

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC NO 70 OF 2019

SAFEWAY HYPERMARKETS LIMITED - PLAINTIFF

VS

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES - DEFENDANT

THE HON ATTORNEY GENERAL - 1ST THIRD PARTY

ENDESHA MULTI-PURPOSE DEVELOPMENT

CENTRE LIMITED - 2ND THIRD PARTY

JUDGMENT

The pleadings

1. Vide a plaint dated the 25/2/2019, the Plaintiff filed suit against the defendant seeking orders as follows;
 - a. A refund of the purchase price in the sum of Kenya Shillings Thirty Million Seven Hundred and twelve thousand three hundred and thirteen Only (Kshs 30,712 320/-)
 - b. Interest on a) above at commercial bank rates from the date of payment to date.
 - c. Compensation and or general damages for loss of user of the property
 - d. Costs of the suit
2. The Plaintiff averred that in 2005 it purchased Land Reference No 209/19459 (originally L R No. 209/11314/2), hereinafter referred to as the suit land and paid the full consideration to the Defendant, upon which the suit land was registered in its name in 2013.
3. However, vide a Kenya Gazette notice No 307 Vol CXVIII No 6 of 22/1/2016, the National Land Commission revoked the Plaintiff's title

to the property, which prompted the Plaintiff to file suit via Misc No 203 of 2016. It is averred that the challenge to the revocation was unsuccessful.

4. Consequently, the Plaintiff claims compensation from the defendant as a bona fide purchaser for value of the property.
5. The Defendant denied the Plaintiff's case in its statement of defence dated 10/6/2019. It denied any knowledge of the aforementioned Kenya Gazette or of the revocation of the title, as by then, it had already relinquished its rights, title, and interest in the suit land.
6. Furthermore, the defendant averred that it was a bonafide purchaser of title from its predecessor in title, the 2nd third party, from whom it acquired a proper and valid title to the suit premises, which the Government endorsed as legally transferable.
7. The Defendant denied the Plaintiff's claim for Kshs 30,712,320 or any other payment, asserting that the claim was not proven. It relied on sale agreement warranties that the property was sold free of encumbrances, with the Plaintiff accepting all sale conditions. He added that the risk in the property therefore passed to the Defendant at the completion of the sale; therefore, any claim on the property by the Plaintiff is barred by the doctrine of estoppel.
8. Maintaining that the Plaintiffs' claim against it is misplaced and directed at the wrong party due to lack of causation, the defendant undertook to file proceedings seeking to strike it out on the grounds of the time bar.
9. On application by the Defendant, the 1st and 2nd Third Parties were joined to the suit.
10. The 1st third party [though it framed itself as the 2nd Third party] filed a third-party statement of defence dated 15/15/2021.
11. It denied the Plaintiff's claim and asserted that the defendant has admitted to selling the land and receiving the full consideration from the Plaintiff.
12. It added that the title was revoked by the National Land Commission [NLC] on grounds of illegality and fraud, due to the manner in which

the title was allocated. It cited instances of illegality, abuse of office, and conflict of interest, illustrated by the relationship between the original allottee and one of its directors, namely John Ohas, who also served as the Director of Physical Planning at the time and was responsible for re-planning the suit land.

13. The 1st third party contends that the allocation processes of the disputed land were manipulated and intentionally designed to facilitate the unlawful transfer of public land, and therefore, the decision by NLC to revoke the title was justified.
14. In conclusion, the 1st third party averred on a without prejudice basis the defendant, having admitted to selling the land to the Plaintiff, and the Plaintiff having accepted the terms of the sale agreement—which included warranties and disclaimers regarding the title—no claim for liability should lie against the defendant or, further, against the 1st third party.
15. The 2nd Third party failed to enter an appearance or file any defence to the Plaintiff's/ defendant's claim.

