correspondence file no. C/F 185854; It was the evidence of DW5 that the said sub-division took place on 16th December, 1996. This evidence corroborates with the statement of Mr. G.S Birundu who stated that I.R. Number 71611 could not have been issued in the year 2002 as the running series was then in the 80's.

88. The testimony and evidence of DW5 that IR 71611 was a subdivision of LR No. 209/11521 which was done on 16th December, 1996 was neither rebutted nor challenged by the 1st Defendant. Indeed, the Director of Volta Insurance Consultants Limited, DW6, was categorical that the said company did not have any land at the time they sold it in the year 2008.

89. The I.R. register and the testimony of the witnesses of the 2nd -6th Defendants, which I have summarised above, shows that No. I.R. 71611 is for another parcel of land, being a sub-division of L.R. No. 209/11521. Parcel of land L.R. No.18469 was allocated Grant No. I.R. 72481.

90. The sum total of this testimony is that the Grant No. I.R. 71611 for L.R. No. 18469 does not appear in the register as provided under Section 25 of the Registration of Titles Act (Repealed), and that the same was never presented in the presentation day book entry number 279 as alleged on 18th June, 2002 as required by section 26 of the Registration of Titles Act (*Repealed*).

91. In the circumstances, the Grant No. I.R. 71611 for L.R. No. 18469 having not been registered in accordance with Part V of the RTA, is null and void, and was ineffectual to pass any land or any interest therein.

92. In his submissions, the 1st Defendant's advocate, raised the Torrens system of registration as a justification of their Grant No. I.R. 71611 for L.R. No. 18469. Indeed, the Torrens system was intended to guarantee the integrity and conclusiveness of the certificate of title based on registration. However, it was never the intention of the system to divest the legal interests of the real owner of land by use of non-registered or forged instruments.

93. The Torrens system cannot therefore be used to protect a person who fraudulently acquires land from the true owner. Thus, unless and until the existing title of the 2nd Plaintiff is declared a nullity, or, for that matter, declared authentic but subject to any other "superior rights" such as encumbrances, it remains subsisting as it is, and a later application for registration of the same land, or any portion thereof, cannot legally stand.

94. The evidence adduced in this matter shows that the alleged Grant No. I.R. 71611 for L.R. No. 18469, was not a registered document and did not originate from, and has no root in the register of titles to land, and thus cannot benefit from the presumption that it was issued regularly or procedurally.

95. It is therefore my finding that Grant No. I.R. 71611 for L.R. No. 18469 which was purportedly registered on 18th June, 2002 under presentation day book number 279 was not registered on the said day or at all. What was registered under the presentation Day Book number 279 was a Trust Deed. I.R. 71611 is for a sub-division of another parcel of land, L.R. No. 209/11521 and not the suit property. Being a non-registered document, Grant No. I.R. 71611 with L.R. No. 18469 does not offer or accrue any protection to the 1st Defendant either under the Torrens System or the Registration of Titles Act (Repealed), and cannot confer any rights or interests.

96. I am therefore convinced, on a balance of probabilities, that Grant No. I.R. 72481 for L.R. No. 18469 was registered on 13th March, 1997 under correspondence file No. 141301 in favour of the 1st Plaintiff. In light of the evidence before me, I do find that the genuine Grant for L.R. No. 18469 is Grant No. I.R. 72481, and I so hold.

C. Bona fide Purchaser for value

97. The 1st Defendant pleaded in its Defence that it was a *bona fide* purchaser for value of the parcel of land under Grant No. I.R. 71611 for L.R. No. 18469. The 1st Defendant has sort for the protection of its title pursuant to the provision of Section 23 of the Registration of Titles Act (*repealed*).

98. The 1st Defendant 's counsel submitted that the Plaintiffs' recourse is under Section 24 of the Registration of Titles Act (*repealed*), against the 2nd Defendant, and that the Plaintiffs are only entitled to compensation.

99. The protection of a *bona fide* purchaser for value without notice is founded under Section 23 of the Registration of Titles Act (*repealed*). Section 23 states as follows:

“23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof....”

