

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 409 OF 2015

FORMERLY KSM HCCC NO 135 OF 2007)

MAYFAIR HOLDING LIMITED PLAINTIFF

VERSUS

ANNE AKECH CHRISTENSEN 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, KISUMU 2ND DEFENDANT

AND

THE DISTRICT LANDS OFFICE, KISUMU 1ST THIRD PARTY

THE CHIEF REGISTRAR 2ND THIRD PARTY

THE COMMISSIONER OF LANDS 3RD THIRD PARTY

THE MINISTRY OF LANDS & SETTLEMENT 4TH THIRD PARTY

THE ATTORNEY GENERAL 5TH THIRD PARTY

KIPROTICH KORIR 6TH THIRD PARTY

JUDGEMENT

Introduction

The suit the subject matter of this judgement was first filed in the High Court at Kisumu as KSM HCCC No. 135 of 2007 vide the plaint dated 3rd October 2007. The subject matter of the suit is a parcel of land known as KISUMU MUNICIPALITY BLOCK 12/125 (the suit land) which the Plaintiff claimed to belong to it as the registered proprietor as lessee of the Government of the Republic

of Kenya for a period of 99 years from 1/2/2002 having purchased the land from one Edison Kiplagat Bundotich.

The Plaintiff's complaint was that on 24/9/2007 it had come to its attention that some people who were unknown to it had entered the premises and commenced renovations of the same by demolishing the roof and purporting to paint the walls. That the Plaintiff discovered that the suit land had, on 12/6/2007, been fraudulently registered in the name of the 1st Defendant as proprietor of the lease comprised in the title purporting that the same was purchased from one Kiprotich Korir. The Plaintiff sought the intervention of the court.

In response to the claim the 1st Defendant filed the 1st Defendant's Statement of Defence dated 9th January 2008 denying the Plaintiff's claim. The 1st Defendant claimed that she was the lawful and true proprietor of the lease comprised in the suit title No. KISUMU MUNICIPALITY /BLOCK 12/125 and that the Plaintiff had no lawful or other interest over the title to the suit land to warrant a grant of the relief sought in the Plaint. The 1st Defendant sought that that suit be dismissed with costs.

Vide Court order dated 23/4/2010, the District Lands Officer, Kisumu, the Chief Land Registrar, the Commissioner of Lands the Ministry of Lands and Settlement, the Attorney General and Kiprotich Korir were joined to the suit as the 1st to 6th Third Parties.

A statement of defence dated 30th June 2010 was filed on behalf of the 6th Third Party, Kiprotich Korir.

The 1st Defendant later amended her defence and replaced it with the amended 1st Defendant's statement of defence and counter claim dated 29th May 2012.

The Plaintiff filed reply to amended 1st Defendant statement of defence and defence to counterclaim dated 9th July 2013.

On behalf of the Attorney General a statement of defence and reply to the 1st Defendants counter claim dated 8th August 2013 was filed denying the claims of both the Plaintiff and the 1st Defendant.

The suit was later transferred to the Environment and Land Court and assigned the current case number for hearing and disposal.

The Evidence

On behalf of the Plaintiff one witness Mr. Amin Gilani testified as PW1. He relied on the contents of his witness statement dated 5th September 2013 which was adopted as his evidence in Chief. He had stated in the said witness statement that he was the managing director of the Plaintiff company which is the proprietor of the suit land having bought it from Edison Kiplagat Bundotich through an agreement of sale dated 13th November 2002 for a consideration of Kshs.300,000/-. He rehashed the contents of the Plaintiff and stated that he conducted a search on the property and

discovered that the said parcel was registered in the name of the 1st Defendant the same having been transferred fraudulently to her on 12/6/2007.

He stated that he was in possession of the suit property.

On cross examination he stated that he did not know the 6th Third Party. That the property is a bungalow with servants' quarters. That he did not have evidence of payment of purchase price but he was sure it was paid. That he has never interacted with the 1st Defendant.

The 1st Defendant testified as DW2. She relied on the contents of her witness statement dated 10th November 2017 and produced the following documents as exhibits; sale agreement, acknowledgment of payment dated 13/6/2017, electricity bills, copy of power supply document, photographs of the property before and after renovation, evidence of expenses for renovation, copy of certificate of official search, copy of certificate of lease in the name of Kiprotich Korir, Certificate of clearance of rates, valuation stamp duty documents, stamp duty payment slip, stamp duty receipt, consent for transfer, transfer to lease , lease certificate, extract of the register (white card), response to letter seeking for return of title, Notice of intention to sue Attorney General and reply from Attorney General undertaking to compensate.