The evidence of the parties

16. **PW1 - Stanley Kigera Thuo** took the stand and singularly led evidence on behalf of the Plaintiff. He introduced himself as a director and shareholder of the Plaintiff company and relied on his witness statement dated 25/2/2019 in his examination-in-chief. He produced documents marked as PEX No. 1-31 in support of the Plaintiff's case.
17. Briefly, he stated that on 15/4/1991, the Commissioner of Lands **[COL]** issued grant No IR 52263 to Multi-Purpose Cooperative Development Centre Limited **[MPCDCL]** for a term of 99 years from 1/4/1987 for LR No 209/11314 **[mother title]** measuring **4.581 hectares** and bordering the railway line along the Outering/Jogoo Road intersections. The part development plan **[PDP]** No 335 in respect to the property was approved and registered in 1989.
18. That four years later, on 23/2/1995, MPCDCL sold the land to the National Social Security Fund Trustees **[NSSF]**. After acquisition,

NSSF commenced the subdivision of the mother title into approximately five parcels, namely **LR No 209/11314/1, 209/11314/2 [suit land], 209/11314/3, 209/11314/4, and 209/21245**. To cater for the public utilities, NSSF surrendered part one of the parcels to the Government.

19. By a letter dated 25/8/25, the Plaintiff expressed interest in purchasing parcel 209/19459 [**original No. 209/11314/2**]. On 19/10/2005, NSSF offered to sell the suit land measuring approximately 3.5 acres for KShs. 30,712,320/- to the Plaintiff, and a sum of Kshs 3,978,000/-, being a 10% deposit, was paid by the Plaintiff to the Defendant. NSSF also obtained or provided the necessary consents for the property, including payment of outgoings such as rates and land rents. Upon payment of the full purchase price, the property was transferred and registered in the Plaintiff's name.
20. Eager to develop the suitable land, the plaintiff secured approvals for its building plans from Kenya Railways and other relevant government agencies in 2013. Furthermore, it obtained funding from a financial institution, but during the process of securing building approvals, it discovered that Kenya Urban Roads Authority [**KURA**] intended to build an interchange over its property.
21. Shortly thereafter, the NLC published in the Nation Newspapers on 18/11/14, calling on property owners, including the Plaintiff, to appear before it on 26/11/14 at 10:00 am to make representations in response to a complaint from KURA. After hearing the parties, the NLC found that the suit land was part of a transport corridor reserved for the expansion of the Jogoo and Outering roads and that the Plaintiff's property had been unlawfully acquired. Subsequently, via a Kenya Gazette No 307, Vol CXV111, No 6, dated 22/1/2016, the NLC purported to revoke the title of the suit property.
22. Almost one year later, on 7/9/2016, following the revocation of the title to the suit land, NSSF wrote a letter to NLC requesting a review of the decision, prompting the NLC to reopen the case and hear the

parties afresh. In the hearing scheduled for 4/11/2016, all the parties who had purchased the subdivision titles [sub plots referred to in para18 of this judgement] from NSSF were heard, including the Plaintiff. NLC returned a verdict similar to the previous one and further directed NSSF to, without any further delay, compensate the affected property owners for disposing of a fake title to them.

23. Dissatisfied with the verdict of NLC, the Plaintiff lodged a Judicial Review application seeking orders of certiorari to, inter alia, quash the decision. However, in a judgement delivered by the court in **JR Misc Application No 203 of 2016** on 18/9/2017, the court declined to grant the sought orders on grounds of public interest. Having failed to overturn the NLC decision, the plaintiff has approached this court seeking compensation for the purchase price.
24. In cross-examination by Mr Ochieng, learned Counsel for the Defendant, PW1 stated that although he did not have a copy of the title search in court, his advocates nevertheless conducted a search on the suit title.
25. Equally, he paid the full purchase price, including stamp duty on transfer. Upon completing the transaction, he took possession of the suit land situated in 2012 and commenced plans to develop it. He exhibited the building plans and approvals on pages 112-114 & 135 of his trial bundle in support.
26. The development plans were thwarted by KURA, which asserted that the land was public, prompting NLC to hold hearings and ultimately issue its verdict revoking the Plaintiff's title.
27. Before purchasing the suit land, he was unaware that the Defendant had acquired it from the second third party. He did not know that the land was public land. When shown the disclaimer clause in the sale agreement, he argued that the disclaimer related to the condition and suitability of the land, not the title. He stated that, in any event, he had legal counsel who advised him on the acquisition of the suit land.