100. In the case of **Redcliff Holdings Limited Vs Registrar of Titles & 2 others (2017) eKLR**, the Court of Appeal held as follows:

“The Judge further appreciated the import of Article 40 of the Constitution which protects the rights of property that is lawfully acquired, thus a title under Section 23(1) of the Registration of Titles Act is no longer held sacrosanct by hook, line and sinker as it was under the Australian Law of Torrens Systems especially when there are allegations of illegalities or irregularities in acquisition of title. In this respect the Judge went on to cite the case of Mureithi & 2 Others vs. Attorney General & Others, Nairobi HCMA No. 158 of 2005 (2006) 1 KLR where the courts even before the promulgation of the Constitution, appreciated that the mere fact that a person had title to land did not mean that such title could not be questioned.”

101. The protection of a *bona fide* purchaser for value is applicable where one purchases a property, in *bona fide* and for value from a registered proprietor. (See *Gibbs V Messer [1891] AC247 P.C.*, cited with approval by the Court of Appeal in *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR*).

102. The 1st Defendant’s witnesses informed the court that it paid Kshs. 51,000, 000 to Volta Insurance Consultants Limited as purchase price for Grant No. I.R. 71611 for L.R. No. 18469. Although the 1st Defendant alleges that it entered into a sale agreement with Volta Insurance Consultants Limited, the said agreement was not produced in evidence. Indeed, no evidence was placed before the court to show that Volta Insurance Consultants Limited was paid the said sum of Kshs. 50,000,000 or at all.

103. The Transfer dated 7th August, 2008 between the 1st Defendant and Volta shows that as at the date the transfer was been executed, the Vendor had received the entire purchase price of Kshs. 51,000,000. To support the payment of the purchase price, the 1st Defendant produced bank statements. The said bank statements do not show any direct transfers or cheques made to the Vendor.

104. Instead, the statements show withdrawals by way of cheque from three different accounts belonging to Mungai, Agwaro and Kitawi; Tamarind Park Limited; and Tamarind Meadows Limited. The bank withdrawals show that the alleged payments continued up to about 12th March, 2009, six months after the transfer had been executed.

105. The bank statement shows that the withdrawals ran from 5th December, 2007 to 12th March 2009. DW2’s evidence was that he met with the vendor’s representative Mr. Chemos, at the offices of C.W. Wanjihia & Company Advocates on 23rd June, 2008, and that it was on that day that the purchase price was discussed and a sale agreement prepared. This evidence demonstrates that it could not have been possible for the vendor to have received the purchase price in 2007 considering that the 1st Defendant was incorporated on 20th May, 2008.

106. According to the 1st Defendant’s witnesses and the letter dated 21st June 2011, the 1st Defendant instructed the firm of C.W. Wanjihia & Co Advocates to act for them in the purchase transaction on 23rd June, 2008. It was also the 1st Defendant’s witness testimony that the purchase price was paid to the Vendor through the firm of C.W. Wanjihia & Co Advocates.

107. However, the firm of C.W. Wanjihia & Co advocates, despite stating its role in the transaction, did not state that the firm had received the purchase price from the 1st Defendant. Indeed, there is no evidence to show that the said purchase price was forwarded to the vendor by the said advocates.

108. Furthermore, from 20th May, 2008, when the 1st Defendant was incorporated, to 7th August, 2008, when the Transfer instrument was executed, there was no single withdrawal that was made from the bank accounts towards the payment of the purchase price of the suit property. The withdrawals from the bank resumed way after the Vendor had acknowledged receipt of the entire purchase price.

109. The 1st Defendant’s witnesses testified that they purchased the property, had it transferred to the 1st Defendant on 29th August, 2008 and collected the title in September, 2008 from the land registry. The evidence on record shows that the 1st Defendant, even before the transfer was lodged at the lands registry on 29th August, 2008, had submitted the application for building approvals in July, 2008 and obtained approvals to construct on the suit property on 12th August, 2008.