She stated that she was forced out of the premises by some APs and that the Plaintiff is in possession of and using the property.

DW2 had stated in her witness statement dated 10th November 2017 that she bought the residue of the leasehold interest in the suit land from one Kiprotich Korir, the 6th Third Party herein at Kshs.4,200,000/-. That the said Kiprotich Korir showed her certificate of lease issued in his favour by the District Land Registrar, Kisumu on 4/12/2002 confirming that he was the Grantee of a 99 years lease over the property by the Government of Kenya from 1/07/1997.

That she had taken out a loan to enable her purchase and renovate the property. That soon thereafter she took possession of the property, renovated it ready for occupation when she was served with Summons to Enter Appearance in this case that the Plaintiff laid claim to the suit property. That the Plaintiff obtained an injunction restraining her from interfering with the property.

That at the time of she took possession of the property, it was dilapidated and completely run down and that she spent nearly 2 months to renovate it. That at the time she took possession of the property the Plaintiff was not in possession. That it was after obtaining the order of injunction that the Plaintiff proceeded to dispossess her of the property.

That the register of the title to the property was free from any encumbrance and that she did not see any notice before purchasing the property.

That if the Plaintiff's claims are right then it is clear that the Third Parties acted negligently, recklessly and fraudulently and in breach of their respective duties and obligations to her and that she is entitled to contribution indemnity and / or compensation arising out of the information and assurance accorded to her either expressly or by necessary implication by the Third Parties.

On Cross-examination, DW2 stated that after 3 months she was told the land was not hers. That she did not maintain contact with Kiprotich Korir. That she received a letter from the lands office asking her to return the certificate of lease she had been given. That the title of the Plaintiff was issued earlier than hers. That she heard that there was a caveat placed on the land.

DW3 was Philip Odongo a valuer who produced a valuation report as exhibit. He testified that he did a valuation for market rental for the suit property and concluded that the average rent was Kshs.125,000/= per month for the property.

On behalf of the 2nd Defendant DW1, one Nicholas Obiero, testified. He stated that he was a Land Registrar stationed at Kisumu and that he was testifying as the 2nd Defendant and as an expert witness.

He stated that he realized that there were two registers (white cards) in respect of the suit land. That ordinarily there should be only one register.

That the first register was in respect of a lease given to Edson Kiplangat Bundotich which card was opened on 25/6/2002 and certificate of lease issued to Edison Kiplangat Bundotich on 7/11/2002. That on 27/11/2002 Edison Kiplangat Bundotich transferred the land to the Plaintiff and certificate of lease was issued on the same day to the Plaintiff.

That the second register was opened on 4/12/2002. That it was a lease from the Government to Kiprotich Korir. That Kiprotich Korir transferred the land to the 1st Defendant on 12/6/2007.

That there is a transfer form from Kiprotich Korir to the 1st Defendant. And similarly, in respect of the first register there is a transfer form from E. Bundotich to Mayfair Holdings Ltd. That there were also consents from the Commissioner of Lands.

He testified further that there was a caveat placed by Mayfair Holdings Ltd on 7/5/2007. That there were two letters from the Land Registrar to M/S Otieno Yogo Advocates to the effect that the title given to Ann Okech was recalled for cancellation. That the reason for cancellation was not clear from the letter. That there was another from a Land Registrar by the name of Mr. Nyangweso to M/S Otieno Yogo Advocates indicating that the

certificate of lease was issued but should be surrendered for cancellation

He produced exhibits namely the white card opened on 25/6/2002, copy of consent to transfer dated 28/11/2002 in favour of Mayfair Holdings Limited, copy of consent to transfer in favour of Anne Okech, certificate of lease for Mayfair Holdings Ltd, certificate of lease for Ann Okech, Caveat Emptor dated 7/5/2007, Letter from Land Registrar to Otieno Yogo Advocates dated 3/10/2007, letter dated 12/4/2016 and white card in favour of Anne Okech.

On cross examination DW1 stated that the transactions on the suit land were subject to consent of the Commissioner of Lands and that failure to obtain the consent would nullify the transaction. That the white card showed that the property was transferred to Mayfair on 27/11/2002 and the consent was dated 28/11/2002. That the property was again transferred to Ann Okech on 12/6/2007 and that consent was obtained on the same date. He confirmed that all the documents he had produced were in his file.