28. In reexamination by Mr Angwenyi, Learned Counsel for the Plaintiff, the witness stated that NSSF transferred the land to his company on 23/1/95. He explained that in its verdict on pages 87-90 of the trial bundle, NLC directed NSSF to compensate the Plaintiff. The suit land is listed on page 90 of the NLC's verdict as one of the properties adversely affected. Despite the demand, NSSF has refused to compensate him.
29. At that point, the Plaintiff wound up its evidence.
30. **DW1 - Ms Hellen Chepkorir Koech** testified on behalf of the Defendant and stated that she works as a Legal Officer at NSSF. She relied on her witness statement dated 24/7/23 in evidence-in-chief and produced documents marked as DEX No 1-10 on pages 7-35 of the Defendant's trial bundle in support of its defence.
31. In summary, she stated that NSSF owned parcel LR No 209/11314 [mother title], measuring 4.581 hectares, which was acquired at a consideration of **Kshs 26,734,320/-** from the sister company of the second third party, namely **Endesha Multi-Purpose Cooperative Development Centre Limited**, in 1995.
32. That prior to the acquisition, NSSF conducted the necessary due diligence and obtained land rent and rates clearances from the relevant authorities, and that NSSF acquired a valid and proper title free from any taint and protected under section 53(1) of the Land Registration Act [now repealed] by the Government of Kenya through the Ministry of Lands.
33. She stated that on 5/3/2012, NSSF caused the mother title to be subdivided into three sub-plots and followed all necessary procedures during which the required consent and clearances were obtained. As a precondition for approval of the subdivision, NSSF surrendered a parcel measuring 0.1445 ha to the Government to provide the necessary public utilities therein.
34. Furthermore, she added that on 19/10/2005, the plaintiff agreed to purchase the mother title for the sum of Kshs 26,734,320/-, which was later amended to 2.79 acres at Kshs 30,712,320/- [See letter of

offer dated 19/10/2005 on pages 16-17 of the Defendants' trial bundle].

35. Thereafter, the parties entered into a sale agreement, upon which the plaintiff paid the purchase price. Upon receipt of the full purchase price, NSSF handed over the completion documents, and the transfer was ultimately registered in favour of the plaintiff.
36. She added that, since NLC has revoked the title to the suit land, NSSF seeks indemnification from third parties amounting to Kshs 30,712,320/- together with interest at commercial bank rates and all other liabilities that the Plaintiff may be entitled to.
37. In cross-examination by Mr Angwenyi, counsel for the Plaintiff, the witness stated that NSSF subdivided that mother title and sold the resultant subdivisions to the Plaintiff, Oil Libya, Naivas Supermarket, among others. She could not recall how those parcels were advertised for sale but stated that she was employed at NSSF at the time of the transaction. She confirmed that the plaintiff paid the full purchase price to NSSF.
38. Additionally, she stated that the titles were revoked by NLC and transferred to the Nairobi County Government for the expansion of Outer Ring and Jogoo Roads. Dissatisfied with the NLC's verdict and having made no representation at the initial hearing, NSSF successfully petitioned the NLC to reopen the case for a further hearing. After rehearing the complaint in the presence of NSSF, the plaintiff, and other affected parties, NLC delivered its finding on 18/7/2017 that NSSF had sold public land to unsuspecting Kenyans, including the plaintiffs. Subsequently, NLC ordered NSSF to compensate the affected parties, including the plaintiff. The witness stated that, to date, despite the plaintiff's written demand, NSSF has not paid any compensation to the Plaintiff, nor has it challenged the NLC's decision to compensate it.
39. Regarding the disclaimer clause in the sale agreement, the witness testified that the clause offers NSSF implied protection from having to indemnify the Plaintiff for any compensation claims, as the

Plaintiff had inspected the property and purchased it on an 'as is, where is' basis.