110. In fact, the 1st Defendant’s witness, DW2, an architect by profession, testified that such approvals could not have been obtained without annexing a copy of the title in the name of the owner. In conclusion, it is my finding that the 1st Defendant did not prove on a balance of probabilities that it purchased the suit property and paid the purchase price *bona fides* or obtained the building approvals validly.

111. The second issue is whether the 1st Defendant purchased the alleged No. I.R. 71611 for L.R. No. 18469 from a person who was registered as the proprietor thereof. The Registration of Titles Act (*repealed*) defines a registered proprietor under Section 2 as follows:

“proprietor” means the person or corporation registered under this Act as the owner of land or as a lessee from the Government.”

112. From the face of the alleged Grant No. I.R. 71611 for L.R. No. 18469, it is evident that it is purported to be a lease from the Government to Volta Insurance Consultants Limited for a period of 99 years, which was later transferred to the 1st Defendant.

113. As I have found in the earlier part of this judgment, the evidence on record shows that Grant No. I.R. 71611 with L.R. No. 18469 is not a registered document and is non-existent in the register of titles to land. Indeed, IR 71611 is in respect to a different piece of land, and not the suit property, which is LR No. 18469. Therefore, Volta Insurance Consultants Limited was not registered as the proprietor of the parcel of land L.R. No. 18469 under presentation day book number 279 on 18th June, 2002 as alleged.

114. Mr. Francis Mwirigi Mbogori (DW6) testified that he, together with Mr. Lawrence Ngige Mbugua were the subscribers, and founding directors of Meruki Enterprises Limited in the year 1989, which later in the same year, changed its name to Volta Insurance Consultants

Limited. He further testified that Volta Insurance Consultants Limited was a dormant company from the date of incorporation, until the time they sold the company between the year 2007 and 2008 for Ksh. 50,000.

115. DW6 stated that when he sold the company, it did not own any assets and had never applied for land or accepted any letter of allotment for land. DW6 denied that Volta Insurance Consultants ever owned or was Granted I.R. No. 71611 for L.R. No. 18469 in the year 2002.

116. Based on the uncontroverted testimony and evidence of DW6, I am convinced that the persons who bought Volta Insurance Consultants Limited in the year 2007/2008, bought it with the intentions of using the said company to create a non-existent and a fake title. Volta Insurance Consultants Limited did not own any land in the year 2002 or at all.

117. It is important to reiterate that in the transfer dated 7th August, 2008, the vendor purported to transfer to the 1st Defendant “*it’s right, title and interest in the said piece of land together with all the buildings and improvements erected and being thereon*”. As has been shown above, the Vendor did not own any property known as Grant I.R. No. 71611 with L.R. No. 18469. The parcel of land LR No. 18469 was registered IR 72481 originally in favour of the 1st Plaintiff on 13th March, 1997. The purported vendor was therefore not a registered proprietor, and it had no title, interest or right to transfer to the 1st Defendant or at all.

118. The protection offered under the repealed Section 23 of the Registration of Titles Act is only offered to a person who has dealt with the registered proprietor of the land, and who did not obtain the title fraudulently. Where the land is neither registered nor belongs to the person purporting to transfer it, the subsequent transactions become null and void. This is the position that was taken by the Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR* where the court held as follows:

“A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration...But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law.”

119. The Court of Appeal in the *Arthi Highway case (supra)* further held as follows:

“68. The doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests...bona fide purchaser.

69. It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”

120. Having found that the Volta Insurance Consultants Limited never owned any land or title, they had nothing to pass to the 1st Defendant. A void title is that, void. In *Macfoy vs United Africa Co. Ltd (1961) 3 All ER, 1169* Lord Denning held as follows:

“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 more ado, though it is sometimes convenient to have the court 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...”

121. Indeed, even if the 1st Defendant was an innocent purchaser for value, which it was not, the legal interest in the property registered as IR 72481 could not have passed to the 1st Defendant because the said legal right was, and has always been with the Plaintiffs herein. It is only the 2nd Plaintiff who can pass the legal right in the said property to a third party.