Submissions.

Parties filed written submissions on the case.

Submissions for the Plaintiff

Written submissions dated 8th April, 2025 were filed by the firm of Otieno, Yogo, Ojuro & Company Advocates.

Counsel framed the issues for determination as;

- (a) whether the registration in favour of the 2nd Defendant was fraudulent;
- (b) whether the certificate of lease issued to the 1st Defendant by the 2nd Defendant is valid and able to give rise to ownership
- (c) whether the caveat emptor posted on the Daily Nation newspaper dated 7th May, 2007 amounts to restriction on any dealings on the suit property
- (d) whether the transfer of the suit property to the Plaintiff before signing of the consent of the Land Board could vitiate the said registration
- (e) is the Plaintiff entitled to damages.

Counsel submitted that the Plaintiff was granted the certificate of lease by the 2nd Defendant for a term of 99 years running from 1st February, 2002. That the 1st Defendant's certificate of lease was granted on 12th June, 2007 by which time the suit property was already under the Plaintiff hence not available to be transferred.

Counsel relied on the case of Arthi Highway Developers Limited - vs- West End Butchery Limited & 6 Others [2015] KECA 816 (KLR) where it was held that any title acquired by fraud is irredeemable

and incapable of passing any ownership. That the title issued to the 1st Defendant was recalled by the Registrar for cancellation. That the transfer to the 1st Defendant was fraudulent as the property was not available for transfer as it already belonged to the Plaintiff.

Relying on the case on Eliza Makeri Nyang'wara -vs- Stephen Mungai Njuguna & Another (2013)KEHC 5046 (KLR), Counsel submitted that the attempts by the Land Registrar to recall the certificate of lease given to the 1st Defendant shows that the certificate is null and void and incapable of giving ownership.

That the caveat emptor advertisement placed in the Daily Nation Newspaper was deemed to have cautioned the public accordingly and that the 1st Defendant is deemed to have been aware of the caveat emptor.

Relying on the case of Aliaza -vs- Saul [2022] KECA 583 KLR Counsel submitted that absence of a consent of the Land Control Board does not vitiate a title deed and urged the court to find that if indeed the title was issued a day before, does not vitiate the title. Counsel urged the court to allow the Plaintiff's claim.

Submissions for the 1st Defendant (Plaintiff in the Counterclaim)

Written submissions dated 9th June 2025 were filed by the firm of Owiti, Otieno and Ragot advocates. Counsel submitted that the broad issue to be determined is whether the Plaintiff has a lawful

and valid title to the suit property and whether the allegations of fraud pleaded by the Plaintiff have been proved.

Counsel submitted that the Plaintiff failed to prove this because the transfer of the land to the Plaintiff was done without consent.

Counsel relied on the case of *Southern Shielv Holdings Ltd -vs- Estate Building Society [2013]3 EA 340* where the Court of Appeal held that in respect of land in which the government is the lessor the consent of the Commissioner of Lands was mandatory prerequisite to the transaction and that failure to obtain such consent rendered the transaction void.

Counsel submitted that if an act is void then it is in law a nullity.

Relying on section 26 of the Land Registration Act and article 40 of the Constitution, Counsel submitted that these provisions of the law have been interpreted to mean that there is no such thing as indefeasibility of title, that the law only protects title that is obtained lawfully.

That the Plaintiff in the present case made no effort to prove that its title was obtained lawfully.

That the evidence clearly shows that the Plaintiff was not in possession of the suit land at the time when the 1st Defendant took possession of the suit land in June 2007 and undertook extensive renovations.

That the allegations of fraud pleaded in paragraph 7 of the plaint have not been proved at all. That the act of buying the land from Kiprotich could not be an act of fraud, that there is no evidence that the card containing information regarding the Plaintiff's title was removed by the Defendants or that the 1st Defendant played a role.

That the allegations of fraud were not specifically pleaded as required by law.

That regarding the prayer for recall, cancellation or revocation of the 1st Defendant's title, the 1st Defendant is an innocent purchaser for value and that she paid all necessary dues and obtained consent from the Commissioner of Lands before the land was transferred to her.

That the 2nd Defendant confirmed the legality of the title of the 1st Defendant.

Counsel submitted further that damages cannot issue to a person claiming a violation of a title that is void.