40. During cross-examination by Mr. Motari, Learned State Counsel representing the 1st third party, the witness stated that in **ELC No 563 of 2018**, the court ordered NSSF to refund the purchase price to Naivas Supermarket, one of the purchasers of the subdivided plots from NSSF, and ordered the 1st and 2nd third parties to indemnify it. She added that NSSF did not appeal the above decision. She also stated that NSSF has not successfully challenged the decision of the NLC.
41. In re-examination, she stated that the transfer dated 02/10/95 was executed by the first third party, COL and NSSF. She emphasized that NSSF is entitled to indemnity from the third parties if the court allows the Plaintiff's claim against NSSF.
42. With that NSSF closed its case.
43. **Abdul Kadir Ibrahim Jatani** testified as **DW2**. He stated that he is the Deputy Director of Survey at KURA and relied on his undated witness statement on record, and produced documents marked as DEX No 11-26, in support of the 1st third-party's defence.
44. At the start of the expansion of Outer Ring Road, KURA identified properties that had been removed from the existing transport corridor. One of these was the mother title [LR No 209/1134/4], which was located within the junction of Jogoo/Outer Ring roads and the Kenya Railways reserve. This led KURA to refer the matter to NLC for review of such grants, aimed solely at verifying their legality. NLC conducted hearings which resulted in the revocation of the title to the land in question for several reasons; initially, the land under the mother title was allotted to a company called Rachuonyo Enterprises Limited and Outering Road Limited under Part Development Plan [PDP] and a letter of allotment dated 25/2/1988. However, this allocation was short-lived because the Nairobi City Commission opposed it through their letter dated 7/4/1988, stating that the commission was already in the advanced stages of

developing road infrastructure, including the existing outer ring road —Jogoo Road—and the proposed 18-metre road from Kayole Estate and Lunga Lunga Road link at the intersection of the two major highways. The witness referred the court to several correspondences on record regarding this matter.

45. As a result of the opposition, Rachuonyo Enterprises Limited and Outer Ring Road Enterprises Limited successfully requested a resitting of the plot, and upon approval, the allotment letter was cancelled, and it was allocated an alternative property, being LR No 209/11152.

46. Shortly thereafter, MPCDCL applied for re-planning of the area for purposes of allocation. The witness pointed out several correspondences in that regard. Ultimately, a fresh allotment letter was issued to Endesha Multipurpose Cooperative Society Limited vide allotment letter dated 1/8/198. Subsequently, the allottee aforesaid, on 3/7/1990, applied to transfer the allocation to its sister company, MCDCL, the current 2nd third-party, leading to its issuance of title for LR No 209/11314.

47. Referring to the extensive record of correspondence, the witness stated that Mr. John Ohas, who was then the Director of Physical Planning and also served as the director of the 2nd third party, was responsible for the illegal re-planning of the land for allocation despite opposition from the City Commission, which maintained that the land was public. He explained that the allocation was marred by illegality and abuse of office committed by government officials led by Mr. John Ohas. He further added that the allocation of the disputed land was carried out without consultation with the relevant state authorities, as it was intended to alienate public land unlawfully, and he confirmed that the NLC's findings were thus correct.

48. The witness concluded that, from the foregoing, the title held by NSSF was therefore fraudulent, legally irregular, and a nullity ab initio, and hence cannot enjoy legal protection under Article 40(6) of

the Constitution as the same is impeachable. He added that it would not be prudent for the Government to deploy taxpayers' money to recover land that was illegally alienated, and the indemnity sought by the plaintiff is not founded since NSSF has admitted receipt of the purchase money, and the only remedy is to pay compensation.

49. In cross-examination by Mr Ochieng, Learned Counsel for the Defendant, the witness restated the historical background of the suit land as outlined above.

50. He added that the relocation of the power lines on the suit land to pave the way for allocation was irregular.

51. In cross-examination by Mr Angwenyi, learned counsel for the plaintiff, the witness explained that he has worked for KURA for 15 years. In addition, he added that the Nairobi City Commission recommended rescinding the land allocation because the land was reserved for a transport corridor, hence for a public purpose.

52. The witness clarified that, unlike an official search on a title in the land registry, a party cannot obtain information from the lands office indicating any cancellation of an allocation, as such correspondence would be part of the office's internal documents.

53. He added that according to the verdict delivered by NLC, NSSF was ordered to refund the purchase monies to the purchasers of the land sold by it.

54. In his closing statement, he stated that he was testifying on behalf of the 1st third party.

55. With that the hearing closed.

56. The 2nd third Party did not adduce any evidence.

The written submissions

57. At the close of the hearing, the respective parties undertook to file written submissions upon which the court directed the parties to file and serve their submissions within 45 days, in any event by the close of business on 31/10/25, and proceeded to reserve the date for delivery of the judgment.