122. Suffice to say that a transfer of land under the repealed Registration of Titles Act envisages the existence of a validly registered Grant, which must be in accordance with the provisions of the said Act, to wit, Part V and VI. No good title can pass from a fraudulently obtained title.

D. Section 24 of the Registration of Titles Act (repealed)

123. The 1st Defendant’s advocate submitted that the Plaintiffs’ claim ought to have been made against the 2nd Defendant, and only for compensation pursuant to section 24 of the Registration of Titles Act, (*repealed*). Section 24 of the Repealed Act provides as:

“24. Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any Grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription:

Provided that—

(i) except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription in the application of a

person to bring the land under the operation of this Act, or to be registered as proprietor of the land or interest, or in any instrument signed by him, that person shall upon a transfer of the land bona fide for value cease to be liable for the payment of any damages, which, but for that transfer, might have been recovered from him under the provisions herein contained; and in the last-mentioned case, also in case the person against whom the action for damages is directed to be brought is dead or has been adjudged insolvent or cannot be found within the jurisdiction of the court, then the damages with costs of action may be recovered out of the public funds of Kenya by action against the registrar as nominal defendant;

(ii) in estimating the damages, the value of all buildings and other improvements erected or made subsequently to the deprivation shall be excluded;

(iii) no such damages may be recovered out of public funds for any loss, damage or deprivation occasioned by the improper or irregular exercise of the mortgagee's statutory power of sale conferred by the Transfer of Property Act, 1882, of India, in its application to Kenya."

124. The filing of a suit for damages by a person who has been deprived of his land is an alternative prayer that one may pursue. Indeed, section 24 of the Act uses the words: 'may bring and prosecute an action at law for the recovery of damages against...' The law does not therefore prohibit a legal owner of land from filing a suit for recovery of the land that has been transferred to a third party fraudulently or by misrepresentation. Where such a suit is filed, the legal owner of the suit land cannot be told that he should pursue damages and not the land.

125. In the current suit, section 24 of the Act is not applicable at all. I say so because there is no evidence on record to show that the suit land was previously registered under a different registration system or Act, and was thereafter brought into the operation of the Registration of Titles Act (repealed). There is also no evidence that the 1st Defendant, or Volta Insurance Consultant Limited, was ever registered as the proprietor of L.R. No. 18469, Grant IR 7248. The evidence before me shows the said land was registered in favour of the 1st Plaintiff under Correspondence file no 141301 on 13th March, 1997.

126. The title that the 1st Defendant is claiming is in respect of IR 71611, which is a subdivision of L.R. No. 209/11521 and registered on 16th December, 1996 (and not for LR No. 18469) and the daybook presentation number 279 of 18th June, 2002, purportedly under which Grant No. I.R. 71611 for L.R. No. 18469 was registered, was not for the registration of a Grant, but a Trust Deed.

127. Therefore, the evidence before the court shows that Grant No. I.R. 71611 with LR No. 18469 does not meet the threshold of a document that is erroneously registered in the register of titles to land as provided for under Section 24 of the repealed Registration of Titles Act. The issue of the Plaintiffs claiming for damages does not therefore arise.

128. The 2nd Plaintiff holds a validly registered Grant no IR 72481 with LR No. 18469. The 2nd Plaintiff is entitled to protection as its title is absolute and indefeasible. The 2nd Plaintiff cannot be deprived of or dispossessed of its land by way of an unregistered document, which was prepared by the 1st Defendant in an attempt to defraud the 2nd Plaintiff of its land.

E. Trespass

129. The 2nd Plaintiff made a report to the 4th Defendant, in which it complained that the 1st Defendant had trespassed on its parcel of land registered as Grant no. IR 72481 with L.R. No. 18469. It was the uncontroverted evidence of PW1 and PW2 that the 1st Defendant, its directors, shareholders, members, associates, agents, employees and persons acting through them, trespassed on the suit property, and interfered with it by digging and constructing on it.

130. I have already made a finding that the Grant No. I.R. 72481 was originally issued to the 1st Plaintiff, and the same is a valid and genuine Grant for the parcel of land registered on 13th March, 1997 as Land Reference No. 18469. The 1st Plaintiff then transferred the land to the 2nd Plaintiff on 8th August, 2003. I have also made a finding that the 1st Defendant's purported Grant No. I.R. 71611 allegedly for L.R. No. 18469 is not a valid Grant.