Counsel submitted further that if the court finds in favour of the Plaintiff in the suit, the 1st Defendant who is the Plaintiff in the counterclaim is entitled to the relief sought in the counterclaim because the 2nd to 6th Defendants in the counterclaim are public officers. That under section 7 to 9 of the Land Registration Act, they are responsible for keeping records relating to all land within

the area they serve. That section 81 entitles a person who suffers any loss or damage as a consequence of any failure on the part of the office cited to indemnity.

In response to submissions filed on behalf of the Plaintiff, Counsel submitted that getting a title to land is a process and that being in possession of title means nothing if the process was not followed.

That the mere fact that a Land Registrar has recalled a title for cancellation is not proof of fraud. That the Land Registrar testified that the title of the plaintiff is a nullity. Regarding the consent of the Commissioner of Land, Counsel responded that there is no date of 27th November, 2002 anywhere on the document produced.

That it only says that an application was made 26th November, 2002. That if the document was signed on 28th November, 2022 and dated the same day, then that is when the consent was granted.

Concerning the case of Aliaza -vs- Saul relied on by the plaintiff, Counsel distinguished it by stating that the same related to controlled transactions in land and consent of the Land Control Board unlike the present case where the suit property is held by the government in trust for the public and all subsequent holders

only tenants hence government must grant consequent to transactions in respect thereof.

Counsel urged the court to allow the 1st Defendants' claim with costs of both the suit and the counterclaim.

Issues for determination

From the pleadings filed, the evidence adduced and the submissions made the following emerge as the issues for determination;

- a. Who between the Plaintiff and the 1st Defendant has valid title to the suit land?
- b. Whether or not the Plaintiff is entitled to the prayers sought in the Plaint.
- c. Whether or not the 1st Defendant is entitled to the prayers sought in the counter claim.
- d. Costs of the suit.

Analysis and determination

The first issue for determination is who between the Plaintiff and the 1st Defendant has valid title to the suit land.

According to the evidence placed before Court, both the Plaintiff and the 1st Defendant bought the suit land from different sellers.

Each of the sellers had title documents to the suit land hence managed to convince the parties that they had valid title and could sell their interest in the suit land. Both parties (Plaintiff and

1st Defendant) went through the process and obtained documents of ownership of the suit land.

The Plaintiff challenges the 1st Defendant's title on the grounds that as the suit land had already been registered in its name the same was not available for allocation to Kiprotich Korir who subsequently sold it to the 1st Defendant. That Kiprotich Korir did not pass good title to the 1st Defendant. The 1st Defendant's position was that although the Plaintiff's title came earlier, the same was void for want of consent of the Commissioner of Lands hence was not protected by law and could prevent further dealings in the land.

The Land Registrar who testified as DW1 did state on cross examination that failure to obtain consent for a transaction on land for which consent of the Commissioner of Lands was required nullified the transaction. The Land Registrar proceeded to produce as exhibit a copy of Consent of the Commissioner of Lands for transfer of the suit land in favour of the Plaintiff.

Perusal of the same shows that the plaintiff made the application on 26th November 2002 and the consent was issued on 28th November 2002. The transfer was effected on 27th November 2002 which was a day before the consent was signed. The plaintiff's seller did obtain the consent of the Government to transfer the land. I have noted that the validity of the consent has

not been challenged. The evidence shows that it was the 1st defendant who was asked to surrender her lease for cancellation. From this evidence I find that it is the Plaintiff who has valid title for the land.

The next issue for determination is whether the Plaintiff is entitled to the relief sought in the Plaint.

The relief sought in the Plaint is;

- a. a declaration that the transfer in favour of the 1st Defendant was procured by fraud, was unable to pass any title and has never passed any title hence null and void.
- b. An order that the certificate of lease issued to the 1st Defendant by the 2nd Defendant be recalled, cancelled and revoked on the basis that it was procured by fraud and out right illegality.
- c. General exemplary and punitive damages for fraud and trespass.
- d. Costs of and incidental to the suit.

Having determined that the plaintiff has valid title to the suit land, the court finds that, the plaintiff is entitled to the prayers (a) and (b) of the plaint.

Regarding damages, the particulars of fraud have not been proved as against the 1st Defendant. No basis has been shown for award of general damages.

The next issue is whether the 1st Defendant is entitled to the relief sought in the counter claim.