58. The court notes that, in compliance with the court's directions earlier mentioned, the Plaintiff and the Defendant respectively complied. The Plaintiffs' submissions are dated 11/11/25, while those of the Defendant are dated 30/10/25. The 1st and 2nd third parties did not comply.
59. The court has read and considered the submissions and wishes to thank Counsel for their industry and highlights.
60. From the outset, the Plaintiff Submits that there was a contract between the parties, which contract was breached by the Defendant. As a result of the breach, the defendant incurred damages. It was also submitted that consideration was paid in full and acknowledged by NSSF. The importance of consideration in a land sale was emphasised in the case of **Paul N Nyota Vs David Muli Mutua (2020) KLR**, where the court stated;
- “A valuable consideration in the sense of the law may consist either in some right interest, profit, or benefit accruing to one party or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.”
61. The Plaintiff submitted that the defendant failed to transfer a good and marketable title as its primary obligation under the contract. The land sold by NSSF to the Plaintiff was public land; therefore, no interest was conveyed or received by the Plaintiff. The case of **Naivas Limited Vs NSSF (2022) KLR** was cited by the Plaintiffs. In this case, which bore similar facts to the instant case, the court stated that no good title can be passed from land obtained illegally or unlawfully since the suit land was reserved for public use but was fraudulently converted to private land and the title was acquired illegally.
62. The Plaintiff submitted that the damages it suffered were a proximate consequence of the breach and not too remote to be ignored. Reliance was placed on the case of **Desert Commercial Shipping Limited 7 Anor Vs OCPD Changamwe Police & 2 others [2022]**. It was submitted that the loss of the land and the

loss of purchase price were plainly foreseeable in the circumstances of this case.

63. Finally, the Plaintiff submitted that it was a bona fide purchaser for title without notice as to any adverse interests. The case of **Katende V Haridar [2008] 2 EA 173** was cited in support.

64. The defendant, on the other hand, submitted that it acquired a good title from the 2nd third party, and upon completion of the sale and purchase, conveyed a valid title to the plaintiff, having acquired it as a bona fide purchaser for value. It argued that the Government guarantees title, and therefore, any taint on the title cannot be held liable since it obtained all the necessary consents and approvals to effect the transfer of the land to the plaintiff. On this ground, the defendant cited the decision of the court in **AG Vs Kenya Commercial Bank Limited & 3 others [2014] ECLR**, where the court stated as follows;

“... it would be a bad precedent where parties to a transaction in land would not only have to satisfy themselves that the land in question is registered but also trace the history of the land to establish whether or not the title to the said parcel of land was legitimately acquired.... It would also make nonsense of the title deeds issued and guaranteed by the Government in respect of parcels of land owned by individuals.”

65. Relying on the decision of the court in Elizabeth **Wambui Githinji 7 Anor Vs KURA [2013]** in the proposition that it held an indefeasible title being transferred to the Plaintiff.

66. Submitting that it is entitled to indemnity by the third parties, the defendant relied on the case of **City Finance Bank Limited Vs Cedar Bank Enterprises Limited & Anor [2015] ECLR** where the court stated as follows;

“However, the duty to issue a title is a sacred one which only Third Party has. No other entity can share in this study, and that is partly why a title is a sacred document. At all times it is the duty of the Third Party to ensure the sanctity of a title,

and purporting to issue titles for one plot is a gross negligence for which the Third Party cannot escape liability. It is the Third Party's sole mandate to register the Defendant's interest in land. However, in my judgment, parties who have a role to play in the process of protecting the sanctity of a title must be penalized if they are found to be guilty. In that regard, M/S Kikabu Homes Limited cannot escape liability, even if they are not party to these proceedings, and for failing to join the said M/S. Kikabi Homes Limited, the Defendant must take responsibility. It must be noted for the record that the Defendant paid the purchase price to M/S Kikabi Homes Limited who ought to have provided clear and cogent evidence as to how it acquired title to a property which had already been allocated to another party. In my judgment, both the Third Party and the said M/S Kikabi Homes Limited share liability. And in the absence of the said M/S Kikabi Homes Limited in these proceedings, the liability which the Third Party can legally assume cannot exceed 50%”

Analysis and determination

67. Having considered the Pleadings, the evidence adduced at the hearing, the rival written submissions and all the material placed before the court, the issues that fall for determination are;

- a. Whether the Plaintiff is entitled to compensation in terms of refund of the purchase price and other incidentals.
- b. Whether the Plaintiff is entitled to general damages /loss of user for the Property.
- c. Whether the Defendant is entitled to be indemnified by the 2nd third party.
- d. Who meets the costs of the suit?