131. It is not in dispute that the 1st Defendant trespassed on the suit property and erected structures thereon. Trespass concerns the entry of a person to the land of another, without the owner's permission or lawful justification. It does not matter that the entry is made in an honest belief or by mistake. (See *Gitwany Investment Limited Supra*).

132. In the case at hand, the 1st Defendant trespassed on the suit property on the basis of a non-existent and unregistered document. In addition to an order of eviction, the 2nd Plaintiff is entitled to damages for trespass.

F. Indemnity

133. The 1st Defendant filed its Notice of Claim on 29th September, 2017 against its Co-defendants, that is to say the 2nd and 6th Defendants stating that:

"The 1st Defendant herein claims against you indemnity and/or contributory for any loss that may be suffered by it due to negligent acts and omissions on your part or your agent.

The Circumstances Giving Rise to Liability:

A. Before purchasing the property L.R. No 18469, Tamarind Meadows Limited conducted a search at the Registry of Lands.

B. The Registrar of Lands caused a Transfer in favour of our client Tamarind Meadows and recorded the entries in the register.

C. The Registrar of Lands registered a charge in favour of Savings & Loans Kenya Limited to secure the sum of Kenya Shillings one hundred and seventy two million (Kshs 172, 000, 000).

REASONS WHEREFORE the 1st Defendant claims for orders that you are solely and/or exclusively to blame for any loss and/or damage that may be suffered by itself and yourselves also be held liable for indemnity/contribution and to the rights accruing under Section 81(1) and (2) of the Land Registration Act, 2012.”

134. In response to the claim of indemnity by the 1st Defendant, the 2nd and 6th Defendants denied that the 1st Defendant is entitled to any indemnity. In their testimony, the 2nd and 6th Defendants argued that the Grant No. I.R. 71611 for L.R. No 18469 is a fake document which was not registered by the 2nd Defendant or its officers.

135. The 2nd and 6th Defendants further argued that because the 1st Defendant’s Grant was not registered in the register of titles to land, the same was not searchable and no genuine search confirming that the property was free, unencumbered and capable of being transferred to a third party could have been issued on 1st July, 2008 as alleged.

136. In their submissions, the 2nd to 6th Defendants argued that they were not parties to the transactions between the 1st Defendant and the vendor concerning the non-existent Grant No. I.R. 71611 for L.R. No. 18469, did not register the transfer, and that the 1st Defendant can only seek for indemnity from the vendor.

137. The 1st Defendant’s claim is that the 2nd Defendant negligently registered two Grants in respect of one parcel of land, that is LR No. 18469, resulting in double registration. The 1st Defendant’s claim for indemnity is based on Section 81 of the Land Registration Act which provides as follows:

“81 (1) Subject to the provisions of this Act and of any written law relating to the limitations of actions, any person suffering damage by reason of-

a. Any rectification of the register under this Act; or

b. Any error in a copy of or extract from the register, shall be entitled to indemnity.’

(2) No indemnity shall be payable under this Act to any person who has caused or substantially contributed to the damage by fraud or negligence, or who derives title, otherwise than under a registered disposition made bon fide for valuable consideration, from a person who caused or substantially contributed to the damage.”

138. A claim for damages or indemnity against the government on matters concerning land registration arises when a title holder suffers any damages emanating from either the negligence, mistake or fraud on the part of the registrar while undertaking the process of registration and/or rectifying the register of title to land, including what is often referred to as double registration.

139. Double Registration, taken in its ordinary meaning in land law, means a situation where the registrar, in the performance of his or her statutory duty, has registered and/or caused to be issued two titles to different persons, in regard to the same parcel of land.