Vide the counter claim dated 29th May 2012, the 1st Defendant (plaintiff in the counterclaim) sought for an order dismissing the plaintiff's claim and entry of judgment in her favour for: -

1. A declaration that the actions and omissions of the Defendants in the counter claim were fraudulent, reckless and negligent and constituted a breach of their respective duties to the Plaintiff in the counter claim.
2. An order against the 1st Defendant in the counter claim directing it to give vacant possession of the suit property to the Plaintiff by way of counter claim, an order for accounts and for mesne profits and in the alternative a reimbursement of Kshs.703,121 being the amount spent on renovations and utilities with interest thereon at court rates from the date the expenses were incurred until payment in full.
3. Against the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants in the counter claim jointly and severally for Kshs.4,903,121/- plus interest thereon at Court rates from the date the various sums making up this amount were expended by the Plaintiff in the counter claim until payment in full.
4. Costs of the counter claim.

The Defendants in the counter claim are the Plaintiff in the suit, the Lands Officer Kisumu, the Land Registrar Kisumu, the Chief Land Registrar, the Commissioner of Lands, the Attorney General and Kiprotich Korir.

The evidence placed before Court is that both the Plaintiff in the suit and the Plaintiff in the counter claim bought the suit land from two different individuals both of whom had documents of ownership issued and guaranteed by the 2nd to 6th Defendants in the counter claim. The Court has already found that the Plaintiff's title is the valid title to the suit land hence an order of vacant possession cannot issue against the Plaintiff in the suit in favour of the Plaintiff in the counter claim. It is clear from the evidence of all witnesses, and particularly that of DW1, that the 2nd to 6th Defendants were reckless and negligent in creating two registers (white cards) in respect of one piece of land, issuing two sets of ownership documents to different people namely; Edison Kiplangat Bundotich and to Kiprotich Korir and in allowing the 7th Defendant in the counterclaim to purport to transfer the land to the Plaintiff in the counter claim when the land was already transferred to the plaintiff in the suit, and in receiving payments and taking the Plaintiff in the counter claim through the process of acquisition of title when they had already taken the Plaintiff in the suit through the same process.

The Plaintiff is therefore entitled to prayer 1 of the counter claim. Although the Plaintiff in the counter claim pleaded that the Plaintiff in the suit acted fraudulently and negligently in knowingly allowing her to undertake extensive renovations to the suit premises before striking its claim to the same, no evidence was led to prove this. But vide the receipts and photographs produced as exhibits, the Plaintiff in the counter claim proved that she undertook renovations of the premises and expended the amount claimed of Kshs.703,121/- this amount should be paid by the 2nd to 6th Defendants. No evidence was led to the effect that the plaintiff in the suit played any role in causing the 1st Defendants to incur expenditure of the said amount.

Similarly, the plaintiff in the counterclaim is also entitled to the sum of Kshs.4,903,121/- claimed in prayer 3 of the counter claim

The plaintiff in the counter claim is entitled to costs of the counter claim to be paid by the 2nd, 3rd, 4th, 5th 6th and 7th Defendants in the counter claim.

Conclusion

For the foregoing reasons, the Court finds that both the suit and the counter claim succeed as follows;

1. Judgment is entered in favor of the Plaintiff in the suit for;
 - a. A declaration that the transfer of the suit land in favour of the 1st Defendant in the suit did not pass

title to the 1st Defendant and was null and void *ab initio*.

b. Certificate of lease issued to the 1st Defendant in the suit by the 2nd Defendant in the suit be recalled, cancelled and revoked on the basis that it was an outright illegality.

c. Costs of the suit to be paid by the 2nd Defendant in the suit.

2. Judgment is entered in favour of the Plaintiff in the counter claim for:

a. A declaration that the actions and omissions of the 2nd, 3rd, 4th, 5th and 6th Defendants in the counter claim were reckless and negligent and constituted a breach of their respective duties to the Plaintiff in the counter claim.

b. Reimbursement of the sum of Kshs.703,121 being the amount spent on the renovations and utilities with interest thereon at Court rates from the date of filing the counter claim till payment in full, to be paid by the 2nd, 3rd, 4th, 5th and 6th Defendants in the counter claim.

c. Kshs.4,903,121 and interest thereon at court rates from the date of filing the counter claim to the date

of payment in full to be paid by the 2nd, 3rd, 4th, 5th, 6th and 7th Defendants in the counterclaim.

d. Costs of the counterclaim to be paid by the 2nd, 3rd, 4th, 5th, 6th, and 7th Defendants in the counter claim.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 30th day of October, 2025.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen - Court Assistant.

Ojuro for the Plaintiff

Atieno h/b for Otieno for the 1st Defendant (plaintiff in the counterclaim)