Whether the Plaintiff is entitled to compensation in terms of refund of the purchase price and other incidentals.

68. It is undisputed that the suit land originates from the mother title, namely LR No 209/11314. DW2 led evidence that this particular land was reserved as a transport corridor for the expansion of Jogoo and Outering Roads. The land had already been alienated for public purposes and was therefore beyond the COL's reach for allocation to any other party.

69. Records clearly show that the allocation that led to the suit land was not the first one. In fact, the land had been allocated to two entities, namely Rachuonyo and Outering, as far back as 1987. During the planning of the area, the then Nairobi City Commission, vide its letter dated 7/4/1988, protested this allocation because the land was public land reserved for road expansion. It stated in part;

“ I wish to state that the City Commission is opposed to the above allocation [unsurveyed commercial plot, later LR 209/11314] on the following technical grounds;

- a. Plot access from either outering road or Jogoo road is not permissible.
- b. The numerous high voltage power lines and the railway line are major constraints to the proposed development plan
- c. There is already an advanced road development proposal by the city commission for the existing outering road, Jogoo Road, and the proposed 18-meter road from Kayole Estate and the Lunga Lunga Road Link at the junction of Jogoo Road and the Outering Road.
- d. There is also the need to have the plan proposal approved by the Kenya Railway Corporation, Kenya Power Lighting Co Limited since they attached parties.

I therefore recommend that the allocation be rescinded as the same is not applicable from the engineering and planning point of view, respectively."

70. Arising from the above opposition, ultimately, COL rescinded the allotment to the initial allottees and provided them with alternative land.

71. One would have expected that the matter would rest there, but it was not to be.
72. Shortly afterwards, concerted efforts by none other than the office of the Director of Physical Planning and COL, in conjunction with Kenya Railway Corporation and Kenya Power Lighting Co Limited, began to replan the site to undermine the public status of the suit land for purposes of alienation to private hands, as can be seen in the letter of allotment issued to Endesha Multi Purpose Cooperative Society Limited on 27/8/1990. The society later transferred the said interest to its sister company, the 2nd third party, which included John M Ohas, the Director of Physical Planning, and the top leadership of the then Nairobi Commission, according to the CR 12 on record. The allottee had sought the land for a multi-purpose development; however, once it obtained the title, it quickly sold the land to NSSF in 1995.
73. It is not in dispute that upon acquisition of the said land, NSSF embarked on subdividing the land into 5 parcels, one of which is the suit land.
74. The question before the court is whether NSSF acquired a good title and, consequently, whether it passed a valid title to the Plaintiff.
75. Land in Kenya is protected under Article 40 of the Constitution. However, the provisions of Article 40(6) of the Constitution states that the right to property does not extend to property that is unlawfully acquired. Courts have upheld this jurisprudence in many decided cases all the way upto the Apex Court. See the cases of ; **Dina Management Ltd v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment)** and **Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)**Torino.
76. Arising from a complaint lodged by KURA, NLC, held hearings involving the parties and made a finding that the land was public

land and was not available for alienation. It is therefore recommended that the title be revoked and that the remedy available for the plaintiff is to pursue compensation from NSSF.

77. I have had the benefit of reading the persuasive decision of this court in **Regnol Oil (K) Limited v National Land Commission & another [2017] eKLR** where the dispute arose from one of the subdivisions that emerged from the mother title. In determining the same question, the court stated as follows;

“NLC found that Regnol had indeed put up developments on the Suitland. These developments were valued at Kshs . 269,675,000/= . Regnol is to be paid this amount but they argue that they are also entitled to compensation for the land itself. Already the land in issue has been found to have been unlawfully acquired. It was public land meant for expansion of two crucial roads in the city of Nairobi. Article 40(6) of the Constitution does not afford any protection to land which is found to have been unlawfully acquired. Article 40(6) of the Constitution does not exclude innocent purchasers of land which is found to have been unlawfully acquired. This is so because someone who has acquired land unlawfully has no good title to pass because that title is void ab initio. If it was the intention of the constitution to protect such innocent purchasers of unlawfully acquired land, then there will be chaos because people would unlawfully acquire land and quickly sell the same to innocent purchasers who would then retain it. I therefore find that Regnol is not entitled to compensation for the land”.