140. However, where it is shown that the rectification of the register has been occasioned by the claimant’s negligence or fraud, then such a claimant is not entitled to indemnity by the government. The evidence before me does not show that there was double registration of the suit property by the 2nd Defendant. In fact, no evidence was led by the 1st Defendant to show any negligence, error or mistake attributable to the 2nd Defendant

141. To the contrary, the evidence that was adduced shows that the suit land was never allocated or registered to Volta Insurance Consultants Limited by the registrar, and the said Volta Insurance had no valid title to pass to the 1st Defendant. This fact was known by the 1st Defendant as at the time it purchased the shares of Volta Insurance Consultants Limited.

142. Indeed, this court has already found that Grant no. IR 71611 for LR No. 18469 is a fake document, a fact which the 1st Defendant knew all along. Being not an innocent purchaser for value of the suit property, the 1st Defendant is not entitled to indemnity from the government or at all.

143. The person that the 1st Defendant should pursue for damages, if at all, is the vendor. This is the position that was taken by the Court of Appeal in the case of *Sukhdev Singh Laly v Philip Ojwang Kamau & 3 others [2018] eKLR*, where the Court held as follows:

“Since Ojwang’s title was unknown to the Registrar of Titles, because no valid documents existed to support the transfers or the endorsements to Akuka, his title was discredited, as were the ensuing transfers to Sukhdev or Ojwang. This lends credence to the assertion that since no root of their title was established, they were rendered invalid. Akuka’s title was empty and devoid of substance or foundation. It was defective, invalid and incapable of conveying any rights to a third party. And it mattered not that

it mysteriously found its way into the registry. Without such rights attached to it, it was nothing but a worthless piece of paper. So that the Jethwas, not having executed a transfer in favour of Charles Oduol Akuka or any other persons, it could not be said that they passed on their proprietorship or the interests that had vested in them in the suit property to Sukhdev, or to Ojwang, who in turn, did not acquire any rights or interest in the suit property.”

144. The Court of Appeal further held as follows:

“In this case, there is no evidence that the Registrar was to blame and by virtue of the sale agreement made between them, Sukhdev must look to Akuka, and not the Registrar for redress for any losses that he may have suffered in terms of their agreement, and we so find. In this case, Ojwang’s certificate of title having been found to be invalid, illegal, null and void, we find that the learned judge, rightfully cancelled it, and properly declared the Jethwas to be the legal and valid titleholders of the suit property. The documents registering Akuka, Sukhdev and Ojwang as the alleged registered proprietors were subsequently found by the Registrar to be forgeries and the transfers fraudulent and unlawful, thereby giving rise to a defective title, which was unlike in the case of Gitwany, where the court found the Commissioner of Lands culpable. The court declared Gitwany’s title that was first in time to be the valid legal title, and held the Commissioner of Lands liable for the losses that accrued to the unsuccessful party on account of mistakenly issuing the second title.”

145. Where fraudsters, trespassers, squatters, or any other person operating in such syndicates, create a fake document purported to be a Grant, they are liable to those who suffer losses as a result of the said fake document. If the integrity of the land register and the protection of registered proprietors is to be safeguarded, the courts should not indemnify the very people who introduce forged documents in the land registry. The 1st Defendant’s claim for indemnity therefore fails.

G. Damages

146. The Plaintiffs sought for general and exemplary damages against the 1st Defendant. In their submissions, the Plaintiffs invited the Court to issue judgment pursuant to order 21 rule 13 of the Civil Procedure Rules, basically calling upon the court to set an inquiry into the *mesne* profits that is payable by the 1st Defendant.

147. It is trite that *mesne* profits must be specifically pleaded and proved. That was not done in the instant case. I therefore decline to order for an inquiry into *mesne* profits, or even general and exemplary damages.

148. The issue of damages for trespass is now settled. Trespass is actionable *per se*, whether harm or damage is actually caused or not. *Halsbury’s Laws of England 4th ed, Vol 45 at para 26, 1503*, provides as follows on computation of damages in an action of trespass: -

- a. If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.***
- b. If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.***
- c. Where the defendant has made use of the plaintiff’s land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.***
- d. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.***
- e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.***

149. I have already found and held in the foregoing paragraphs that the 1st Defendant, its associates, agents, members and all those claiming through it are trespassers on the 2nd Plaintiff’s land. This act of trespass by the 1st Defendant entitles the 2nd Plaintiff, in the least, to nominal damages, even if there is no proof of loss and damage.