78. The Defence has argued that it was a bonafide purchaser for title without notice from the 2nd and 3rd parties. In the case of **Eunice Grace Njambi Kamall and another v. The Hon. Attorney General and five others, Civil Suit No. 976 of 2012**, the court cited the case of **Fletcher v. Peck, 10 U.S. 87 (1810)**, to illustrate how other jurisdictions have handled the issue of sanctity

of title and the plight of innocent third parties. In the said **Fletcher v. Peck case (Supra)**, Marshall J had this to say:-

"If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.

79. The definition of a bonafide purchaser for value without notice was given in the case of **Lawrence Mukiri v. Attorney General & 4 Others [2013] eKLR** thus:

... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

80. In this case, I agree with the NLC that the suit land, having been reserved for public use, was not available for allocation to the 2nd

third party. Therefore, the 2nd third party did not acquire any valid title to the suit land, nor could it convey any to NSSF.

81. Had NSSF bothered to carry out due diligence on the suit land, it would have discovered that the same was public land and that it acquired no interest or title as a result.
82. Having considered the above, I agree with the Plaintiff that a key aspect of a contract is that each party is bound to its bargain and legally expected to fulfil its contractual obligations. NSSF was legally obliged to transfer good title to the Plaintiff. It failed to do so. Having acknowledged receipt of consideration and failed to deliver the land, this court cannot countenance unjust enrichment. Therefore, I find that NSSF is liable to the Plaintiff for a refund due to a breach of contract.
83. Regarding the prayer for general damages and loss of mesne profits, it is trite that general damages are not awarded for breach of contract. Loss of damages is classified as special damages, or, in other words, as mesne profits. In any event the court has found that the title conveyed to the Plaintiff was illegal and therefore the Plaintiff cannot benefit from an illegal transaction.

Whether the Defendant is entitled to be indemnified by the third parties.

84. The defendant's case is that if it is found liable to compensate the plaintiff, it will seek indemnity from the third parties. The court has determined that the 2nd third party acquired no title at all. It has also been found that, through its director, John M. Ohas, the third party was aware that the land was reserved for public purposes, but, clandestinely, along with others, manipulated the site's replanning to defeat that public purpose. It cannot be permitted to retain the proceeds for which no interest or title was conveyed to NSSF.
85. For that reason, I find the 2nd third party liable to indemnify NSSF against the liability to the Plaintiff.

86. Costs follow the event and this court is guided by the provisions of Section 27 of the Civil procedure Act, which state as follows;

‘Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall, for good reason, otherwise order.

87. Final orders for disposal

In the foregoing, I enter judgment in favour of the Plaintiff against the Defendant as follows;

- a. NSSF is hereby ordered to refund the purchase price of Kshs 30,712,320/- to the Plaintiff forthwith.
- b. Interest on a) above at court rates from the date of judgment till payment in full.
- c. Special damages in the sum of Kshs 345,875/-
- d. General damages and loss of user are declined.
- e. The 2nd third party is hereby ordered to indemnify NSSF in relation to the awards, interest, and costs awarded to the plaintiff, as well as the costs incurred by the defendant in defending the suit. This order is conditional upon full compliance with prayer No. a) to c) by NSSF.
- f. Costs shall be in favour of the Plaintiff.

88. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF
DECEMBER 2025 VIA MICROSOFT TEAMS.**

J. G. KEMEI
JUDGE

Delivered online in the presence of;

1. Mr Wanjohi HB for Ms Wamboi for the Plaintiff
2. Mr Ochieng for the Defendant
3. Ms Kirina HB for Mr Motari for the 1st third Party
4. N/A for the 2nd third party
5. C/A - Ms Yvette Njoroge