150. I take judicial notice of the fact that the user of the 2nd Plaintiff’s Grant No. I.R. 72481 for L.R. No. 18469 was for inoffensive light industrial purposes. The Plaintiffs witnesses testified that they were in the process of seeking for funding to develop the suit property, hence the incorporation of the 2nd Plaintiff as a vehicle for that purpose.

151. On the other hand, the Grant No. I.R. 71611 for L.R. No. 18469 held by the 1st Defendant, which I have held to be a nullity, is for residential purposes. In the circumstances, based on the foregoing, and considering the suit land is 17 acres, and the 1st Defendant having denied the 2nd Plaintiff the use of the land since the year 2008, I grant the 2nd Plaintiff damages for trespass of Kshs 3,000,000 as against the 1st Defendant.

Final disposition, declarations and orders of the court

152. For the reasons I have given in this Judgment, I find that the Plaintiffs have proved their claim on a balance of probabilities. The 1st Defendant did not prove on a balance of probabilities the Notice of Claim against Co-Defendants. I therefore dismiss the 1st Defendants

Notice of Claim against Co-Defendants and allow the Plaintiff dated 15th May, 2017 in the following terms:

a. A declaration be and is hereby issued that the Grant Number IR 72481 and allocated L.R. 18469 issued to the 1st Plaintiff and registered on 13th March, 1997 is the valid and genuine title for the parcel of land L.R. No. 18469 situate in Athi River, Machakos County.

b. A declaration be and is hereby issued that the purported Grant number IR 71611 said to have been allocated L.R. No. 18469 for residential purposes on 18th June 2002 and transferred to the 1st Defendant on 29th August, 2008 is fraudulent, invalid non-existent, null and void.

c. A declaration be and is hereby issued that the Grant Number I.R. 72481 and allocated to L.R. No 18469 having been the first in time to be registered in the government lands register, is the only valid and genuine title of land L.R. 18469 situate in Athi River in Machakos County.

d. A permanent injunction directed at the 1st Defendant, its directors, shareholders, members, associates, agents, employees and any person claiming the suit property through them, be and is hereby issued restraining them from trespassing or in any way dealing with or interfering with the Plaintiff's parcel of land registered as Grant number I.R. 72481 and allocated L.R. No. 18469 situate in Athi River, Machakos County.

e. A permanent injunction be and is hereby issued directed at the 2nd Defendant, his subordinates, officers or persons acting through them from interfering with or dispossessing/depriving the Plaintiff herein of his parcel of land registered as Grant number 72481 and allocated L.R. No 18469 situate in Athi River Machakos county including through making entries, registration or receiving documents on the lands register adverse to the Plaintiff's interests and proprietorship of the suit property without the Plaintiff's consent.

f. An order be and is hereby issued directed at the 1st Defendant, its directors, shareholders, members associates, agents, employees and any person claiming through them, compelling them to vacate the Plaintiff's parcel of land registered as Grant number IR 72481 and allocated L.R. No. 18469 situate in Athi River, Machakos County, within 60 days of this Judgment, failure to which they will be forcefully evicted from the 2nd Plaintiff's land.

g. The Officer Commanding Police Division, Athi River and the Divisional Criminal Investigations Officer Athi River, to ensure that the orders issued by this Court are obeyed and to provide assistance in the evictions should the 1st Defendant, its directors, shareholders, members, associates, agents, employees and any person acting through them fail to vacate the suit property, that is to say the parcel of land registered as Grant number IR 72481 and allocated L.R. No. 18469 situate in Athi River, Machakos County, within 60 days of the date of this Judgment.

h. General damages for trespass to be paid to the 2nd Plaintiff to the tune of KShs 3,000, 000 by the 1st Defendant.

i. Costs of the suit are awarded to the Plaintiffs as against the 1st Defendant.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF APRIL, 2020.

O.A. ANGOTE

JUDGE